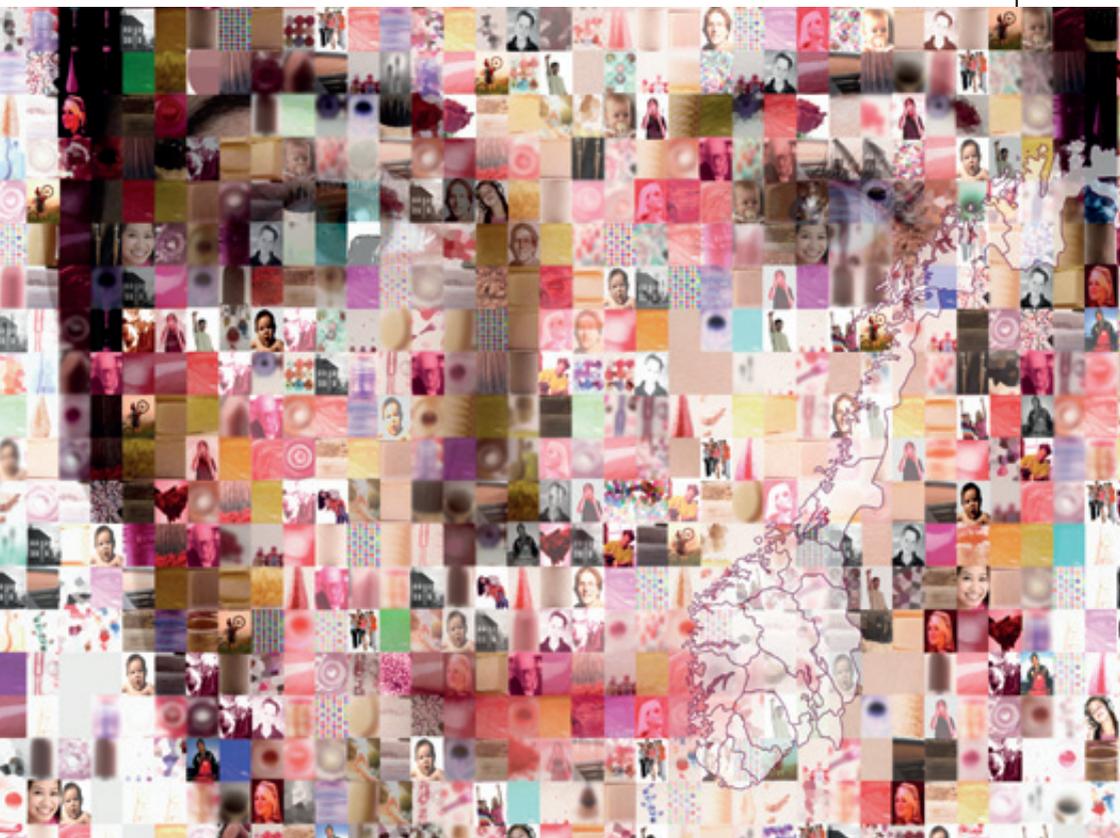


Official Norwegian Report NOU 2011: 18 Summary

# Structure for Equality



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# Structure for Equality

A report by a commission appointed pursuant to a Royal Decree of 12 February 2010.  
Submitted to the Ministry of Children, Equality and Social Inclusion on 15 November 2011.



# To the Ministry of Children, Equality and Social Inclusion

A commission to report on Norway's gender equality policy based on people's lifecycle, ethnicity and social class was established pursuant to a Royal Decree of 12 February 2010.

In addition to the report which is to be submitted in the autumn of 2012, the Commission is, pursuant to a specific mandate dated 21 October 2010, to deliver a review and assessment of the policy implementation system linked to the field of equality and anti-discrimination. The Equality Commission hereby submits its recommendations. These recommendations are unanimous.

Oslo, 15 November 2011

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## Chapter 1

# The Commission's mandate, composition and work

### 1.1 The Commission's appointment and mandate

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The Equality Commission was established by a Royal Decree of 12 February 2010 in order to report on Norway's equality policy based on people's lifecycle, ethnicity and social class. The goal of its work is to lay the foundation for an integrated, knowledge-based equality policy for the future. The Commission was asked to discuss the fundamental starting point for Norway's gender equality policy and equality policy dilemmas and challenges from a lifecycle, social class and ethnicity perspective.

The Commission started its work on 1 August 2010. The mandate requested the Commission to deliver its report two years after it started its work.

In October 2010, the Commission's mandate was more precisely defined in relation to reporting on the existing institutional and organisational frameworks for efforts to promote equality carried out by public authorities at a national, regional and local level. The report entitled *Struktur for likestilling* (Structure for Equality) is the Commission's follow-up of this first part of the task.

The Commission will deliver its second report on 27 August 2012.

*More precise definition of the mandate. The acceleration of parts of the Commission's work*

In connection with the Ministry of Children, Equality and Social Inclusion's work on reviewing the anti-discrimination legislation, the Ministry required a review and assessment of the policy implementation system.

In a letter dated 21 October 2010, the Ministry of Children, Equality and Social Inclusion (BLD) asked the Commission to carry out some parts of its work more quickly:

“We ask the Equality Commission to assess the existing institutional/organisational frameworks for efforts to promote equality carried out by public authorities at a national, regional and local level and, if relevant, to propose measures that can further develop and strengthen the public sector efforts.

The Commission is asked to consider the Equality and Anti-Discrimination Ombud’s roles and tasks separately, including:

The advantages and disadvantages of gathering the function of promoting equality and developing expertise and enforcement tasks in one body and the advantages and disadvantages of assigning law enforcement and supervisory tasks to one ombudsman. This should also be assessed in relation to other types of organisational solutions for this kind of tasks.

The division of authority between the Equality and Anti-Discrimination Ombud and the Equality and Anti - Discrimination Tribunal in relation to the law enforcement tasks, including the impact on the general public of statements and decisions.

An assessment of the Equality and Anti-Discrimination Ombud’s tasks relating to monitoring that Norwegian law and administrative practices comply with international human rights obligations. The Commission is requested to assess how this monitoring is currently carried out and how it may possibly be improved.

Various models for ensuring cooperation and dialogue between public authorities and civil society in the area of equality and anti-discrimination, as well as the employers’ and employees’ organisations.

We ask the Equality Commission to indicate, at a general level, the administrative and economic consequences of any proposals it makes.”

## Chapter 2

# Report summary: Equality ambitions

### 2.1 Introduction

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In October 2010, the Equality Commission was asked to provide a separate assessment of the policy implementation system linked to the field of equality and anti-discrimination. The Commission was requested to assess the existing institutional/organisational frameworks for efforts to promote equality carried out by public authorities at a national, regional and local level. The Equality and Anti-Discrimination Ombud's roles and tasks are to be assessed separately. The same applies to the division of authority between the Ombud and the Equality and Anti – Discrimination Tribunal, especially with regard to impact. The Commission shall, if relevant, propose measures that can further develop and strengthen the public sector efforts. In light of the fact that the report deals with the policy implementation system, the Commission interprets this to mean measures to strengthen the structure for implementing efforts to promote equality and measures that can ensure effective protection against discrimination.

In this chapter, the Commission first of all gives an account of the starting points for the report and of the Commission's analysis of the policy implementation system. Thereafter, the main items in the Commission's overall assessment are presented before a summary is given of the assessments and main proposals in each of the report's chapters 3-10. All the Commission's proposed amendments to Acts and regulations are stated in chapter 11. The financial, administrative and other significant consequences are assessed in chapter 12. The Commission's mandate, composition and work on the report are presented in chapter 1. The Commission's recommendations are unanimous.

*Protection against discrimination and proactive obligations*

The equality policy states high ambitions for the public authorities. Equality is described as a basic value for society. Efforts to promote equality are regarded as a human-rights obligation, i.e. a duty that the state has when international human rights are to be implemented in Norwegian law and administrative practice.

In the Gender Equality Act's statement of legislative purpose, this is formulated as a duty for public authorities to "make active, targeted and systematic efforts to promote gender equality in all sectors of society" (section 1a). At the same time, it is often pointed out that active efforts to promote equality are good economic policy. In such case, for example, a high percentage of women and men in work is regarded as a significant contribution both to the development of the welfare state and to economic growth and improvements in prosperity in a more general sense.<sup>1</sup>

The equality legislation covers both protection against discrimination and proactive duties. While the protection against discrimination is a right at an individual level, the proactive work is a duty which enterprises and institutions have. The Norwegian parliament, Storting, has decided that both the government and municipalities are to have such a duty as a public authority, i.e. in their role as bodies exercising authority and providing services. All employers also have a duty to make active efforts to promote equality within the framework of their operations. The same applies to both employers' and employees' organisations.

The starting point for the Commission's assessment of the policy implementation system in the equality and anti-discrimination field is this combination of rights and duties: individual rights to protection against discrimination as well as institutional duties to make active efforts to promote equality. The Commission wishes to underline that it views this assignment as a very important one. The policy implementation system's impact provides a specific basis for stating both how the state in practice meets its human-rights obligations and how the state otherwise makes arrangements for good societal developments.

Since the mid-1980s, Norwegian authorities have based their efforts to promote equality in the public administration sector on a so-called inte-

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<sup>1</sup> See for example Proposition 1 to the Storting (Resolution) (2011-2012) for the Ministry of Children, Equality and Social Inclusion. For the same perspective, refer to a report issued by the World Bank (World Bank 2012).

gration strategy.<sup>2</sup> This integration strategy means that the work of promoting equality is to be integrated into the enterprises' day-to-day work, in all decision-making processes, at all levels and in every step of the processes and by those that normally take part in the work of making decisions. The integration strategy must, among other things, make visible and assess the effects of political decisions on women, men, girls and boys and the way in which apparently gender-neutral policies and administration can help to maintain or reinforce stereotypical gender roles. In addition, the *integration of an equality perspective* has for a long time been the dominant strategy for the UN's and EU's efforts to promote equality. Internationally, the concept of "*mainstreaming*"<sup>3</sup> is often used to describe such a strategy.<sup>4</sup>

The Commission views the integration strategy mainly as a principle governing how the public-sector responsibility for equality is to be practised. The strategy states how the obligations in the equality legislation are to be carried out in practice: through regular daily work, at all levels and steps of a decision-making and implementation process. The question is thus not only *whether* this takes place and how it takes place but also who is to monitor that it does take place.

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<sup>2</sup> Public documents in Norway use both "the integration of an equality perspective" and "the integration of a gender perspective" to describe the English concept of *mainstreaming*. In its report, the Committee will mainly use the concept of the integration of an equality perspective, since the report is based on a multidimensional approach to equality.

<sup>3</sup> See, among others, Yuval-Davis, Nira, (2005) «Gender mainstreaming och intersektionalitet». *Kvinnovetenskaplig tidskrift*, 2-3: 19-29.

Squires, Judith, (2005) «Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation» *Social Politics*, 12(3): 366-388.

Verloo, Mieke, (2002) «The Development of Gender Mainstreaming as a Political Concept for Europe » Conference Gender Learning, Leipzig 6-8 September.

<sup>4</sup> Following the Women's Conference in Beijing in 1995, the UN's Economic and Social Council (UN ECOSOC) issued the following definition of the strategy: «Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies and programs, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality». United Nations Economic and Social Council: Mainstreaming the gender perspective into all policies, E/1997/66, page 2.

*Statutory prohibition against discrimination on several grounds*

The equality and anti-discrimination policy currently covers discrimination on more grounds than just gender. There is a statutory prohibition against discrimination on the basis of ethnicity, religion, ethical and cultural beliefs, political views, membership of employee organisations, sexual orientation, disability or age.

- The Gender Equality Act, which was passed in 1978, prohibits discrimination on the basis of gender. It entered into force in 1979.
- In 1982, the Working Environment Act introduced a prohibition against requiring job seekers to provide information on their attitudes to political, religious or cultural issues. In 1998, this was extended to prohibit discrimination against job seekers on the basis of race, skin colour, national or ethnic origins, homosexual orientation or form of cohabitation. In 2001, the Working Environment Act's protection rules were reinforced with a new section 54 A-M on equal treatment in working life, and a separate chapter 13 prohibiting discrimination on the basis of age, political views and sexual orientation was introduced in 2005.
- The Anti-Discrimination Act prohibits discrimination based on ethnicity, national origin, ancestry, skin colour, language, religion or beliefs.<sup>5</sup> The Act was passed in 2005 and entered into force on 1 January 2006.
- The Anti-Discrimination and Accessibility Act introduced a prohibition against discrimination on the basis of disability. The Act was passed in 2008 and entered into force on 1 January 2009.
- A prohibition against discrimination based on gender, ethnicity, religion, disability and sexual orientation has also been included in the housing legislation (the Tenancy Act, Property Unit Ownership Act, Housing Building Association Act and Housing Cooperative Act). The housing legislation provisions prohibiting discrimination were passed in 2003 and entered into force on 1 January 2004.

Parallel to the expansion of the prohibition against discrimination, there has also been a greater public focus on the equality challenges related to

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<sup>5</sup> The Commission uses "ethnicity" as a collective term for the grounds of ethnicity, national origin, ancestry, skin colour and language. "Religion" is used as a collective term for the grounds of religion and beliefs.

so-called “intersections”, i.e. cases where unlawful discrimination cannot be traced back to only one discrimination ground, but where unique challenges arise in combinations of, for example, gender and ethnic minority background, gender and a disability, or gender and age. Kimberlé Crenshaw, a professor of jurisprudence, used the image of an intersection – to show how several discrimination cases meet and form distinct kinds of discrimination.<sup>6</sup> In discrimination law, increasing international attention is being paid to situations in which different grounds for discrimination interact.<sup>7</sup> International human rights bodies now recommend that national anti-discrimination legislation should also prohibit intersectional forms of discrimination.<sup>8</sup>

In this report, the Commission assesses the policy implementation system in the equality field based on the Gender Equality Act's provisions prohibiting discrimination and stipulating active efforts to promote equality. The Commission places emphasis on the interaction between various grounds for discrimination and includes the statutory prohibition against discrimination on grounds other than gender in its analyses and assessments.

#### *Duty to make active efforts to promote equality*

Ever since the Gender Equality Act was passed in 1978, it has contained a provision stating that public authorities are to make efforts to promote gender equality. This has later been concretised and more precisely defined:

- Rules imposing a duty on employers and employers' and employees' organisations to carry out active efforts to promote gender equality were stipulated in 2002. These rules entered into force on 1 July 2002.

<sup>6</sup> Crenshaw, Kimberlé (1989) «Demarginalizing the Intersection of Race and Sex. A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics». *University of Chicago Legal Forum*, side 139–67.

<sup>7</sup> See, i.a. Makkonen, Timo (2002) *Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalised to the fore*. <http://www.abo.fi/institut/imr/norfa/timo.pdf>;

Fredman, Sandra (2005) «Double Trouble. Multiple Discrimination and EU Law». *European Anti-Discrimination Law Review*, No. 2, pp. 13-18.

Schiek, Dagmar og Victoria Chege (2008) *European Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*. London: Routledge.

<sup>8</sup> See for example the UN Committee on the Elimination of Discrimination against Women's general recommendation no. 28, article 18.

- In 2008, this duty to make active efforts was extended to also apply to the grounds of ethnicity, religion and disability. This was as part of the Anti-Discrimination Act and Anti-Discrimination and Accessibility Act. The duty applies to both public and private enterprises. These rules entered into force on 1 January 2009.
- Public authorities also have a duty to make active efforts in relation to gender, ethnicity, religion and disability, not only as employers but also as bodies exercising authority and as service providers. This is stipulated in the Gender Equality Act (as from 1978 but made clear in 2002) and in the Anti-Discrimination Act and Anti-Discrimination and Accessibility Act as from 1 January 2009.
- There is also a duty to report (in the annual accounts) of measures that the enterprise has planned to be implemented or implemented in order to fulfil its duty to make active efforts to promote gender equality. In addition, the enterprise is to give an account of its actual state of affairs as regards gender equality. As regards ethnicity, religion and disability, there is no duty to give an account of the actual state of affairs, but there is a duty to give an account of measures that the enterprise has planned or implemented in order to fulfil its duty to make active efforts. The duty to give an account is stipulated in the Norwegian Accounting Act, Gender Equality Act, Anti-Discrimination Act and Anti-Discrimination and Accessibility Act.
- Public authorities and enterprises that do not prepare annual reports are to provide a corresponding account in their annual budgets. The municipalities' and county councils' duty to give an account of equality measures relating to gender, ethnicity, religion and disability are stipulated in the Local Government Act.

*Greater ambitions for the protection against discrimination and active efforts to promote equality*

Both the statutory protection against discrimination and the duty to make active efforts to promote equality have been expanded in Norway since 2000. The statutory duties currently include efforts to promote equality in relation to gender, ethnicity, religion and disability. This combination of the protection of the individual's rights and proactive duties at an institutional level in relation to several grounds for discrimination also means an expansion of this field as an administrative area. If the statutory provi-

sions are to be effective, they must be implemented and followed up as organisational practice.

The Commission has examined the policy implementation system in such a way that, firstly, we take into account the statutory prohibition against discrimination on several grounds in addition to gender and, secondly, we emphasise the interaction between gender and other grounds of discrimination. The Commission has thus based its work on a wide understanding of equality. However, at the same time we restrict the “equality and anti-discrimination field” to activities that follow from the equality and anti-discrimination legislation.

The Commission is on the one hand interested in what the prohibition against discrimination entails and how it is enforced. On the other hand, we are interested in how the duties to make active efforts to promote equality are carried out and followed up by state authorities, municipalities and county councils. It is thus important to bear in mind that this relates in part to duties that have been statutory for 10 years (the duties pursuant to the Gender Equality Act), and in part to completely new statutory duties (the duties pursuant to the Anti-Discrimination Act and the Anti-Discrimination and Accessibility Act). While for one set of duties we can ask how they have been implemented, it is perhaps more relevant to ask how the other set of duties can best be implemented.

### *The policy implementation system*

The Commission is thus to assess the organisational frameworks for the public sector’s efforts to promote equality. We see this as a question of implementation structure and differentiate analytically between a structure for implementing the protection against discrimination and a structure for implementing proactive duties. This only partly corresponds to how the policy implementation system is organised.

The policy implementation system in the field of equality and anti-discrimination usually means the following administrative agencies:

- The Ministry of Children, Equality and Social Inclusion (BLD/the Ministry) has the main responsibility for the work on the government’s equality policy. The Ministry has the overall responsibility for gender equality and equality relating to all other statutory grounds. This responsibility is anchored in the Department of Family Affairs and Equality. The Ministry is also responsible for coordi-

nating the state's efforts to promote equality in a more general sense. All Norwegian ministries are responsible for promoting equality in their areas – the so-called sector-responsibility principle. In addition to equality, the Ministry of Children, Equality and Social Inclusion has the overall responsibility for families and marriage/cohabitation, the conditions in which children and adolescents grow up and live, consumer interests and the integration and social inclusion of immigrants. Several ministries are responsible for some important equality policy issues, such as violence in close relationships. As regards the aforementioned example, the responsibility is mainly divided between the Ministry of Justice, Ministry of Health and Care Services, Ministry of Education and Research and Ministry of Children, Equality and Social Inclusion.

The Ministry of Children, Equality and Social Inclusion has delegated some equality tasks to two of its directorates, the Directorate for Children, Youth and Family Affairs and the Directorate of Integration and Diversity . None of the Ministry's underlying directorates have special responsibility to ensure there is no discrimination on any of the grounds that are prohibited by statute in Norway. Nor does any directorate have special responsibility for gender equality.

- The County Governor, who is the government's representative in the counties, has been assigned the task of having a proactive role in relation to the municipalities' work of promoting equality linked to various grounds, but has not been given the resources to carry out this work.<sup>9</sup>
- The Equality and Anti-Discrimination Ombud enforces the anti-discrimination legislation with regard to all discrimination on grounds which are prohibited according to Norwegian law. The role of law enforcer covers two main types of task. In the first place: the treatment of individual incidents and complaints about breaches of the prohibitions against discrimination. In the case of complaints, the Equality and Anti-Discrimination Ombud issues statements. In the second place: ensuring that the duty in working life to report in the annual accounts is complied with. The Equality and Anti-Discrimi-

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<sup>9</sup> Some equality and diversity centres, which are mainly private foundations, also receive state funding in order to provide guidance on equality.

- nation Ombud's mandate also includes information, guidance and documentation tasks and the Ombud must ensure that Norwegian law and administrative practice do not conflict with Norway's obligations under the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In other words, the Equality and Anti-Discrimination Ombud carries out law enforcement work, promotes equality and develops expertise and monitors compliance with conventions.
- The Equality and Anti-Discrimination Tribunal has the authority to decide on appeals made pursuant to the anti-discrimination legislation. The Tribunal deals with appeals concerning discrimination once the case has been dealt with by the Equality and Anti-Discrimination Ombud. Both the parties to a complaint and the Equality and Anti-Discrimination Ombud may appeal against decisions to the Tribunal. The Equality and Anti-Discrimination Tribunal may order stoppages, rectifications and other measures necessary to ensure that discrimination, harassment, etc, stops and is not repeated. The Tribunal may stipulate a date for the order to be complied with and impose a coercive fine to ensure that the order is carried out. However, the Tribunal cannot award damages for non-economic loss and compensatory damages if there is a breach of the anti-discrimination legislation. The Tribunal can also deal with equality reports that have first been checked by the Equality and Anti-Discrimination Ombud.

The authority of the Ombud and Tribunal is regulated in a separate law, the Anti-Discrimination Ombud Act. This Act stipulates the Ombud's and Tribunal's authority and the division of authority between the two bodies. The Anti-Discrimination Ombud Act stipulates that the Ombud and Tribunal are independent administrative agencies. This means that the Ombud and Tribunal cannot be instructed how to deal with individual cases or in their other professional activities.

The Norwegian parliament (Storting) has emphasised that there must be a low-threshold service for discrimination cases. By low threshold is meant that the service is to be easily available, nationwide and provide guidance on and deal with complaints about discrimination free of charge.

It is possible to have an Equality and Anti-Discrimination Tribunal decision overturned by the courts. The Tribunal's decision may be brought before the courts in order for the case to be heard in full.

*Supervising active efforts to promote equality*

Employers have a statutory duty to give an account of or report on their actual state of affairs as regards equality (gender) and on measures that the enterprise is planning to implement and has implemented (relating to gender, ethnicity, religion and disability). The Equality and Anti-Discrimination Ombud supervises the duty to give an account. The Ombud has concentrated this supervisory work on public enterprises as employers, with particular emphasis on municipalities.

From 2007-2009, 160 equality reports from a total of 86 municipalities were checked. Several cases were also brought before the Equality and Anti-Discrimination Tribunal and the Tribunal drew up guidelines for what the reports are to contain in one of its statements. The Ombud must comply with these guidelines in her work.

Over the past few years, some other public enterprises have also been checked (ministries and educational/research institutions). These have to little extent submitted equality reports that meet the legal requirements.

Private enterprises have more or less not run any risk of being checked. However, the Equality and Anti-Discrimination Ombud checked the equality reports of five of the biggest auditing firms in 2010. This check included equality relating to gender, ethnicity and disability. None of the equality reports were considered to meet the legal requirements.

Public authorities are subject to the duty to make active efforts in their role as an employer. However, public authorities are different from other employers in that this duty also relates to their role as a body exercising authority and providing services.

For the public sector, the duty to make active efforts entails a duty not only to implement specific equality measures but also to ensure that equality considerations are integrated into all public enterprises. This means, for example, ensuring that new draft regulations comply with the Gender Equality Act, Anti-Discrimination Act and Anti-Discrimination and Accessibility Act and implementing measures whose objective is to promote equality. It also entails a duty to ensure that other administrative

decisions that are implemented take equality policy considerations into account.<sup>10</sup>

The preparatory works to this legislation have not made it clear whether the duty to give an account applies to public enterprises in their role as bodies exercising authority and providing services, and whether the Equality and Anti-Discrimination Ombud is to supervise this. The public authorities' duty to make active efforts in their role as bodies exercising authority and providing services has in any case not been followed up to any great extent.

#### *Greater emphasis on the duty to make active efforts and report*

At the same time, the duty to make active efforts and report is gaining increasing attention as a tool for practical efforts to promote equality. Three examples can be pointed out, all of which relate to an employer's duty to make active efforts:

In the autumn of 2010, the Norwegian government presented a White Paper (Meld. St. 6 (2010-2011)) entitled *Equality for Equal Pay (Likestilling for likelønn)*. This once again states that the differences in men's and women's pay are due to the gender divide in working life. Many young people still make traditional choices when it comes to careers, although we are seeing major changes in higher education in that women now dominate in number, even in previously male-dominated subjects. Women still often work part-time. Although there is more equality, there is still a traditional division of labour in many families. All these factors affect women's participation in working life and finances. The White Paper emphasises the importance of a better gender balance in people's choice of education. It refers to the Equality and Anti-Discrimination Ombud's enforcement of the Gender Equality Act's equal pay provisions and the employers' duty to make active efforts to promote equality as important tools for effectively following up the right to equal pay. In the White Paper, the government gives notice that it will ensure the publication of pay statistics divided into gender and job groups at enterprise level, and suggests that this should form part of the enterprises' duty to make active efforts and report. The government also wants to impose a duty on employers to

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<sup>10</sup> See Proposition to the Odelsting (parliamentary bill) no. 77 (2000-2001), page 20.

disclose pay if there is any suspicion of pay discrimination on the grounds of gender.

The same tool is pointed out in the government's White Paper on working conditions, the working environment and safety (Meld. St. 29 (2010-2011)) entitled *Shared Responsibility for a Good, Decent Working Life (Felles ansvar for eit godt og anstendig arbeidsliv)*. This White Paper raises the issue of part-time work, with an emphasis on underemployment and involuntary part-time work. Most of those who are involuntarily working part-time are women. The number of part-time employees who want to work longer hours each week is highest in female-dominated occupations that do not require an education. The White Paper also proposes clarifying the employer's duty to hold discussions with employee representatives on the use of part-time jobs and the right to work full-time in the case of work in excess of the agreed working hours. At the same time, the government warns that it will consider how the efforts to prevent involuntary part-time work can form part of the employers' duty to make active efforts and report pursuant to the Gender Equality Act.

The government's job strategy for young people with disabilities, which was launched in connection with a Proposition to the Storting (Resolution) (Prop 1 S (2011-2012)), also includes measures linked to the duty to make active efforts and report. Despite the fact that the statutory prohibition against discrimination has been strengthened, employers still have objections to hiring job seekers with disabilities. For example, it has been documented that highly qualified wheelchair users and blind people are less likely to be summoned to an interview than other people. Reference is made to the fact that the duty to make active efforts means that employers are to make active, targeted and systematic efforts to promote equality and equal status, ensure equal opportunities and rights for everyone and prevent discrimination on the basis of disability. The government has given notice that it will consider in further detail how the enterprises' work to recruit and include persons with disabilities can best form part of the follow-up of the duty to make active efforts and report stipulated in the Anti-Discrimination and Accessibility Act.

Greater attention is now being paid to corporate social responsibility in both Norway and the rest of the world. Social responsibility is mainly about taking account of social and environmental considerations in excess of those stipulated by law. In various White Papers on ownership, the state

has further defined what social responsibility means in enterprises in which the state owns a share. Among other things, the government has clear expectations concerning equality and diversity. It is underlined that equality in business is a competitive advantage that can help to overcome the companies' global challenges. In addition to the goal of a high level of gender equality on boards, clear guidelines are provided stating that Norwegian companies should prepare strategies for how to utilise their best expertise, including how women and minority groups can be recruited to top management positions, see the White Paper entitled *Active Ownership* (Meld. St. 13 (2010-2011) *Aktivt eierskap*).

## **2.2 Summary of the Commission's assessments and proposals**

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### **2.2.1 Main points**

The report on the policy implementation system concludes that the duties to make active efforts to promote equality must be made into law to a further extent. These duties are intended to further the local efforts to promote equality in all types of enterprises. Such duties, which can also be called integration duties, are different from other types of equality policy efforts in that they emphasise the systematic, targeted everyday work to ensure equality at enterprise level. Through such duties, equality is lifted from an individual to a collective level.

Several other public reports and some new White Papers underline the potential of the duty to make active efforts and report as a tool for promoting equality. The Commission proposes that defined duties are made into law. A clear distinction should also be established in the body of laws between the public authorities' duty to make active efforts in their role as bodies exercising authority and providing services and the employers' duty to make active efforts and report. The Ministry of Children, Equality and Social Inclusion should be responsible for supervising the public authorities' duty to make active efforts.

The Commission finds that the administrative structure for implementing an equality policy is too weak to realise the equality policy ambitions. Different governments have failed to take action to strengthen the national administration's ability to implement. They have focused in part

on spreading responsibility throughout the ministry structure, in part on developing independent administrative agencies and in part on delegating implementation tasks to private foundations, etc. However, this also means that the political authorities have put themselves at arm's length distance from the implementation of the equality policy. The Commission believes this is extremely negative and therefore proposes strengthening the structure for implementing the equality policy under the authority of the Minister of Children, Equality and Social Inclusion. This means that an equality directorate underlying the Ministry should be created. It is important that such a new equality directorate has a regional scope and can help to mobilise municipalities and county councils in the public efforts to promote equality. In the Commission's opinion, the Ministry should also strengthen its contact with voluntary parties and organisations as well as with the employers' and employees' organisations in relation to active efforts to promote equality.

The municipalities have large equality-policy tasks, both as employers and as service providers. There is a huge variation in the municipalities' interest in carrying out active efforts to promote equality, and regional environments with equality expertise are few and far between. State authorities have spent little on development and guidance work to help ensure that mandatory duties are carried out at municipal and county council level. The Commission believes it is necessary to make an all-out effort in the local equality work. The Swedish government's major efforts to promote gender equality (*Den särskildskilda jämställdhetsatsningen 2007-2010*) also put a lot of resources into efforts to promote equality carried out by municipalities and county councils. The Commission recommends implementing similar focused efforts to improve equality in Norway, and outlines a 10-year programme to develop local equality through earmarked funds allocated in the national budget and administered by the Ministry of Children, Equality and Social Inclusion.

The Equality and Anti-Discrimination Ombud and Equality and Anti-Discrimination Tribunal have a very important role to play in the implementation of the legal prohibition against discrimination. According to Norway's international obligations, such bodies are to act independently of the state. This means that the current method of organisation is to be retained. There should be no doubt about the independence of the enforcement system and this is best safeguarded by the maintenance of

the current organisational form. The Commission also places emphasis on the Equality and Anti-Discrimination Ombud's mandatory task of monitoring compliance with conventions. In addition, the Commission places great emphasis on the Norwegian parliament's objective in establishing this enforcement structure: to provide a real low-threshold service to people who experience discrimination. On this basis, the Commission is critical of some of the restrictions on the Equality and Anti-Discrimination Tribunal's authority, such as the restriction on awarding damages for non-economic loss if discrimination has been ascertained. The Commission believes that this restriction results in rather ineffective protection against discrimination and considers it to be a clear weakness, including in relation to the enforcement system's impact on the public sector. The report has also revealed other weaknesses in the low-threshold service which indicate that changes should be made to the Anti-Discrimination Ombud Act and to the regulations applicable to the Equality and Anti-Discrimination Ombud.

The Commission underlines how important it is that both the legal protection against discrimination and the active efforts to promote equality recognise the intersections between gender and other grounds for discrimination. The Commission therefore recommends that the efforts to promote equality carried out by public authorities should continue to be structured so that they include all the prohibited grounds for discrimination.

A summary of the report's assessments and main proposals is provided below.

### **2.2.2 The protection against discrimination and active efforts to promote equality. The statutory basis**

In chapter 3, the Commission discusses the legal protection against discrimination and the duty to make active efforts to promote equality, and assesses proposed amendments to the law. The Gender Equality Act is used as a basis, but the Commission's proposals are also relevant for the other anti-discrimination legislation.

By ratifying international human rights conventions, Norway has undertaken to oppose discrimination on various grounds. The protection afforded by conventions follows from UN conventions, Council of Europe conventions and EU legislative acts.

Norway was one of the first countries in Europe to introduce legislation prohibiting gender discrimination. The Gender Equality Act, which was passed in 1978, applied to all areas of society and prohibited the differential treatment of women and men.

The Gender Equality act stipulates requirements relating to gender representation on boards, councils and panels. The gender representation requirements applicable to committees and panels have also been incorporated into the Local Government Act and apply to the boards of public limited companies, of all public enterprises, of cooperative societies and of municipal limited companies in which the municipality owns two-thirds or more. Gender-representation requirements also apply to the boards of foundations when the state, a county council or a municipality appoints the foundation's entire board.

In addition, there is now a statutory prohibition against discrimination on the basis of ethnicity, national origin, ancestry, skin colour, language, religion, beliefs, political views, membership of an employee organisation, sexual orientation, disability and age. The prohibition applies to both direct and indirect discrimination. The protection against discrimination varies depending on the ground for discrimination. Discrimination on some grounds is prohibited in all areas of society, while discrimination on other grounds is only prohibited in working life. And only gender discrimination is prohibited in the framework of family life and private life. Different levels of protection have led to demands for the prohibition against discrimination to be harmonised and strengthened. Proposals regarding integrated anti-discrimination legislation have been examined by a public committee, the Anti-Discrimination Act Commission, which submitted its recommendations in 2009.<sup>11</sup> At present, however, the prohibition against discrimination and duty to make active efforts to promote equality are still regulated by various Acts and the Commission has based its assessments and proposals on this legal structure.

Anti-discrimination law has traditionally dealt with discrimination in a one-dimensional way, according to separate grounds for discrimination and without placing particular emphasis on the interaction between sev-

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<sup>11</sup> Official Norwegian Report (NOU) 2009: 14 *Et helhetlig diskrimineringsvern (Comprehensive Protection Against Discrimination)*. The Anti-Discrimination Act Commission's report on a comprehensive anti-discrimination Act, the protection to be afforded by the Constitution and the ratification of Additional Protocol no. 12 to the European Convention on Human Rights.

eral grounds. This creates problems for persons affected by discrimination, such as discrimination on the grounds of both gender and ethnicity interacting with each other. In some cases, it will also be a combination of two or more grounds for discrimination that leads to the discrimination. In the EU, the concept of multiple discrimination is often used to describe this. The Commission uses the concept of *compound discrimination* as a collective term for such cases of simultaneous and interwoven discrimination.

A survey of the Ombud's complaints cases conducted by the Equality and Anti-Discrimination Ombud on behalf of the Commission shows that compound discrimination cases comprise a not insignificant share of the cases dealt with by the Ombud and Tribunal. Of 244 complaints about discrimination in this survey, 53 were about compound discrimination.<sup>12</sup> The legal basis does not provide explicit protection against compound discrimination. Although the legislation currently allows the Ombud, Tribunal and courts to deal with cases in which compound discrimination is alleged, the Commission believes there is a need to specify a prohibition against compound discrimination in the law. Such a prohibition will strengthen the protection against discrimination and provide clearer guidelines for the way in which enforcement bodies are to deal with such cases. The prohibition will also create greater awareness of persons and groups that are particularly vulnerable to discrimination. Specific statutory provisions to counteract compound discrimination are in line with international recommendations, primarily general recommendations by the UN Women's Anti-Discrimination Committee<sup>13</sup>, but also recommendations from the European Commission<sup>14</sup>.

*The Commission proposes incorporating a prohibition against compound discrimination in the Gender Equality Act and other anti-discrimination legislation.*

According to prevailing rules, all employers, employers'/employees' organisations and public authorities shall make *active, targeted and systematic efforts* to promote equality linked to gender, disability and ethnic-

<sup>12</sup> Cases concerning discrimination based on disability were not included in the survey.

<sup>13</sup> The UN Committee on the Elimination of Discrimination against Women: General recommendation no. 28, article 18 to the Convention on the Elimination of All Forms of Discrimination against Women, article 2.

<sup>14</sup> The European Commission's report (2007) *Tackling Multiple Discrimination. Practices, policies and laws*.

ity, religion, etc. Public authorities have a duty to make active efforts both as an employer and as a public body exercising authority and providing services in its sphere of operations. These duties are very generally worded in the current legislation.

In addition to a duty to make active efforts, all employers have a duty to give an account/report. The duty to give an account means that the annual report/budget must state what has been done to fulfil the duty to make active efforts. An account must be given of planned and implemented measures relating to gender, disability, ethnicity and religion, etc. As regards gender, an account must also be given of the actual state of affairs.

It is the Equality and Anti-Discrimination Ombud who enforces the employers' duty to report. The information and guidance work has particularly placed emphasis on the employers' duty to make active efforts. The Ombud's controls on employers' equality reports have up to now been limited in scope and mainly dealt with municipalities' gender equality reports. The controls show that the reports are to a large extent insufficient.

Several public reports and White Papers emphasise that the duty to make active efforts and report stipulated in the Gender Equality Act is an efficient tool for promoting equality in working life. In the Commission's view, there is no doubt that working life is a key arena for implementing equality. Today's equality challenges also indicate it is necessary to stipulate such a duty to make active efforts in the legislation. The Commission believes that the duty of both public authorities and employers to make active efforts and report is nonetheless of limited value if it is not given more specific content in laws or regulations and followed up by active guidance, the dissemination of good examples and control measures. The Anti-Discrimination Act Commission placed great emphasis on the duty to make active efforts being a tool for achieving equality in working life.<sup>15</sup> The Equality Commission does the same, but believes there is also a need to specify the public authorities' duty to make active efforts.

*The Commission proposes that the duty to make active efforts which relates to employers and the duty to make active efforts which relates to public authorities as bodies exercising authority and providers of services are to be specified in the Gender Equality Act.*

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<sup>15</sup> Official Norwegian Report (NOU) 2009: 14 *Comprehensive Protection Against Discrimination*.

In the Commission's view, there is a need to monitor and ensure that the duty to make active efforts is followed up in practice. The Commission therefore believes it is important to strengthen the Ombud's monitoring of the employers' duty to give an account/report. The Commission also sees the follow-up of the duty to make active efforts in connection with its assessment of the existing organisational frameworks for efforts to promote equality at a national, regional and local level. The Commission believes that a system should be established to follow up the duty of public authorities to make active efforts in their capacity as bodies exercising authority and providers of services.

*The Commission proposes that the Ministry of Children, Equality and Social Inclusion is to be authorised to supervise the duty of public authorities to make active efforts, and that the Ministry is to be able to delegate this task to an underlying agency (directorate).*

### **2.2.3 Structure for implementing equality at a national, regional and local level**

In chapter 4, the Commission gives an account of the efforts to promote equality carried out by the Ministry of Children, Equality and Social Inclusion, which has overall political and administrative responsibility for the government's equality policy and work to prevent discrimination. The Commission also briefly discusses other ministries' efforts to promote equality and the work to prevent violence in close relationships. This chapter gives an account of, among other things, the findings of a questionnaire conducted by the Commission among the ministries in the spring of 2011.

In chapter 5, the Commission gives an account of the tasks and work relating to equality carried out by municipalities, county councils and county governors. This account is among other things based on a survey of municipal and regional efforts to promote equality conducted by the Equality Centre at Hamar and the Eastern Norway Research Institute on the orders of the Commission.<sup>16</sup> The organisational frameworks for local efforts to prevent violence in close relationships are also referred to briefly. In addition, a brief description is given of private foundations/cen-

<sup>16</sup> See Guldvik et al 2011: *Vedvarende vikeplikt. En kartlegging av kommunalt og regionalt likestillingsarbeid*. (A lasting obligation to give way. A survey of the municipal and regional efforts to promote equality)

ties in the equality sector which, with state funding, work to promote equality both regionally and locally.

In chapter 6, the Commission provides an overall assessment of the organisational frameworks for the state administration of equality.

The authorities have ambitious targets for the public sector's efforts to promote equality. This is especially expressed through the duty of public authorities' to make active efforts to promote equality and through the integration strategy which has formed the basis of the public sector's efforts to promote equality since the mid- 1980s. Among other things, the strategy means that an equality perspective is to be integrated into all professional areas and levels of public administration. Since the mid-1990s, the Instructions for Official Studies and Reports<sup>17</sup> has also stated that cases of major importance to equality are to be referred to in state reports. The Commission has examined how ministries, county governors, county councils and municipalities follow up the integration strategy and duty to make active efforts to promote equality. The questionnaire shows there are clear variations between the ministries with regard to the anchoring, organisation and prioritisation of the efforts to promote equality. Some ministries work systematically on the issue of equality. The Ministry of Education and Research and Ministry of Foreign Affairs are examples of ministries that have ensured this work is well anchored through networks or teams that are responsible for coordination across departments. The Ministry of Agriculture and Food is another example of a ministry that uses a wide range of tools to promote equality across its areas of responsibility. Other ministries work less systematically. The Ministry of Labour is an example of a ministry in which the efforts to promote equality are weakly anchored. Nor has this ministry prepared its own action plan to ensure equality within its administrative areas. The Ministry of Finance did not reply to the questionnaire. However, in a previous evaluation of the efforts to integrate a gender perspective into the national budget, the Ministry of Finance achieve a low overall score.<sup>18</sup>

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<sup>17</sup> The Instructions for Official Studies and Reports are aimed at ministries and their underlying enterprises and apply to the work on public reports, regulations, reforms and measures, as well as parliamentary bills and White Papers presented to the Norwegian parliament.

<sup>18</sup> See the Agency for Public Management and eGovernment (Difi) 2009: *På sporet av kjønnspektivet – Integrering av et kjønnspektiv i budsjettarbeidet. (On the track of the gender perspective – integrating a gender perspective into the budget work)*

Many ministries only state general guidelines on equality in their allotment letter to underlying enterprises.

Similarly, the survey of regional and local efforts to promote equality conducted by the Centre for Equality at Hamar and the Eastern Norway Research Institute shows variable efforts, but also that many municipalities do not make any active efforts to promote equality. Only 10 per cent of the municipalities in the survey state that they have a separate gender equality policy committee. Two-thirds of the municipalities have no action plan for equality on one or more grounds. Less than one-third of the municipalities state that they know a lot about the duty to make active efforts and report stipulated in the legislation. Equality is only sporadically mentioned in the municipal plans, and then mainly as a general reference. The county councils include this as a topic in the county plans and regional planning strategies slightly more often. To the extent that municipalities and county councils make active efforts to promote equality, it is primarily in their role as an employer. The municipalities seem to know little about their duty as bodies exercising authority and providers of services. Neither county councils nor county governors' offices appear to be clear centres of expertise in the work of promoting gender equality.

The most obvious explanation of the lack of public effort to promote equality seems to be that neither the duty to make active efforts nor public strategies and instructions to promote equality have been followed up by proactive work. State authorities have not really anchored the efforts to promote equality regionally or locally, apart from the efforts to prevent violence in close relationships.

The Ministry of Children, Equality and Social Inclusion has few powerful means in order to promote and coordinate the government's equality policy. None of the Ministry's underlying directorates has been given special responsibility for gender equality. There is no state nationwide system that can provide the municipalities with support, advice and guidance on efforts to promote equality and help to develop an integrated knowledge base for the development of policy in this field.

The Commission's main conclusion is thus that the implementation structure in the field of equality is too weak to realise the equality policy ambitions. There is a need to establish organisational frameworks that ensure the implementation of a national equality policy at a national, regional and local level. In addition, in the Commission's view, state

authorities have so far allocated too little funding to support the regional and local efforts to promote equality.

*The Commission proposes establishing a new directorate under the Ministry of Children, Equality and Social Inclusion to have professional responsibility for implementing an equality policy. An equality directorate should be regionally anchored through regional offices. The Commission also proposes initiating greater efforts in the form of a 10-year programme to develop local work to promote equality.*

The core tasks of an equality directorate will be:

- To supervise the public authorities' duty to make active efforts.
- To provide training and guidance on the duty to make active efforts and report in working life.
- To administer financial tools in the efforts to promote equality, including regional development funds.
- To take care of documentation and disseminate knowledge.

#### **2.2.4 Consultations with equality organisations and employers' and employees' organisations**

In chapter 7 of the report, the Commission considers the national authorities' consultations with organisations in the field of equality. The chapter also looks at the national authorities' consultations with employers' and employees' organisations.

In the Commission's opinion, making conditions suitable for relevant organisations to have a public voice in the debate on equality is an important democratic consideration. The organisations are both driving forces behind and a corrective to the public authorities' efforts to promote equality. The state grants to voluntary organisations working to achieve gender equality are small. There are currently no fixed structures for contact between the authorities and the organisations working to promote gender equality.

*The Commission proposes establishing a contact committee between the national authorities and organisations in the field of gender equality.*

Such a committee should consist of representatives of voluntary organisations in the field of equality, preferably organisations working to promote gender equality. The Commission also believes that the state grants to voluntary organisations should be increased in order to ensure

that organisations in this field have the funds necessary for carrying out their roles.

Norwegian working life has a long tradition of institutionalised cooperation between the labour market organisations - at enterprise, regional and national level. This cooperation rests on relationships of trust that have been built up over time between the authorities and the labour market organisations and between employees' and employers' organisations in Norway. Even though there are long traditions of cooperation between labour market organisations in Norway, the established cooperation between the labour market organisations and the authorities when it comes to gender equality is limited. The Commission believes there is a need for more and stronger links between the Minister of Children, Equality and Social Inclusion and the employers' and employees' organisations. These organisations should be key dialogue partners for the Minister in the work of promoting equality in working life in general and of developing the duty to make active efforts and report in particular. The employers' and employees' organisations themselves have a duty to make active efforts both as employers and within their professional areas.

*The Commission proposes establishing a forum to discuss equality in working life that consists of the Minister of Children, Equality and Social Inclusion and the employers' and employees' organisations. One of the forum's main goals will be to help follow-up the duty to make active efforts and report stipulated in the anti-discrimination legislation.*

### **2.2.5 A nationwide low-threshold service. The Equality and Anti-Discrimination Ombud**

In chapter 8, the Commission reviews the Equality and Anti-Discrimination Ombud's tasks and work and states its views on the tasks that the Ombud should have and how these tasks should be organised.

The Commission has assessed the Equality and Anti-Discrimination Ombud's law enforcement tasks. One of the main objectives of establishing the Ombud was to provide a low-threshold service for individuals who believe they have been subject to discrimination. The Ombud was to be a quick, efficient and inexpensive way of making complaints about discrimination. The Equality and Anti-Discrimination Ombud has a duty to provide guidance to those who make contact to ask questions relating to dis-

crimination. The guidance and processing of complaints are to be available nationwide.

At the request of the Commission, the Ombud has mapped its own complaints according to the ground for discrimination<sup>19</sup>. This mapping provides information on typical complaints cases, who is complaining, where in the country the complainants live, the outcome of the cases and how the cases have been resolved. The mapping shows that it is challenging for the Ombud to be a low-threshold service. There are inequalities regarding who makes use of the service and the discrimination issues that are raised. For example, the mapping shows that around 70 per cent of those who complain come from Oslo and the south-east area of Norway. Half of those who complain about discrimination in working life are in administrative/managerial/academic professions. The percentage of cases where it is concluded that there has been discrimination varies according to the discrimination ground. For example, a breach of the law is ascertained far more often in cases concerning gender discrimination than in cases concerning ethnic discrimination. This type of mapping provides information on the Equality and Anti-Discrimination Ombud's activities as a low-threshold service that is important for the continuous evaluation of these operations. The Commission believes that such systematic documentation and analysis should be an integral part of the Equality and Anti-Discrimination Ombud's work.

*The Commission proposes assigning the Ombud, as part of its mandate, a duty to map and analyse its own complaints and guidance cases. The Commission also proposes assigning the Ombud a duty to obtain information from the parties on whether and how the case has been resolved. The Commission proposes stipulating in the Equality and Anti-Discrimination Ombud Act that the parties are obliged to provide such information.*

The Commission has considered the need for a low-threshold service when it comes to cases of sexual harassment. Cases of sexual harassment are currently not covered by the Ombud's enforcement duties. Surveys

<sup>19</sup> Hellum, Anne og Else McClimans (2011) *Kartlegging av Likestillings- og diskrimineringsombudets tilsyn med FN's kvinnediskrimineringskonvensjon og FN's rasediskrimineringskonvensjon. (A survey of the Equality and Anti-Discrimination Ombud's monitoring of compliance with the UN Convention on the Elimination of Discrimination against Women (CEDAW) and UN Convention on the Elimination of Racial Discrimination (CERD))*. A report conducted by the Department of Women's Rights Law, Children's Rights Law and Equality and Discrimination Rights Law (KVIBALD) at the Faculty of Law, University of Oslo.

show that sexual harassment is widespread. There is therefore a great need for a low-threshold service in this area.

*The Commission proposes making the Equality and Anti-Discrimination Ombud and Equality and Anti-Discrimination Tribunal responsible for enforcing the prohibition against sexual harassment which is stipulated in the Gender Equality Act.*

The Commission has also assessed the Ombud's tasks in relation to monitoring the duty to report of employers and employers' and employees' organisations. The Commission believes that the Ombud's work on the reports has been carried out well but that, on the whole, too few enterprises have been controlled. The controls have been on some municipalities, some ministries and state educational institutions. Almost no private-sector enterprises have been controlled.

*The Commission therefore recommends that the Ombud intensify its monitoring of the employers' duty to report.*

According to the more precise specification of the mandate, the Commission is to compare the Ombud's law enforcement and supervision tasks with other types of organisational solutions for this kind of task. According to Norway's international obligations, there must be independent bodies in the field of discrimination. The enforcement and supervision tasks relating to the prohibition against discrimination cannot therefore be organised within the framework of the Ministry's authority to instruct. The Commission also places great emphasis on the Norwegian parliament's objective in establishing this enforcement structure: to be a real low-threshold service for people who experience discrimination and an alternative to a court hearing. This objective is also underlined through the Ombud's general duty to provide guidance. On this basis, the Commission proposes maintaining the law enforcement tasks within the framework of the Equality and Anti-Discrimination Ombud.

The Commission has examined the Ombud's function of promoting equality and developing expertise. The tasks as they are described in the Ombud's mandate are not sharply demarcated and overlap each other.

*The Commission proposes simplifying the regulations governing the Ombud's mandate so that the core tasks in the function of promoting equality and developing expertise are clearly stated.*

The Commission believes this will make it easier to prioritise tasks. There are major challenges involved in carrying out some of the statutory

activities, such as the scope of controls on the duty to report, examinations of the nature and extent of discrimination and the documentation and analysis of the Ombud's own complaints and guidance cases. The work of carrying out these tasks should be given greater priority.

The Commission proposes making a new directorate responsible for providing guidance to employers on their duty to make active efforts and report. This does not prevent the Ombud from continuing to provide such guidance but a certain division of labour in this area may lead to the Ombud prioritising the core tasks referred to above. The Commission has not recommended that the Ombud is to be responsible for supervising and providing guidance on the public authorities' duty to make active efforts as bodies exercising authority and providers of services. This is a key task for a new directorate.

The Commission has also considered the question of whether there should continue to be one ombud. The Commission refers to a number of considerations which indicate that the ombud function should *not* be divided. The duty of employers and employers' and employees' organisations to make active efforts and report applies to several discrimination grounds and the Commission has recommended strengthening the work of monitoring the reports. Splitting up the Ombud organisation would make this more difficult. It would also complicate the treatment of individual allegations of compound discrimination, which currently exist in quite a lot of the Ombud's complaints cases.

### **2.2.6 The Equality and Anti-Discrimination Ombud's monitoring of compliance with UN conventions**

In chapter 9, the Commission assesses the way in which the Equality and Anti-Discrimination Ombud monitors that Norwegian law and administrative practice comply with Norway's obligations pursuant to the UN Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Convention on the Elimination of Racial Discrimination (ICERD). This is one of the Equality and Anti-Discrimination Ombud's statutory tasks. The fact that the Ombud has been assigned this task is in line with Norway's international obligations to establish an independent surveillance mechanism. Norway is obliged to comply with these two ratified conventions. This means that the state must respect, protect and comply with the obligations that are protected by the conventions, and

Norwegian law and administrative practice must not contravene the conventions. If this is not the case, Norwegian rules of law, case law or administrative practice will contravene that which is determined by or pursuant to the case law relating to the two conventions. If a contravention is ascertained, the Norwegian authorities must amend the law and/or their administrative practice.

The Commission has initiated a survey of the Ombud's monitoring of the conventions.<sup>20</sup> The Commission's assessments in chapter 9 are based on this survey.

According to this survey, the Ombud has not developed many routines for reviewing and updating based on the relevant practice of the international supervisory bodies. It is the Ministry of Children, Equality and Social Inclusion that is responsible for implementing the conventions. The survey shows that the Ombud has not reported to the Ministry many conflicts between Norwegian law and administrative practice on the one hand and the conventions on the other. It seems as if contact with the Ministry takes place more as part of the Ombud's national law enforcement task than as the reporting of cases of conflict between the conventions' obligations and Norwegian law and administrative practice.

The Act's preparatory works do not provide a lot of guidance on how the Ombud is to carry out its monitoring duties. The Ombud has not prepared fixed routines, formal requirements or quality assurance standards for this work. The survey recommends making the monitoring of compliance with the conventions a separate function.

The Commission proposes to include in the Equality and Anti-Discrimination Ombud regulations a specification that the Ombud is to report any conflict between Norwegian law/administrative practice and the conventions to the Ministry of Children, Equality and Social Inclusion. Conflict may also be that the state has failed to implement the conventions in some other way. The Commission therefore proposes specifying that such a situation also triggers a duty to report to the Ministry. A failure to implement the conventions must be understood here in a legal sense. In the Commission's view, the Ombud should report regularly to

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<sup>20</sup> The Equality and Anti-Discrimination Ombud (2011) *LDOs klagesaker 2007-2010 for utvalgte diskrimineringsgrunnlag og områder. (The Equality and Anti-Discrimination Ombud's appeals 2007-2010 related to selected discrimination grounds and areas).*

the Ministry and as soon as the examination of a relevant conflict issue has been completed.

*The Commission proposes stipulating in regulations that the Ombud is to report to the Ministry any conflict between Norwegian law and administrative practice and the UN Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Convention on the Elimination of Racial Discrimination (ICERD). The duty to report must also apply to cases where the state has in some other way not complied with its obligations pursuant to these conventions.*

The Ombud should also consider organisational measures in relation to formal requirements, quality assurance routines and any spinning off as a separate activity of the work of monitoring compliance with the conventions, in accordance with the recommendations made pursuant to the survey of this convention-compliance work.

The Equality and Anti-Discrimination Ombud was not allocated special funds for monitoring compliance with the conventions when this work was made mandatory.

*The Commission proposes additional funds to strengthen the Ombud's function of monitoring compliance with the conventions.*

### **2.2.7 Efficient protection against discrimination. The Equality and Anti-Discrimination Tribunal**

In chapter 10, the Commission reviews the Equality and Anti-Discrimination Tribunal's law enforcement tasks in light of the mandate that the Commission is to assess the division of authority between the Ombud and Tribunal and the impact of statements and decisions on the public sector. The Tribunal is a law enforcement agency and the Commission does not propose making any changes to the Tribunal's neutral and independent role as a law enforcer.

The Equality and Anti-Discrimination Tribunal's authority is currently limited in several ways. The Commission concentrates its discussions on two limitations: one is that the Tribunal cannot award damages for non-economic loss in discrimination cases. The other relates to the Tribunal's authority vis-à-vis other administrative agencies.

Only the courts may award damages for non-economic loss in discrimination cases, and very few discrimination cases are dealt with by the courts in Norway. In the Commission's view, the fact that the Equality and

Anti-Discrimination Tribunal cannot award damages for non-economic loss in discrimination cases results in the protection against discrimination being rather ineffective.

The Commission has reviewed the general requirements as to national procedural legislation and the Tribunal's casework and finds that the Tribunal's procedures are satisfactory for giving the Tribunal the authority to award damages for non-economic loss. In addition, reference is made to examples from some of the other Nordic countries. The Commission has also reviewed examples from other appeals tribunals in Norway that have similar authority.

*The Commission proposes giving the Equality and Anti-Discrimination Tribunal authority to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination.*

In order to provide a real alternative to a court hearing, the Commission proposes that a decision by the Tribunal to award damages for non-economic loss is to have the same effect as a final and enforceable judgment. The Commission's proposal does not apply to damages for economic loss, which should be dealt with by the courts.

The Commission also points out that there is a need to review the various provisions concerning damages for non-economic loss and damages for economic loss in order to create a clearer distinction between the two reactions.

If the Commission's proposal that the Tribunal is to be able to award damages for non-economic loss is not followed up, the Commission believes it is time to reconsider the Equality and Anti-Discrimination Tribunal scheme and to look at other more efficient solutions. In this context, the Commission has reviewed the scheme which applies in Sweden, according to which the Anti-Discrimination Ombud can bring discrimination cases before the courts. In such case, it will not be relevant for the Equality Tribunal to continue dealing with individual discrimination complaints.

The proposal concerning damages for non-economic loss makes relevant the fact there are currently stricter fault requirements, i.e. a requirement of gross negligence, in order to be awarded damages for non-economic loss due to gender discrimination outside working life compared to discrimination on the grounds of ethnicity, religion, etc, and disability, where only ordinary negligence is required. The Commission does not

believe there are any grounds for the requirement of gross negligence for the award of damages for non-economic loss due to gender discrimination while less stringent requirements apply to the award of damages for non-economic loss due to ethnic discrimination or discrimination on the grounds of disability.

*The Commission proposes that the fault requirement for obtaining damages for non-economic loss due to gender discrimination outside working life should be changed from gross negligence to ordinary negligence.*

In cases relating to individual administrative decisions, the Equality and Anti-Discrimination Tribunal may only issue a statement on the relationship to the prohibitions against discrimination and may not make a decision. A distinction can be drawn between two types of individual decisions. In the first place, there are decisions made by the public administration as an employer. In the second place, there are decisions made by the public administration as a body exercising authority in other areas. The Commission cannot see any justifiable reason for treating public enterprises that are employers any differently to private employers when it comes to the question of the Tribunal's authority to make decisions. It is not reasonable for job seekers and employees to be in different positions in cases brought before the Tribunal depending on whether the case relates to the public or private sector. The Tribunal should therefore have the same opportunity to impose orders on these and, if relevant, to award damages for non-economic loss. Nonetheless, the Commission is in favour of limiting its proposal in such a way that individual decisions made by the King in Council and ministries are not covered.

Relevant individual decisions linked to a public enterprise as an employer may be related to hiring, dismissal with notice, summary dismissal, suspension or a transfer in a public service employment relationship.

*The Commission proposes authorising the Equality and Anti-Discrimination Tribunal to review other authorities' individual decisions when the decision has been made in the authority's capacity as an employer. Decisions made by the King or ministries are exempt from this.*

The Commission has dealt with the question of the Tribunal's authority in relation to other individual decisions that do not relate to the role of an employer and the relationship to regulations that contravene the prohibition against discrimination. In such cases, the Tribunal may issue a

statement but may not make a decision. A statement may mean that an individual decision, regulation or practice is criticised because it contravenes the anti-discrimination legislation. The Tribunal's case law contains several examples of statements that an administrative practice contravenes the equality and anti-discrimination legislation where the statement has not led to changes. This violates the individual's protection against discrimination. The Commission has nonetheless decided that the Tribunal should not be given greater authority to review regulations and other individual decisions made by the public administration apart from decisions made in the public administration's role as an employer. The Commission points to the opportunity to have the case in question reviewed by the courts. According to current regulations, such cases do not automatically provide for legal aid.

*The Commission proposes granting legal aid without any requirement of means testing in cases where the Tribunal has agreed with the complainant that discrimination has taken place and has recommended that legal aid be granted.*





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