

# Algorithms, artificial intelligence and discrimination

An analysis of the Norwegian Equality and Anti-Discrimination Act's possibilities and limitations

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**Illustration: Cover of the report. Credit: Incept-G**

**Description: Index finger presses graphics on a transparent screen.**

## Summary

In order to ensure effective protection against discrimination in the face of new technology, it is important that the equality and anti-discrimination legislation evolves to address emerging issues. This report reviews and analyzes key provisions and conditions in the Norwegian Equality and Anti-Discrimination Act (EADA), with a focus on the prohibition against discrimination. The starting point is that the act applies to algorithmic discrimination. At the same time, the report highlights several challenges within the legal framework.

The report seeks to identify and highlight the possibilities and limitations embedded in the Equality and Anti-Discrimination Act's prohibition against discrimination in light of issues of discrimination triggered by the use of algorithmic systems. Furthermore, the report seeks to identify the potential for further developing protection against discrimination, either through interpretation or through adjustments to the current legislation. Through this, the report aims to contribute to future discussions on how to ensure robust protection against discrimination amid rapid technological development.

Throughout the report, attention is given on the relationship between the Norwegian Equality and Anti-Discrimination Act and EU/EEA non-discrimination law. This is due to the fact that certain differences between the regulatory frameworks may be relevant when addressing issues related to algorithms, artificial intelligence, and discrimination. It should be noted that the Norwegian Equality and Anti-Discrimination Act implements EU/EEA directives in the field of discrimination law into Norwegian law.

The report is based on the premise that the prohibition against discrimination constitutes a crucial starting point for addressing algorithmic discrimination. This means that understanding the content and scope of the prohibition is essential not only when assessing whether discrimination has occurred once a system has been put into operation, but also during the phases in which algorithmic systems (including AI systems) are developed and tested.

Overall, the report reveals the need for a revision of the Equality and Anti-Discrimination Act to introduce specific regulations that can better and more clearly address algorithmic discrimination. Special regulations targeting algorithmic discrimination will be important for clarifying the possibility of enforcing the prohibition on discrimination in individual cases. However, such regulations could also have a preventive effect, especially for public and private entities that use algorithmic systems as part of their operations.

**Chapter 3** highlights a selection of connections from the prohibition against discrimination in the Equality and Anti-Discrimination Act – to the EU AI Act and the EU General Data Protection Regulation (GDPR).

- The AI Act specifies that EU discrimination regulation is not impacted by the act. This emphasizes the importance of analyzing and developing the content of the individual prohibition against discrimination based on the discrimination legislation itself.
- The AI Act article 10 no. 5 ties together the three sets of rules (the prohibition against discrimination, the AI regulation, and GDPR). The provision provides, under certain conditions, an opening for processing special categories of personal data if the intent is to prevent discrimination through the use of AI systems. Going forward, this provision may become an important tool for preventing discrimination.
- The chapter raises the possibility of introducing a specific provision in the Equality and Anti-Discrimination Act regarding activity and reporting duties for actors utilizing automated and decision support algorithms and AI systems in their activities.

**Chapter 4** analyzes the Equality and Anti-Discrimination Act's prohibition against direct and indirect discrimination.

- The chapter illustrates that algorithmic systems and artificial intelligence challenge the legal distinction between direct and indirect differential treatment. Discrimination may occur through systems' emphasis on proxy factors («proxy discrimination»), triggering new issues, especially concerning the prohibition against indirect discrimination. Additionally, the Court of Justice of the European Union has expanded the understanding for what is to be considered direct differential treatment. In light of these developments, the chapter explores the possibilities of introducing specific definitions of direct and indirect algorithmic discrimination into the Equality and Anti-Discrimination Act.
- Creating a specific exemption for situations with algorithmic differential treatment may also be considered. The current general exemption clause in the Equality and Anti-Discrimination Act § 9 is based on the premise that protection against discrimination is particularly strong in working life, and the distinction between direct and indirect differential treatment affects the strictness of the exemption. The report indicates that algorithmic differential treatment challenges both these starting points. Algorithmic systems are used across various social areas and contribute to decisions that can significantly

impact individuals. Hence, the premise that working life is of particular importance should be reassessed. Furthermore, the complexity of algorithmic systems complicates the distinction between direct and indirect differential treatment (also commented in the bullet point above). In light of these challenges, the chapter presents the possibility of introducing a separate and more specific exemption for algorithmic differential treatment into the legislation.

- The chapter shows that the burden of proof in discrimination law may be key addressing algorithmic discrimination, particularly as the rule is specified in the EU Pay Transparency Directive (Directive 2023/970) article 18. Differential treatment concerning pay is characterized by lack of transparency regarding the criteria used for pay setting, creating a clear parallel to issues of algorithmic discrimination, such as the “black box” challenge.

**Chapter 5** focuses on the different parties involved in cases of discrimination.

- The chapter draws attention to the Equality and Anti-Discrimination Act’s exhaustive list of discrimination grounds. However, algorithmic systems may lead to new individuals and groups being subjected to differential treatment. For instance, factors like social status, health, and educational attainment fall outside the current list of discrimination grounds. Algorithmic discrimination underscores the need to discuss whether there should be more flexibility in the act’s approach to discrimination grounds. This could be addressed through a specific provision banning algorithmic discrimination, which might include a positive list of discrimination grounds (cf. EADA § 6), as well as an open-ended category.
- The chapter underscores that an individual claim concerning discrimination should be directed against the private or public actor that has made a decision, issued a ruling etc. regarding the individual, and who – as part of its activities – has used an algorithmic system.
- The chapter shows that the Equality and Anti-Discrimination Act’s prohibitions against instruction and participating in discrimination may contribute to expanding the range of actors who can be held liable for algorithmic discrimination, potentially including developers in some cases. However, the substance of these two prohibitions is currently underdeveloped.

**Chapter 6** focuses on the enforcement and sanctioning of algorithmic discrimination.

- The chapter indicates that the possibility for organizations to have questions of algorithmic discrimination enforced may prove vital going forward. This must be seen in light of the fact that individuals may not always be willing to pursue cases of algorithmic discrimination before the Norwegian Anti-Discrimination Tribunal or the ordinary courts.
- Discrimination directives in EU/EEA law require effective sanctioning of the prohibition against discrimination, including cases where an organization is the complainant or plaintiff.
- The tribunal's limited sanctioning competence in cases outside working life may make it particularly relevant to bring cases of algorithmic discrimination before the regular courts. This emphasizes the need to discuss the role of the Norwegian Anti-Discrimination Tribunal in cases involving algorithmic discrimination.
- Raising awareness about the roles of the Norwegian Equality and Anti-Discrimination Ombud (LDO) and various NGO's and interest organizations in ensuring that algorithmic discrimination is effectively enforced and sanctioned is important. This could involve a conscious strategy regarding the possibility of bringing cases to the courts or the Anti-Discrimination Tribunal. It could also involve efforts to ensure sufficient supervision and control of algorithmic systems and their effects, in light of the prohibition against discrimination.

Further work should build upon the substantive prohibition against discrimination as currently regulated in the Equality and Anti-Discrimination Act §§ 6-9, and as it may be adjusted in response to the new challenges posed by the use of algorithmic systems.





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