



# A Promise Not Realised:

## The Right to Non-Discrimination in Work and Employment

The International Lawyers Assisting Workers (ILAW) Network, a Solidarity Center project, is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.

The Equal Rights Trust is an independent, international organisation which works in partnership to support the development, adoption, implementation and use of equality laws. Our vision is an **equal world**: a world in which everyone – irrespective of their identity, status or beliefs – can participate in life on an equal basis with others. We pursue this vision by addressing one of the root causes of inequality: discrimination. **We work in partnership to support the development, adoption, implementation and use of equality laws.**

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The research project was initially conceived by Jon Hiatt, Jeffery Vogt, Monika Mehta and Ziona Tanzer of the Solidarity Center, who also developed the initial terms of reference for the research to be conducted. The overarching approach to the research and the methodology was developed by Ariane Adam, Sam Barnes, Fernanda Farina, Jim Fitzgerald and Ellie McDonald from the Equal Rights Trust.

Research in the first phase was undertaken by individual experts working on each country in focus, as follows: Nicole Bernhardt (Canada); Nicolas Forero Villarreal (Colombia); Charlotta Blomqvist (Finland); Ariane Adam (Great Britain); Jessamine Mathew (India); Soraya Bouwens (Jordan); Benjamin Velasco (the Philippines); Muriel Mushariwa (South Africa). The research in Russia was undertaken by a legal expert whose identity has been withheld for reasons of safety and security. The authors are grateful to all of these researchers for their care and diligence in mapping, researching and analysing the national legal frameworks.

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Research in the second phase involved interviews with experts in each of the countries in question. A full list of those interviewed is provided as an Annex to this report. Some individuals asked that their identity be withheld for reasons of safety and security. In these cases, interviewees are listed with a pre-agreed alternative to their name. We are grateful to all interviewees for giving their time and expertise to contribute to the project.

The findings of the research were compiled and analysed by Sam Barnes and Jim Fitzgerald of the Equal Rights Trust, who together produced the draft consolidated report. Further editorial work was undertaken by Simon Collerton of the Equal Rights Trust, who produced a revised draft for validation.

The final consolidated report was submitted to a process of verification and validation involving review by the national research teams, the interviewees and respondents and an expert group.

Every effort has been made to ensure the accuracy of this report, and in particular to ensure that all interviews are correctly and accurately recorded and presented. Any errors or misunderstandings are entirely the responsibility of the authors.

# Acronyms and Abbreviations

|               |   |
|---------------|---|
| <b>CAT</b>    | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment        |
| <b>CED</b>    | Convention for the Protection of All Persons from Enforced Disappearance                        |
| <b>CEDAW</b>  | Convention on the Elimination of All Forms of Discrimination Against Women                      |
| <b>CMW</b>    | Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| <b>CRC</b>    | Convention on the Rights of the Child   |
| <b>CRPD</b>   | Convention on the Rights of Persons with Disabilities   |
| <b>ICCPR</b>  | International Covenant on Civil and Political Rights  |
| <b>ICERD</b>  | International Convention on the Elimination of All Forms of Racial Discrimination               |
| <b>ICESCR</b> | International Covenant on Economic, Social and Cultural Rights                                  |
| <b>ILO</b>    | International Labour Organization   |
| <b>OHCHR</b>  | Office of the United Nations High Commissioner for Human Rights                                 |
| <b>UN</b>     | United Nations  |

# Definitions

This report adopts definitions of work and employment used by the International Labour Organization (ILO), in particular as provided in the International Conference of Labour Statisticians' *Resolution concerning statistics of work, employment and labour underutilization*<sup>1</sup> and the International Labour Conference's *Resolution concerning decent work and the informal economy*.<sup>2</sup> Definitions of discrimination, the grounds of discrimination and the forms of discrimination are drawn from *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, published by the Office of the UN High Commissioner for Human Rights and the Equal Rights Trust.<sup>3</sup>

**Work** is defined as any activity performed by any person to produce goods or to provide services for use by others or for own use. It includes work which is both formal and informal.

**Employment** is one of five mutually exclusive forms of work. Employment is work performed for others in exchange for pay or profit.

**Informal work** consists of any economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice.

**Decent work** is understood as work which meets several indicators of freedom, security and human dignity. These indicators include, *inter alia*, employment opportunities, adequate pay, job security, equal opportunities and equal treatment in employment.

**Discrimination** concerns differential treatment or impacts that arise in connection with a person's status, identity or belief. There are different *forms of discrimination*, and each of these forms can occur in connection with any one (or any combination) of a large number of "grounds" or personal characteristics which people have.

**Grounds of discrimination:** International law recognises more than twenty-five grounds of discrimination: age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion; pregnancy; property; race; refugee or asylum status; religion or belief; sex; sex characteristics; sexual orientation; social origin; social situation; or any other status. *Discrimination on the basis of other status* is any discrimination which arises in connection with a ground which is not explicitly listed but is considered to be analogous to those recognised. Discrimination may occur on the basis of any combination of these grounds (*multiple discrimination*). Discrimination may also occur on the basis of a *perception* – whether accurate or not – that a person possesses a characteristic connected to a ground of discrimination; or on the basis of an *association* with another person or persons possessing a protected characteristic.

**Direct discrimination** occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.

<sup>1</sup> International Labour Organization (ILO), *Resolution concerning statistics of work, employment and labour underutilization*, adopted by the nineteenth International Conference of Labour Statisticians, October 2013.

<sup>2</sup> ILO *Resolution and conclusions concerning decent work and the informal economy*, adopted by the ninetieth session of the International Labour Conference, June 2002.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, 2023.

**Indirect discrimination** occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.

**Ground-based harassment** occurs when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>4</sup>

**Reasonable accommodation** means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.

**Segregation** occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.

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<sup>4</sup> In some jurisdictions, there is a discrete, separate prohibition on harassment in labour law or criminal that is not part of anti-discrimination law (see, for example, United Kingdom, Protection from Harassment Act, 1997). Such offences cover, for example, abuse, bullying, unwanted touching or other behaviour that makes a person feel distressed or threatened, but that is unrelated to a ground of discrimination. In 2019, ILO adopted the Violence and Harassment Convention, 2019 (No. 190). Under Article 1 (1) of the Convention, the term “violence and harassment” is defined to include “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm.” This is a welcome strengthening of standards by ILO in this area.

# 1. Introduction

In 1958, the member States of the International Labour Organization came together to adopt the Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination. Among the obligations and commitments set out in this Convention, States undertook to:

*declare and pursue a national policy designed to promote (...) equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*<sup>5</sup>

Since its adoption, the Convention – one of ten conventions designated as “fundamental” by the ILO because they are considered as engaging with fundamental principles and rights at work<sup>6</sup> – has been ratified by 175 States; only twelve ILO member States have not ratified it.<sup>7</sup>

In the years since the adoption of the Convention, States have repeatedly reiterated their commitment to the elimination of discrimination in work and employment. States that are party to the International Covenant on Economic, Social and Cultural Rights have committed to “guarantee (...) without discrimination” the right to work, including freedom of choice in work; the right to just and favourable conditions in work; and the right to form and join trade unions.<sup>8</sup> Parties to the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities have all taken on obligations to ensure the equal and non-discriminatory enjoyment of the right to work.<sup>9</sup> Member States of the ILO have adopted specific conventions guaranteeing equal remuneration for work of equal value; prohibiting violence and harassment at work; and guaranteeing the rights of migrant workers, indigenous peoples and workers with family responsibilities, among others.<sup>10</sup> More recently, in the 2015 Sustainable Development Goals, States undertook to “[p]rotect labour rights and promote safe and secure working environments for all workers” and committed that, by 2030, they would:

*achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.*<sup>11</sup>

Yet, despite these repeated undertakings, sixty-five years on from the commitment to pursue a national policy to promote equality of opportunity and treatment and eliminate any discrimination at work, discrimination in the workplace remains widespread, and many millions of workers experience inequalities of treatment and opportunity at work.

<sup>5</sup> ILO, Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination, Convention C111, 1958, Article 2.

<sup>6</sup> ILO, *Conventions and Recommendations*, available at: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations>.

<sup>7</sup> The list of States which have not ratified Convention 111 is: Brunei Darussalam; Cook Islands; Japan; Malaysia; Marshall Islands; Myanmar; Oman; Palau; Singapore; Tonga; Tuvalu; United States of America. (see [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256)).

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 6, 7 and 8, read together with Article 2(2).

<sup>9</sup> Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5(a)(i) and (ii); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 11 and Article 2; Convention on the Rights of Persons with Disabilities (CRPD), Article 27.

<sup>10</sup> ILO, Conventions C100, C190, C143, C169 and C156.

<sup>11</sup> Sustainable Development Goals 8.8 and 8.5.



What is more, the failure to eliminate discrimination at work is not only – or maybe even primarily – a result of a refusal to prohibit it. While less than half of the States in the world lack the dedicated, comprehensive anti-discrimination legislation required by international law,<sup>12</sup> the vast majority of States have laws which prohibit at least some forms of discrimination in the areas of work and employment.<sup>13</sup> Indeed, the area of work and employment is the sphere of life in which States are most likely to have legal prohibitions on discrimination.

As we mark the 65<sup>th</sup> anniversary of States' commitment to eliminate discrimination in work and employment, therefore, two questions arise:

*Why does discrimination in work and employment persist, despite the widespread adoption of laws and legal provisions which prohibit it?*

*How can anti-discrimination laws be better drafted, enforced and implemented to improve their effectiveness in eliminating discrimination?*

This study seeks to answer these questions by examining the legal frameworks on discrimination, and the enforcement and implementation of these laws, in six countries, in different regions of the world, with different economies and employment markets, and with different legislative approaches to discrimination at work. In assessing, analysing and comparing these legal frameworks and their operation, enforcement and implementation, we aim to identify the factors which both prevent and enable the effective prohibition, prevention and – ultimately – the elimination of discrimination in the workplace.

## 1.1 Approach and Methodology

This report is the outcome of a collaborative research project developed, designed and delivered by the Equal Rights Trust and the International Lawyers Assisting Workers (ILAW) Network of the Solidarity Center.

The Equal Rights Trust is an independent international non-governmental organisation which works in partnership to advance equality through law. The Solidarity Center is an international worker rights organisation which partners directly with workers and their unions; its ILAW Network is a membership organisation for union and worker rights lawyers which seeks to foster an exchange of ideas and information in order to best represent the rights and interests of workers.

Our two organisations came together to establish an innovative research partnership, aiming to explore and understand the barriers preventing the enjoyment of the right to non-discrimination at work, and to identify good practices and promising approaches to strengthening the rights framework and its implementation.

Research was undertaken in six countries – **Brazil, Colombia, Great Britain, India, South Africa** and **Tunisia** – with a view to identifying, assessing and understanding barriers to effective protection from – and prevention of – discrimination in a diverse range of legal, institutional and economic contexts. Our aim was to explore the full range of obstacles to the enjoyment of the right to non-discrimination in the workplace and to identify good or promising practices in a variety of contexts.

The authors set out to produce a global report with findings, recommendations and lessons learned from a

<sup>12</sup> This is an assessment made by the Equal Rights Trust based on our mapping of States which have anti-discrimination laws which meet the requirements for comprehensive anti-discrimination legislation set out in *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, the definitive guidance on the law in this area, published by the United Nations Human Rights Office in 2022 (United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023). While this mapping is a work in progress, based on research conducted to date, we are confident that no more than half of the States in the world have laws which could be assessed as meeting the requirements of comprehensive anti-discrimination legislation.

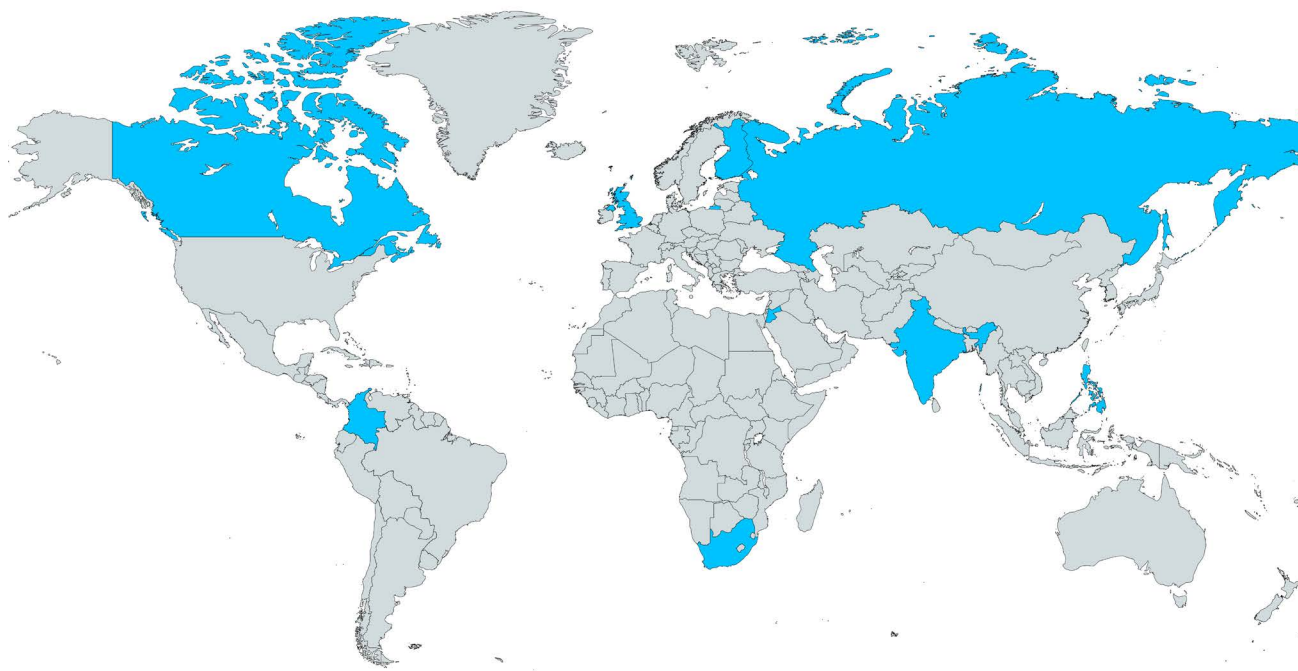
<sup>13</sup> See, for example, the data collated by the World Policy Analysis Center mapping laws prohibiting discrimination in work and employment across the globe, available at: <https://www.worldpolicycenter.org/topics/equal-rights-and-discrimination/policies>.

range of jurisdictions regarding the effectiveness of systems established to prevent discrimination in employment. Research was undertaken in two main stages. In the first stage, we undertook an initial assessment of legal frameworks on non-discrimination in the workplace in a total of nine countries. Following review and analysis of the findings of this initial assessment, the partners selected six countries to undertake further research – through interviews with those using, enforcing and implementing the law – on the effectiveness of these frameworks and the identification of obstacles to implementation. Through comparative analysis of the findings of the research in these States, we sought to map, identify and analyse the factors which limit the effective functioning of anti-discrimination laws – and so allow discrimination to persist – and to identify good or promising practices.

### Stage 1: National legal framework assessments

In the first stage of the research, the partners undertook a systematic assessment of the legal frameworks on non-discrimination in work and employment in a total of nine States. Each national legal framework assessment began with mapping the State's participation in international human and labour rights instruments and examining the principal legal instruments governing discrimination in employment in the country. This was followed by an assessment of: the scope and definition of the right to non-discrimination in these laws; the procedural, enforcement and remedial provisions and mechanisms; and the institutional and implementation elements of the framework.

Nine countries were selected for this initial phase: **Canada, Colombia, the United Kingdom, Finland, Russia, South Africa, Jordan, India** and **the Philippines**. The selection of target countries was informed by the need to study countries from different global regions, with different legal traditions, and at different stages in the development and implementation of anti-discrimination laws. This approach was taken in order to maximise the value of the comparative analysis which the project would deliver.



The partners identified and appointed researchers with knowledge of the legal framework in each country, and the Equal Rights Trust produced a research toolkit providing detailed guidance, instructions and questions for conducting the legal framework assessments. The toolkit was designed to pose questions in all areas of the law, its enforcement and implementation, prompting researchers to gather the relevant information, while offering flexibility as to the final structure and design of the report. This approach allowed for an adaptive approach to be taken by the global research team while ensuring consistency in the approach and scope of the research. The toolkits guided the research team to gather clear and comprehensive information on the legal frameworks and their enforcement and implementation in a way which facilitated

comparative analysis.

The Equal Rights Trust ensured that all members of the research team undertook standard training on international legal standards on the rights to equality and non-discrimination, through its online training platform. Alongside this, the Trust's staff provided one-to-one guidance, mentoring and advice to individual researchers on request.

Using the templates provided by the Trust, each of the researchers produced a national legal framework assessment. The Equal Rights Trust team then undertook a detailed editorial review, provided feedback and posed follow-up questions to the researchers, and supported them in finalising the outputs for each country. These individual studies were then collated in order to produce an initial comparative report.

## Review and planning for Stage 2

Following their completion, the nine national legal framework assessments were compiled, reviewed and analysed in order to inform the next stage of the research. The findings from Stage 1 allowed for an initial comparison of national legal frameworks on equality and non-discrimination in the workplace in the nine countries under investigation. This comparison concluded that, beyond the level of constitutional guarantees of non-discrimination and equality before the law, the laws in the nine States under review could be broadly grouped into four categories:

**Comprehensive:** Four of the countries under review during Stage 1 – Canada, Finland, Great Britain and South Africa – have dedicated, comprehensive (or near comprehensive) anti-discrimination laws. These are laws which have the purpose and effect of prohibiting all forms of discrimination, on all grounds recognised at international law, and in all areas of life regulated by law. They establish the full range of procedural mechanisms which are necessary for access to justice; provide a range of remedies and sanctions; and provide for, and require, positive duties and positive action measures to address structural discrimination and advance equality.

**Labour-specific:** Two countries under review at this stage provide a broad prohibition of discrimination in the area of labour and employment but do not have a comprehensive equality law system. Colombia has a specific law prohibiting harassment in the area of employment, which is defined in such a way as to include discrimination, while Russia has a relatively expansive non-discrimination provision in its Labour Code. In general, these systems fall short of the level of protection provided in systems with comprehensive laws for a range of reasons. These include the fact that they do not define and explicitly prohibit all of the different forms of discrimination; the fact that protections extend only to those in the formal economy (and thus subject to the protection of the labour law); and the fact that provisions for access to justice, the treatment of evidence and proof and remedy and sanction do not meet the specific requirements of anti-discrimination law.

**Patchwork:** Both India and the Philippines were identified as countries in the third category, having what is best termed a “patchwork” approach; a range of ground-specific anti-discrimination laws (such as legislation on the rights of persons with disabilities) and ground-specific non-discrimination provisions (such as provisions prohibiting discrimination on the basis of gender) in employment legislation. These systems are characterised by inconsistent levels of protection between different grounds and in respect of different forms of discrimination; ineffective procedures for enforcement, implementation and remedy; and gaps in protection. It is notable that both countries reviewed in this category have active civil society movements advocating for the adoption of comprehensive equality laws.

**Limited:** Finally, one country under review – Jordan – has the weakest framework, with limited specific anti-discrimination laws and isolated non-discrimination provisions in labour legislation. In such systems, it is extremely difficult for victims of discrimination to challenge the harms they experience; the personal and material scope of the right to non-discrimination is often severely limited, and discrimination is generally defined or interpreted narrowly; mechanisms for enforcement are often unclear or inaccessible, and it is difficult to prove that discrimination has occurred in a court of law.

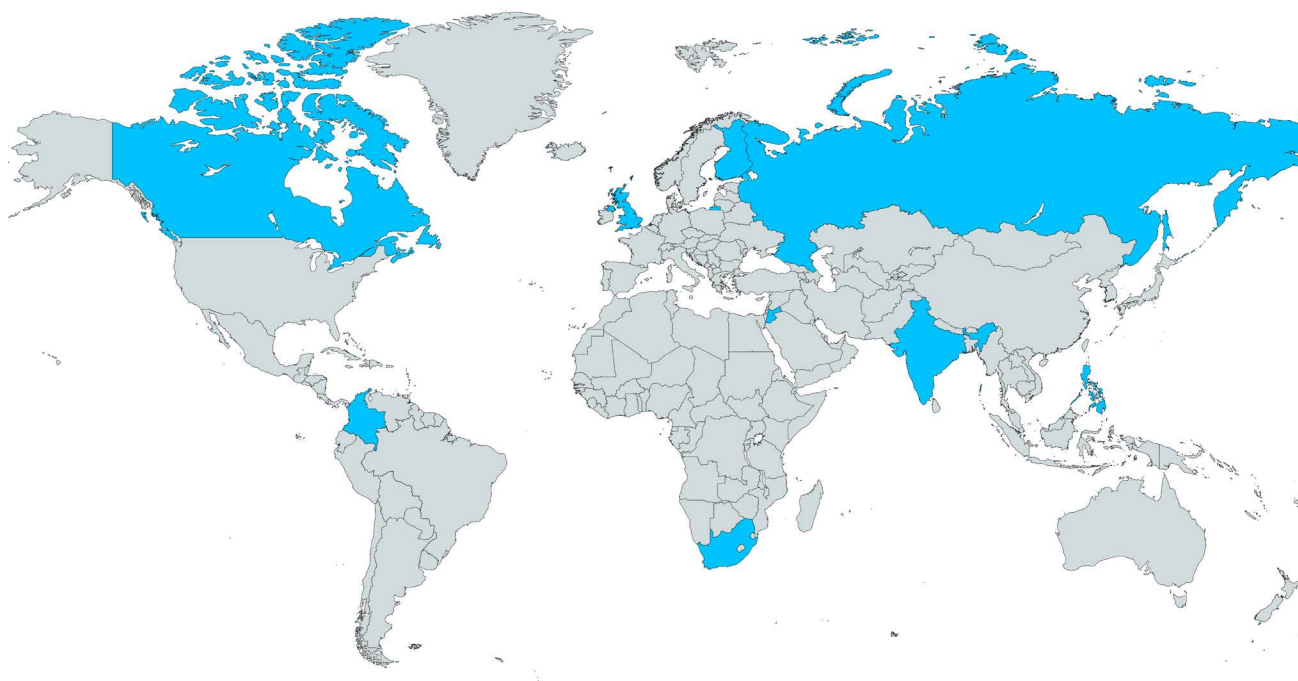
Having completed the preliminary assessment of the legal frameworks in the nine countries initially selected for review, the partners agreed on criteria for the selection of countries for the second stage of the research, in which qualitative research would be undertaken in six States. It was agreed that in the second stage:

1. Only States with comprehensive, labour-specific and patchwork anti-discrimination law systems would be included. The first stage research had found that in States with limited protection, the lack of protection in the law itself is the pre-eminent barrier to the enjoyment of the right to non-discrimination, meaning that further investigation on enforcement and implementation would be unlikely to yield significant relevant findings.
2. Two States with each of comprehensive, labour-specific and patchwork systems would be studied in order to allow for evaluation of the relative impact of less comprehensive and less well-developed systems of legal protection on the enjoyment of the right to non-discrimination, and to allow the project to explore differences in awareness, enforcement and implementation in these different systems.

In addition, the partners agreed to a number of changes to the focus countries, for contextual and logistical reasons. Accordingly, it was agreed that Brazil would be included as a focus country with a labour-specific anti-discrimination system, in place of Russia, while Tunisia would replace the Philippines as the second country under review with what was considered a patchwork of protections.

### Stage 2: Stakeholder consultation to analyse effectiveness of legal framework

Research in Stage 2 was undertaken in six States, as follows: comprehensive systems of anti-discrimination law: **Great Britain** and **South Africa**; labour-specific systems of anti-discrimination law: **Brazil** and **Colombia**; patchwork systems of non-discrimination protections: **India** and **Tunisia**. The research itself took the form of semi-structured interviews with expert stakeholders with direct knowledge and experience of the operation, enforcement and implementation of the legal framework on discrimination. Stakeholders were selected from a variety of relevant sectors and disciplines, to ensure a broad cross-section of expert opinion and experience.



The aim of the qualitative research undertaken during this stage was to gather information on the operation of the legal framework on equality in practice, through engaging with those with experience of the enforcement and implementation of the law. Through interviewing these experts, we sought to gather information allowing for (i) analysis of the comprehensiveness and effectiveness of the legal framework in combating and eliminating employment discrimination and advancing equality opportunity in the workplace; (ii) analysis of the effectiveness, in practice, of legal, policy and institutional measures governing access to justice, enforcement, remedies and sanctions; (iii) analysis of proactive and positive measures to eliminate discrimination and advance equality and of the role of institutions, including public authorities, unions and employers, in the effective implementation of the right to non-discrimination; and (iv) identification of good practices, promising developments and recommendations for reform or improvement of the system.

### Stakeholder selection

The research sought to engage the full range of **actors involved in using, relying upon, enforcing and implementing the law**, including, but not limited to: representatives of the executive and legislative branches; trade unions; civil society organisations and representatives of groups experiencing discrimination; academics; members of the judiciary; lawyers; and representatives of national human rights institutions.

The research team made a conscious, deliberate methodological choice to interview expert “tier 2” respondents and *not* to interview individual workers with personal experience of discrimination. Rather than interviewing such individuals about their personal experience, we chose to interview those with experience of challenging discrimination in the workplace – trade unions, civil society and lawyers – and those with responsibility for the enforcement and implementation of the legal framework.

This choice was made in light of the objective of the research: to develop a comparative assessment of the effectiveness of anti-discrimination law in the employment sector and to identify where and how legal frameworks could be improved to enhance efficacy. Meeting this objective required a comprehensive assessment of the full range of factors – legal, policy, institutional, financial and social – which prevent the realisation of the right to non-discrimination in each country. Given the number of interviews which could be conducted in the time and with the resources available, the team considered that such an assessment could be reached only through engagement with those with a broad overview of the anti-discrimination law framework and its operation in practice. This approach allowed the research to identify patterns and representative findings based on the outcomes of hundreds of cases, rather than place excess weight on individual cases which might have been unrepresentative.

### Stakeholder groups

The respondents were identified in two groups: (i) **“generalist” respondents** – representatives of the government, judiciary, academia, trade unions and civil society with knowledge and expertise on the functioning of the anti-discrimination law regime in the area of employment and work broadly; and (ii) **respondents with expertise in one of three specific sectors** – agriculture, domestic work and the gig economy – identified by the global research team to allow for more in-depth analysis of the challenges in implementation of the legal framework in specific sectors, in particular those with a high degree of informality. Interviews were conducted in two phases, with the generalist interviews conducted first, followed by the sector-specific interviews.

Through the first group of interviews, we sought to examine and expand upon the information in Stage 1 of the research, validating the principal findings and building on the framework assessment to examine questions about the functioning of the legal framework in practice. Interviews focused in particular on the effectiveness of the legal regime, in respect of remedy, sanction and prevention, in order to identify the conditions for effectiveness and common obstacles. These interviews were also used to verify the research team’s proposed three areas of focus, through asking national experts to identify sectors and groups with particular patterns of discrimination, high degrees of informality or other challenges to the application of the framework.

The decision to focus the second phase of the interviews on specific sectors was driven by the view that

this would allow for more in-depth examination of challenges in the application of the law. The three selected sectors were initially identified through dialogue within the research team, on the basis that they would each allow for an examination of discrimination in situations of particular vulnerability and observation of both formal and informal employment. It was also considered that focus on these sectors would allow for comparability between the different countries – due to the presence of these economic sectors in all six countries – while also allowing for contextual differences. In addition, it was considered that these three sectors represent diverse industries, allowing comparison of experiences of discrimination and anti-discrimination law in both rural and urban areas and in both traditional (agriculture and domestic service) and emerging (gig economy) economic sectors. Finally, in these three sectors, it was considered that it would be possible to observe the implications of discrimination at work for different groups: people with informal jobs or working in the informal market, poor people, ethnic and other minorities, women, and others. As noted, following initial identification by the research team, the selection of these three sectors was subjected to review through the first phase interviews, which validated the proposed approach.

### *Phasing*

In line with the approach outlined above, interviews were undertaken in two phases, as follows:

**Phase 1:** In each country, a set of between four and six interviewees were selected from an identified group of national experts with a wide understanding of the employment sector and the anti-discrimination law framework in the country. This included judges, academics, representatives of national human rights institutions, and representatives of trade unions and civil society organisations, among others. Interviews with this group sought to validate or dispute the findings of the research at Stage 1; examine the strengths and weaknesses of the legal system both on paper and in practice; identify the challenges for enforcement and implementation of the law; and identify non-legal factors that have a bearing in the system.

**Phase 2:** Three to five interviewees from each of the three sectors (agriculture, domestic work and the gig economy) were identified both through snowballing from the phase 1 interviews and from independent desk-based research and mapping. At this stage, researchers targeted primarily civil society organisations, lawyers, trade unions and representatives of groups exposed to discrimination. The goal for these interviews was to gain a deeper understanding of how both formal and informal workers experience discrimination and how the legal framework protects them – or fails to do so – in each of these sectors, as a way to shine a light on the functioning of the anti-discrimination framework in general.

### *Interviews and record-keeping*

At each stage, the research was undertaken through in-depth semi-structured interviews. Researchers were provided with a methodological guide, instructions and a standardised interview questionnaire but were given freedom to ask additional questions or omit some altogether, depending on the pertinence and necessity at the time of the interview.

The research questionnaire was structured into different parts, based on the different objectives of each block of questions. Researchers were informed that the questionnaire should be understood as guidance that would ensure some level of standardised information, but that they should use their own experience and knowledge from their context to react to the input provided by interviewees and delve deeper into certain unforeseen but relevant aspects that elicit important information. Accordingly, questions were designated as either (a) mandatory; (b) optional; or (c) follow-up questions which should be asked only if not yet answered in the earlier open-ended questions.

Researchers were encouraged to use a snowball method, asking the representatives to indicate other entities, institutions or groups that influence this agenda and that they considered important for this research. Interviews were conducted both online, through video conference platforms, over the telephone, and in person, depending on availability and the necessities of each interviewee. All interviews were recorded and transcribed, with records kept on file by the research team.

In order to comply with our ethical requirements and maintain the safety of the interviewees, especially regarding vulnerable groups, respondents were asked to complete an Informed Consent Form. Interviewees were informed that they had the option of participating in only a part of the interview or discontinuing it at any time. In addition, following the ethical guidelines of the study, interviewees were asked to confirm whether they preferred to be named, identified only by reference to their expertise or institution, or fully anonymised.

## Results

In total, the six research teams interviewed in excess of eighty experts across the six jurisdictions, with each team meeting the minimum threshold requirements for both generalist and sector-specific interviews. Transcripts were analysed by the research teams, with findings categorised and reported back to the Equal Rights Trust using standardised reporting templates. Findings and quotes from each interview were then coded into one or more of sixty different issue areas, in preparation for the development of this report.

## 1.2 Scope and Limitations

This report is the outcome of an exploratory research project which sought to identify the factors which prevent the effective enjoyment of the right to non-discrimination in the workplace, together with good practices and promising ideas for how this right can be best realised. The methodology for the research was designed pursuant to this aim.

Accordingly, this study is not – and was not intended to be – representative or comprehensive. Research was undertaken in a small number of States which, while from different regions, with different legal traditions, different employment markets and different legal frameworks on discrimination, are not globally representative. While we have sought at every stage to ensure that the research allows for comparability between States and that the findings are of relevance both within the target countries and beyond, a study of this nature can never be representative of the full range of States, given the wide range of economic models and employment markets and the diversity of legal systems on discrimination and equality which exist in different countries and regions.

Moreover, within the States under review, a select number of experts were engaged and interviewed. On average, between thirteen and fourteen experts were interviewed in each country. These experts were selected in order to provide a diverse range of perspectives on the operation, enforcement and implementation of the legal framework. They were also selected because of the breadth and depth of their expertise – interviewees include the leaders of trade unions; experienced employment judges; the directors of civil society organisations and national human rights institutions; recognised academic experts; and the top labour lawyers in their jurisdictions. Nevertheless, despite offering a diverse range of experience and great depth of expertise, an interview group such as this cannot be considered representative, either in general or in a particular sector or discipline.

Furthermore, this report aims to identify issues, challenges and good practices on the basis of qualitative evidence, drawn from interviews with experts involved in the use, operation, enforcement and implementation of anti-discrimination laws in their respective States. Where statistics on the number or proportion of such respondents who identified particular issues are provided, care has been taken to present these accurately and in context. It should be noted, however, that this report is not the result of a quantitative research exercise and that none of the statistics used in this report should be interpreted as such.

As noted, the research team made a deliberate, conscious methodological choice to focus the research interviews on stakeholders with a degree of expertise or overview on the operation of the legal framework governing discrimination in the workplace. This approach was taken in order that the research could identify issues at a systemic level. However, the consequence is that the report does not explore in detail the experiences of particular groups exposed to discrimination in accessing or participating in work or employment. Where individual cases or examples are cited, these are to exemplify issues within the law or its en-

forcement or implementation, not to illustrate particular patterns of discrimination. Accordingly, the report should not be interpreted as an assessment or analysis of experiences of discrimination in the workplace in any of the countries.

With these limitations acknowledged, however, the authors consider that the findings of this research offer an unprecedented and unique insight into how the implementation and enforcement of anti-discrimination laws work in practice and what obstacles and barriers limit or prevent their effectiveness. Most importantly, through the voices of those whom we interviewed, we can understand why discrimination in the workplace persists, despite the existence of anti-discrimination laws, and what we can do about it.



## 2. The Right to Equal Work and Employment

The right to work has been described as a “fundamental right, essential for realizing other human rights” that “forms an inseparable and inherent part of human dignity,” contributing “to the survival of individuals and to that of their family, and, insofar as work is freely chosen or accepted, to their development and recognition within the community.”<sup>14</sup> States have made a number of commitments to ensure the right to work, including through their ratification of international human rights instruments and ILO conventions, as well as through voluntary pledges as part of the 2030 Agenda for Sustainable Development. As expanded in the following sections, for the right to work to be effective, it is essential that it is afforded without discrimination and on a basis of equality. States have accepted specific obligations in this respect, which are elaborated through the respect, protect and fulfil framework.

### 2.1 International Human Rights Treaties

Several international human rights instruments recognise the right to work and employment. Principal among these is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6(1) of the Covenant sets out the “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” States parties agree to take all “appropriate steps” to safeguard this right. Essential measures in this regard are detailed under Article 6(2) and include the development of “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development” alongside other measures aimed at ensuring “productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”<sup>15</sup> Article 7 of the Covenant goes on to elaborate the “right of everyone to the enjoyment of just and favourable conditions of work.” This requires, inter alia, fair wages; equal remuneration for work of equal value; a decent standard of living; safe and healthy working conditions; equal opportunities; and rest, leisure, and the “reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”<sup>16</sup> Finally, Article 8 of the Covenant details the right of all persons to form, join and participate in trade unions, and to strike.<sup>17</sup> UN treaty bodies have referred to this as “the collective dimension” of the right to work.<sup>18</sup>

Components of the right to work are also elaborated under provisions of ground-specific UN treaties, including Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD). In 1990, a discrete instrument was adopted governing protection of the rights of all migrant workers and members of their families (CMW). To realise the right of everyone to work, each of these treaties makes clear that the right

<sup>14</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 8 (Advanced Unedited Version), UN Doc. CRPD/C/GC/8, 2022, para. 2.

<sup>15</sup> See further, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006.

<sup>16</sup> See further, Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016.

<sup>17</sup> The nature of this right is detailed further under Articles 8(1)(a) – (d), and Articles 8(2) and (3).

<sup>18</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 8, para. 2.

must be provided on an equal and non-discriminatory basis.<sup>19</sup> Similar requirements are established under regional human rights instruments.<sup>20</sup>

In addition to these principal legal provisions, Article 26 of the International Covenant on Civil and Political Rights provides for the right of all persons to equality before the law and equal protection of the law. In its General Comment No. 18, the Human Rights Committee interpreted this provision as establishing a free-standing and “autonomous right” to non-discrimination, applicable “in any field regulated and protected by public authorities.”<sup>21</sup> De facto, this includes the areas of work and employment.

## 2.2 International Labour Organization Conventions

Alongside the UN human rights infrastructure, the International Labour Organization (ILO) has adopted a large number of treaties governing different aspects of labour regulation. Following developments at the 110<sup>th</sup> Session of the International Labour Conference in June 2022, ten conventions have been declared “fundamental” to securing the right to work, including: the Forced Labour Convention, 1930 (C29), and its 2014 Protocol (PO29); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87); the Right to Organise and Collective Bargaining Convention, 1949 (C98); the Abolition of Forced Labour Convention, 1957 (C105); the Minimum Age Convention, 1973 (C138); the Occupational Safety and Health Convention, 1981 (C155); the Worst Forms of Child Labour Convention, 1999 (C182); and the Promotional Framework for Occupational Safety and Health Convention, 2006 (C187). Two of the fundamental Conventions, respectively, the Equal Remuneration Convention, 1951 (C100), and the Discrimination (Employment and Occupation) Convention, 1958 (C111), are specifically focused on the elimination of discrimination and achievement of equality. Under the latter, States undertake to:

*declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*<sup>22</sup>

A large number of additional ILO instruments also have an important bearing on labour standards in this area. This includes, non-exhaustively, the revised Migration for Employment Convention, 1949 (C97); the Migrant Workers (Supplementary Provisions) Convention, 1975 (C143); the Workers with Family Responsibilities Convention, 1981 (C156); the Indigenous and Tribal Peoples Convention, 1989 (C169); the Home Work Convention, 1996 (C177); the Domestic Workers Convention, 2011 (C189); and the Violence and Harassment Convention, 2019 (C190).

The ILO has also issued important recommendations aimed at assisting States in meeting their legal commitments. Particularly significant, for the purposes of this report, is the Transition from the Informal to the Formal Economy Recommendation (R204), which identifies practical measures needed for States to discharge their obligations in respect of workers in the informal economy. In its practice, the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) has also issued important guidance to States, noting – for instance – the need for comprehensive anti-discrimination legislation to address “persisting patterns” of discrimination and inequality in work, and providing clear direction on the necessary contents of such law.<sup>23</sup>

<sup>19</sup> ICESCR, Article 2(2); ICERD, Articles 1(1) and 2; CEDAW, Articles 1 and 2; Convention on the Rights of Persons with Disabilities (CRPD), Article 5; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 1(1) and 7.

<sup>20</sup> See, for instance, African Charter on Human and Peoples’ Rights, Articles 2, 3 and 15; Inter-American Convention Against All Forms of Discrimination and Intolerance, Articles 1 and 7.

<sup>21</sup> Human Rights Committee, General Comment No. 18, 1989, para. 12.

<sup>22</sup> ILO, Discrimination (Employment and Occupation) Convention, Convention No. 111, Article 2.

<sup>23</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109, available at: [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf).

## 2.3 Sustainable Development Goals

Through the Sustainable Development Goals (SDGs), adopted by all 193 United Nations Member States in 2015, States made commitments to improve individuals' enjoyment of the right to equal work and employment. Goal 8 promotes "sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all." Targets under this goal include, inter alia, the promotion of "development-oriented policies" that support the creation of decent jobs and entrepreneurship and "encourage the formalization and growth" of enterprises, including "through access to financial services" (Target 8.3); the "full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value" (Target 8.5); the reduction of youth unemployment and the number of young people not in education or training (Target 8.6); the eradication of human slavery, forced and compulsory labour, child labour and trafficking (Target 8.7); and the protection of labour rights, alongside the promotion of "safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment" (Target 8.8).

Reflecting the overarching ambition of the SDGs to "leave no person behind", Goal 10 aims to "reduce inequality within and among countries." Among other targets under this heading, States aim to "empower and promote the social, economic and political inclusion of all" irrespective of their personal characteristics (Target 10.2); ensure equality of opportunity and the reduction of "inequalities of outcome" (Target 10.3); and "adopt policies, especially fiscal, wage and social protection policies, and progressively achieve greater equality" (Target 10.4). Reflecting on these commitments, in a 2019 report the UN Special Rapporteur on the Right to Development noted the centrality of comprehensive and effectively enforced anti-discrimination legislation to achieving sustainable development and, in particular, to meeting the specific targets of Goal 10.<sup>24</sup>

## 2.4 Application of the International Law Framework

It is notable that the six States under review in this study<sup>25</sup> have a remarkably similar record of participation in international human rights law instruments relevant to equal work and employment. Every State has ratified the two international covenants (the ICCPR and ICESCR), as well as the three ground-specific treaties (the ICERD, CEDAW and CRPD). Without exception, each State is also party to the Convention on the Rights of the Child (CRC), and all but India are party to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT). The most obvious protection gap relates to States' failure to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), of which Colombia is the only State party. Two States – – India and the United Kingdom – – have also failed to ratify the Convention for the Protection of All Persons from Enforced Disappearance (CED).

| Ratification of Core UN Instruments |                | ICCPR | ICESCR | ICERD | CEDAW | CRPD | CRC | CAT | CMW | CED |
|-------------------------------------|----------------|-------|--------|-------|-------|------|-----|-----|-----|-----|
| 1                                   | Brazil         | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | ✓   | X   | ✓   |
| 2                                   | Colombia       | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | ✓   | ✓   | ✓   |
| 3                                   | India          | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | X   | X   | X   |
| 4                                   | South Africa   | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | ✓   | X   | ✓   |
| 5                                   | Tunisia        | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | ✓   | X   | ✓   |
| 6                                   | United Kingdom | ✓     | ✓      | ✓     | ✓     | ✓    | ✓   | ✓   | X   | X   |

It should be noted that while the six States have broadly consistent records in respect of their ratification of the principal UN human rights treaties, a different picture emerges when examining the acceptance of

<sup>24</sup> Report of the Special Rapporteur on the right to development, UN Doc. A/HRC/42/38, 2019, paras. 147-48.

<sup>25</sup> The United Kingdom as a whole is party to relevant international human rights treaties. While this report focuses particularly on Great Britain, the table below therefore includes a reference to the United Kingdom.

individual communications procedures, which is far more mixed. As set out below, some States appear less willing than others to submit themselves to the scrutiny of the UN treaty bodies, with different degrees of readiness to be subject to review.

| Acceptance of Individual Communication Procedures |                | ICCPR OP-1 | ICESCR OP | ICERD Art. 14 | CEDAW OP | CRPD OP | CRC OP-IC | CAT Art. 22 | CMW | CED Art. 31 |
|---|----------------|------------|-----------|---------------|----------|---------|-----------|-------------|-----|-------------|
| 1   | Brazil         | ✓          | X         | ✓             | ✓        | ✓       | ✓         | ✓           | NA  | X           |
| 2   | Colombia       | ✓          | X         | X             | ✓        | X       | X         | X           | NA  | ✓           |
| 3   | India          | X          | X         | X             | X        | X       | X         | X           | NA  | X           |
| 4   | South Africa   | ✓          | X         | ✓             | ✓        | ✓       | X         | ✓           | NA  | X           |
| 5   | Tunisia        | ✓          | X         | X             | ✓        | ✓       | ✓         | ✓           | NA  | X           |
| 6   | United Kingdom | X          | X         | X             | ✓        | ✓       | X         | X           | NA  | X           |

Positively, every State under review has ratified the ILO Equal Remuneration Convention (C100); and the Discrimination (Employment and Occupation) Convention (C111). Greater divergence is apparent in respect of other fundamental ILO conventions. The United Kingdom leads the way, having ratified all but the Occupational Safety and Health Convention (C155), one of the newest ILO treaties to be accorded “fundamental” status. India has the lowest total number of ratifications, having failed to ratify five of the ten fundamental conventions.

| Ratification of Fundamental ILO Conventions |                | C100 | C111 | C29 | PO29 | C87 | C98 | C105 | C138 | C155 | C182 | C187 |
|---|----------------|------|------|-----|------|-----|-----|------|------|------|------|------|
| 1   | Brazil         | ✓    | ✓    | ✓   | X    | X   | ✓   | ✓    | ✓    | ✓    | ✓    | X    |
| 2   | Colombia       | ✓    | ✓    | ✓   | X    | ✓   | ✓   | ✓    | ✓    | X    | ✓    | X    |
| 3   | India          | ✓    | ✓    | ✓   | X    | X   | X   | ✓    | ✓    | X    | ✓    | X    |
| 4   | South Africa   | ✓    | ✓    | ✓   | X    | ✓   | ✓   | ✓    | ✓    | ✓    | ✓    | X    |
| 5   | Tunisia        | ✓    | ✓    | ✓   | X    | ✓   | ✓   | ✓    | ✓    | X    | ✓    | ✓    |
| 6   | United Kingdom | ✓    | ✓    | ✓   | ✓    | ✓   | ✓   | ✓    | ✓    | X    | ✓    | ✓    |

## 2.5 The Respect, Protect, Fulfil Framework

Through their ratification of the above, and additional, instruments, the States that are the subject of this review are bound by international law to respect, protect, and fulfil the rights – including the right to non-discrimination – contained therein.<sup>26</sup>

The obligation to *respect* requires States to refrain from discrimination.<sup>27</sup> States are also required to review their existing frameworks and amend or remove any laws or policies that have the effect of discrimination in law or practice.<sup>28</sup> To *protect* the right non-discrimination and the right to work without discrimination, States are required to adopt specific and comprehensive laws that prohibit discrimination in work and employment, including where committed by private entities.<sup>29</sup> Finally, to *fulfil* the right to non-discrimination and

<sup>26</sup> See United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 2-3.

<sup>27</sup> See *ibid.*, Practical Guide and the references provided therein. Within the work context, see Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 58.

<sup>28</sup> See *ibid.*, Practical Guide and the references provided therein. In the work context, see Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, paras. 27(b) and 33.

<sup>29</sup> See *ibid.*, Practical Guide and the references provided therein. On the obligation to protect the right to equal work, see further, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 22; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59. On the need for comprehensive anti-discrimination legislation in the work context, see further ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109.

the right to equal work, States are required to adopt a broad range of measures designed to make progress towards equality and to address the root causes of discrimination.<sup>30</sup> The different dimensions of these inter-related duties are also reflected in Target 10.3 of the Sustainable Development Goals, which aims to achieve the elimination of “discriminatory laws, policies and practices” and the promotion of “appropriate legislation, policies and action in this regard.”

In practice, as is demonstrated throughout the following sections, in many States, equal work and employment remain unattainable for large sections of the population. Protections against discrimination are often scattered, fragmented and thin, impeding rights protection and limiting the realisation of equality for members of disadvantaged groups. Even in those States where non-discrimination provisions have been adopted, inequalities persist. This report seeks to identify some of the factors that can help to explain this anomaly: examining both the quality of anti-discrimination provisions themselves and looking further afield to locate broader challenges associated with States’ legal and policy frameworks that may impede effective equality for those that the law seeks to protect, and whose rights it seeks to promote.

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<sup>30</sup> See *ibid.*, Practical Guide and the references provided therein. In the work context, see, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, paras. 22 and 27.

# 3. Preconditions for Protection and Prevention

The research for this report involved interviews with more than eighty experts – trade union representatives, civil society representatives, lawyers, academics, judges and representatives of public authorities – from six different countries. Through speaking to those with experience of advocating for worker rights; those involved in challenging violations in the workplace; and those using, applying, enforcing and implementing anti-discrimination laws, we have identified myriad barriers which prevent the effective enjoyment of the right to non-discrimination in the workplace. Taken together, our expert interviewees identified more than sixty different factors which contribute to the persistence of discrimination in the workplace, despite States' long-standing and often-repeated commitments to its elimination. Obstacles identified range from gaps in legal provisions to lack of confidence in the system among rights-holders; and from the challenges of collating evidence and proving discrimination through to the absence of proactive, preventative mechanisms in the legal framework.

Nevertheless, all of the barriers, obstacles, limitations and challenges identified by those with whom we spoke can be understood as undermining one of a small number of essential prerequisites for the effective enjoyment of the right to non-discrimination in the workplace – what we call the **preconditions for protection and prevention**. The research for this report identifies four such prerequisites:

First, if discrimination is to be prohibited and prevented, work must be **subject to the protection of the law**. Those working in the informal economy or undertaking informal work in a sector which is semi-formalised, have – by definition – few or no rights under national law. For the 2 billion individuals worldwide (more than 60 per cent of the working population) relying on informal work as a source of income, discrimination occurs unchecked, beyond the reach of the law. This absence of legal protection is *the defining factor* which prevents their enjoyment of the right to non-discrimination.

The research confirms the existence of a multi-layered and mutually reinforcing relationship between informal work and discrimination. Persons in marginalised, stigmatised or discriminated groups are overrepresented in the informal economy, as a consequence of prejudice and stereotypes, systemic discrimination, and structural inequalities in other areas of life, including education and health care. The very fact that many people from marginalised or discriminated groups are effectively forced into informal work as the only way to secure a livelihood may – and frequently does – reflect a discriminatory denial of their right to free choice of work in itself. Moreover, the fact that women, racial and ethnic minorities and other groups are overrepresented in the informal economy results in further indirectly discriminatory impacts, as inequalities in pay, conditions and decent-work protections between the formal and informal economy disproportionately affect these groups. Furthermore, our research finds evidence of patterns of discrimination within the informal economy – women being denied the opportunity to undertake roles which are better remunerated, for example – which are unchecked, as a result of the lack of legal protection from discrimination in a sector which is unregulated. Finally, those experiencing any of these forms of discrimination lack recourse and access to justice and remedy, as a result of the gap in the legal framework.

It must be noted that not all informal work is forced or exploitative – those voluntarily undertaking self-em-

ployed work, for example, may be exercising their right to undertake work freely chosen. Nevertheless, in the absence of an effective legal framework providing basic minimum guarantees, the right to non-discrimination cannot be protected or realised. For all of these reasons, ensuring that work is subject to legal protection and regulation is a first, primary and non-negotiable precondition for the enjoyment of the right to non-discrimination,

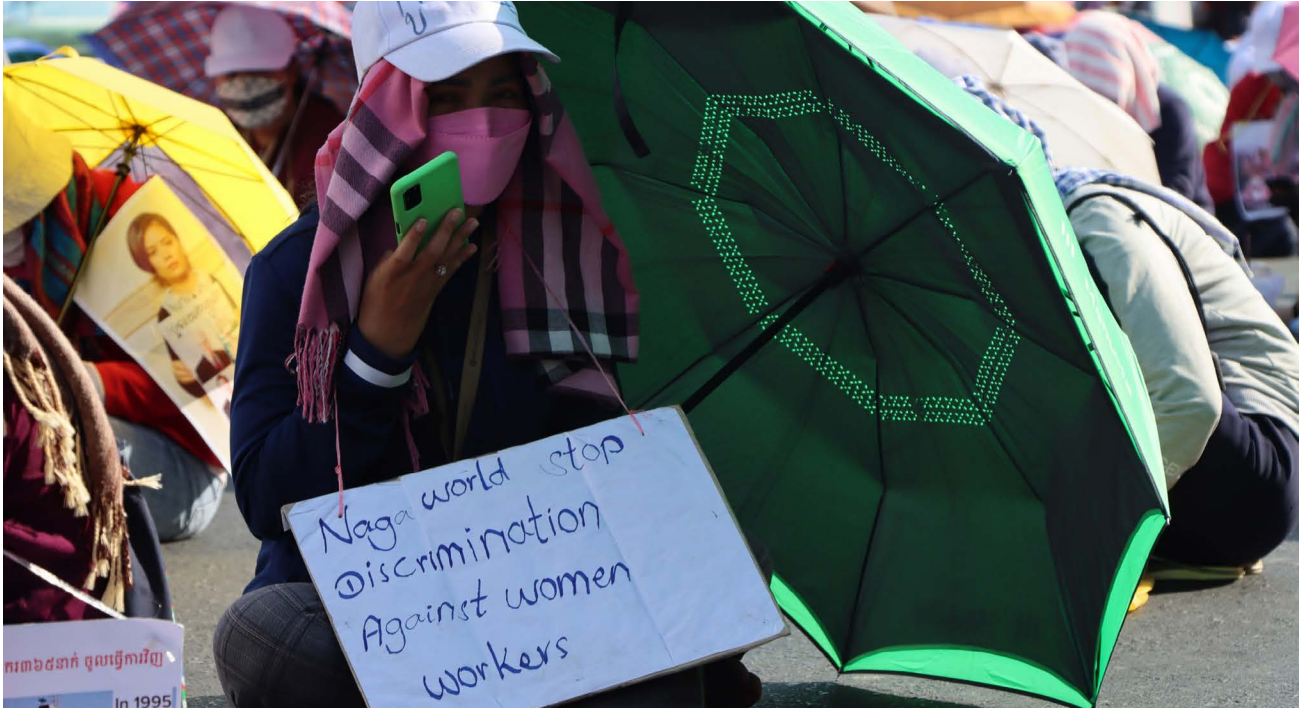
Second, the **law needs to provide comprehensive protection against all forms of discrimination**. International law requires States to establish an effective legal framework to prohibit all forms of discrimination, on all grounds recognised by international law, and in all areas of life regulated by law, including employment. Unsurprisingly, our research confirms that, in the absence of such a framework, discrimination prevails. The research confirms that the existence of labour laws guaranteeing rights to work to all is no substitute for the explicit protection of the right to non-discrimination. Even where labour laws – or other laws – guarantee the right to non-discrimination, our research finds that in many cases this is not comprehensive and that the result is gaps in protection for the most marginalised and vulnerable workers. This may be because the law does not prohibit discrimination on all grounds recognised by law, provide for the recognition of new grounds analogous to those explicitly listed in the law, or recognise and prohibit discrimination by association, discrimination on the basis of perception, or intersectional discrimination. It may equally be because the law does not define and prohibit all forms of discrimination – not only direct discrimination, where a person is treated unfavourably because of a particular status, belief or identity – but indirect discrimination, harassment, failure to make reasonable adjustment and segregation. Even where laws prohibit all forms of discrimination on the basis of an expansive and open-ended list of grounds, limitations in the material scope – the areas of life where the protection applies – or exclusions, exceptions or limitations on the protection can result in gaps in protection.

Where the law does not provide comprehensive protection from discrimination – whether because grounds of discrimination are omitted or excluded, because forms of discrimination are not defined and prohibited, or because the law is limited in its material scope – this is *an immovable obstacle* to those seeking to exercise or vindicate their right to non-discrimination. Through examining States with different models of anti-discrimination framework – those with comprehensive anti-discrimination laws, those with strong non-discrimination provisions in labour laws and those with a patchwork of different anti-discrimination laws and provisions – the report underlines the need for States to enact comprehensive anti-discrimination legislation, in line with international standards.

These first two preconditions may seem obvious or banal. It seems self-evident that if the work a person undertakes falls beyond the reach of the law, or the legal framework does not provide a comprehensive guarantee of the right to non-discrimination, the risk of discrimination will be greater. Yet self-evident though it may be, it is essential to recognise these preconditions, if the problem – and its solution – is to be properly understood. As noted above, an estimated 60 per cent of the global working population are in informal work. For the remaining 40 per cent, the majority live in States which lack the dedicated, comprehensive anti-discrimination legislation which is required by international law and which is necessary to provide effective protection from all forms of discrimination. While these figures are imprecise, we consider it reasonable to state that, for at least 75 per cent of the global working population, the promise of equal work without discrimination is not realised because the law does not provide a comprehensive guarantee of non-discrimination.

It is important to recognise this reality if we are to ensure that efforts to address the problem are to be appropriately targeted. Many activists and experts at the national level are focused on the weak enforcement and implementation of existing laws. While the majority of States lack comprehensive anti-discrimination laws, many have laws which provide some protection for the right to non-discrimination, and those who have advocated for such legislation are understandably frustrated when they see failures of implementation. Equally, much debate at the international level is focused on how to ensure the effectiveness of the right to non-discrimination, and there is an understandable interest in the development of novel approaches and identification of good practices. Nevertheless, the research for this report underlines the simple fact that it is frequently the absence or inadequacy of legal protections that is itself the main limiting factor

preventing the enjoyment of the right to non-discrimination. Experts in India and Tunisia confirmed that the effectiveness of enforcement institutions and implementation measures is largely irrelevant for those experiencing discrimination on the basis of grounds which are unrecognised in the legal system. Indeed, even in States such as Great Britain and South Africa with well-established, well-developed and largely comprehensive anti-discrimination laws, gaps in protection – whether that be for those in informal work or those experiencing forms of discrimination which are not recognised in the law – are a principal barrier to the enjoyment of the right to non-discrimination for the most marginalised workers.



A protest against Cambodian casino NagaWorld. Credit: Cambodia Center for Human Rights

Nevertheless, those we spoke to confirmed that, where anti-discrimination laws exist, enforcement and implementation are critical. Thus, the third precondition identified through this research is that **laws prohibiting discrimination need to be effective in providing justice, remedy and sanction**. For the right to non-discrimination to be effective, individuals exposed to discrimination must be able to access justice and to seek and secure remedy for the harm they experience and sanction for those responsible. The research identifies a wide variety of barriers which limit or prevent victims from securing remedy and sanction. Factors inhibiting effective enforcement include physical, financial and linguistic barriers preventing access to justice; complex or inaccessible procedures; rules regarding evidence and proof which place an excessive burden on claimants; and remedies and sanctions which are not effective, dissuasive and proportionate.

Equally, the research identified the importance of awareness: if rights-holders do not know and understand their rights and how to secure remedy in the event of violation, they will not bring claims, critically limiting the effectiveness of the law. Moreover, where rights-holders lack confidence in the system, or duty-bearers feel no obligation to comply with the law, the system will not be effective in practice. Ensuring the effectiveness of procedure, enforcement and remedy is critical to the realisation of the right to non-discrimination, and the report identifies and recommends a large number of specific measures which States must take to achieve this.

Here again, the central role of the legislative framework itself was repeatedly highlighted by those with whom we spoke. In those States examined which do not have comprehensive anti-discrimination legislation, experts regularly identified that a fragmented and inconsistent legal framework undermines implementation of the right to non-discrimination. In relation to the availability and accessibility of justice, several respondents from States without comprehensive laws noted that legal procedures are complex, opaque or



difficult to navigate, complicating enforcement action and discouraging individuals from seeking redress. In the absence of dedicated, comprehensive anti-discrimination laws, many States do not provide for the transfer of the burden of proof in discrimination proceedings – a procedural safeguard which is critical to the effective functioning of the law. A fragmented legal framework was also identified by respondents as an impediment to understanding – not only among rights-holders, but also among lawyers and judges.

These limitations do not only undermine individual access to justice. They are an impediment to the effective functioning of the legal framework as a whole, because of what has been called the “individualised model” of many anti-discrimination laws. Anti-discrimination law regimes in all of the States under review have enforcement systems which rely heavily – or indeed exclusively – on individual complainants to identify and challenge discrimination. While it is essential for the effectiveness of any human rights system – and thus critical to the enjoyment of the rights themselves – that individual rights-holders have an effective right to remedy, a system of anti-discrimination law which relies on individual complaints as its primary means of enforcement will never be effective in addressing the social and structural causes and consequences of discrimination.

Discrimination cases are almost always characterised by an inequality of arms – individual rights-holders bring complaints against institutions which are in a position of power over them, which have greater resources and which often have better access to the evidence required to prove that discrimination has occurred. In this situation, relying on individual claims as the primary means to enforce compliance will never provide an effective, comprehensive solution. Beyond this clear limitation, the individualised model gives rise to three other major constraints on the functioning of the law. First, it requires individual claimants to know and understand their rights, recognise and articulate that the harms they have experienced constitute discrimination under the law, and have confidence in the enforcement system to provide them with remedy and protect them from victimisation. Second, the remedies and sanctions which are available and awarded in these claims are, frequently, individual in nature – compensation and restitution for the rights-holder, together with a fine for the duty-bearer. Third, the individualised model is – unavoidably – reactive and remedial in nature. Rights-holders bring claims where they have experienced harm and seek remedy for it. While providing effective remedy in individual cases is essential, such an approach fails to address the root causes of discriminatory conduct and means that States are unable to fulfil their obligation to prevent discrimination.

States do not discharge their international law obligations to ensure the enjoyment of the right to non-discrimination by merely enacting and enforcing anti-discrimination legislation, no matter how comprehensive or effective such laws are. International human rights law imposes a general obligation on States to adopt “all appropriate means” to not only prohibit discrimination but to prevent and eliminate it. This in turn requires States to adopt and apply proactive, preventative and restorative measures, always considering different measures to eliminate discrimination in law and practice. Accordingly, the fourth precondition we identify is that **laws must permit, mandate and require positive, proactive measures to prevent discrimination and promote equality**. The research identifies sparse, sporadic and inadequate practice in this area. This is true even in Great Britain and South Africa – the two countries under review with the most well-established and comprehensive anti-discrimination law frameworks. The research identifies various good practices in these States and in others but also finds frustration and concern among experts about the limited scope and ineffective implementation of such measures. Among the most stringent concerns expressed is that many of the best measures are – essentially – voluntary in nature, being either unenforceable in law or unenforced in practice. This in turn results in limitations in scope – policies, programmes or schemes implemented by individual businesses, in specific sectors or focused on participation for a particular group exposed to discrimination – and sustainability – schemes discontinued when funding, interest or ownership diminishes. The result is a patchwork of practices which – even taken together – do not meet States’ obligations to take appropriate measures to prevent and eliminate discrimination.

Beyond the sphere of work and employment, many respondents identified the need to address prejudice, stereotype and discrimination in society more broadly as a necessary step towards eliminating workplace discrimination. Several respondents explained that societal perceptions of the role and status of certain

groups influence both their attitudes towards employment and the attitudes of employers. Perceptions of women as caregivers and homemakers, and stereotypes concerning the physical attributes of certain races and nationalities, all affect the types of job they are employed to do and the manner in which they are treated within these roles. International law imposes obligations upon States to implement the necessary measures to counter prejudice, stereotype and stigma throughout society. Education programmes, media campaigns and other relevant measures can all be effectively utilised to achieve these aims. Again, however, the research finds scant evidence of States either undertaking or promoting such measures, and no evidence of systematic, comprehensive approaches.

The remainder of this publication examines, in detail, the specific obstacles which those whom we interviewed told us prevent the enjoyment of the right to non-discrimination in the workplace. The report's structure follows the four preconditions for protection and prevention identified here, with chapters considering: discrimination in the informal economy; the need for comprehensive protection from discrimination; the need for protections from discrimination to be effective; and the need for proactive and preventative mechanisms within the law. Each chapter examines the specific barriers and obstacles arising in respect of these four preconditions, identifies what States must do to identify and remove these barriers, and makes recommendations for action.

Alongside identifying four preconditions in respect of the legal framework, its enforcement and its implementation, the research also identified two other cross-cutting themes which we identify as **social and political prerequisites** for the development and implementation of an effective anti-discrimination law system.

Throughout the research, the need for ongoing advocacy to improve legal frameworks and strengthen their implementation was a repeated theme. Particular emphasis was placed on the **need for collective, collaborative advocacy with and by workers in inclusive, intersectional movements**. This need was identified in every country, from those with limited legal protections from discrimination to those with well-established anti-discrimination law regimes. In India, the General Secretary of the Self-Employed Women's Association affirmed the power of unionisation and collective action in securing more equal protections for those working the informal economy. At the other end of the legal spectrum, those we spoke to in Great Britain who expressed concern about the limited enforceability, scope and sustainability of proactive and preventative measures underlined the need for collective, collaborative advocacy to address these shortcomings.

Ultimately, the central, essential role of worker organising, including into trade unions, and broader social movements for equality in the world of work were consistently referenced as preconditions for the effective protection, enforcement and implementation of the right to non-discrimination. States must create an enabling environment for workers to exercise their freedom of association, enabling them, inter alia, to demand equality in the workplace. States must also recognise that curtailing associational rights often disproportionately impacts marginalised workers and is thus a discriminatory violation of the right to freedom of association.

### Promising Practice: Trade Unions as Agents of Change

In 1968, almost 200 female sewing machinists at the Ford car plant in Dagenham, Great Britain, went on strike. The women argued that they should be paid the same as the male workers at the plant, who worked on different aspects of the car manufacture process in roles the company had graded as "more skilled." The strike brought production to a halt and led – eventually – to a revised pay deal, though full pay equality took years to achieve. The women's action at that individual car plant inspired the foundation of the National Joint Action Campaign Committee for Women's Equal Rights, which campaigned for equal pay across the country. This movement led, in turn, to the enactment of the Equal Pay Act 1970, which prohibited – for the first time – inequality of treatment between men and women in Britain in terms of pay and conditions of employment.

This case, from one of the six focus countries of this research, powerfully exemplifies the central, critical role trade unions can play in promoting the rights to equality and non-discrimination in the workplace. A group of fewer than 200 women, in a single factory, used collective bargaining to secure pay equality and in so doing inspired a movement leading eventually to legal reform. This example from Great Britain is illustrative of two of the various ways in which trade unions have been drivers of improved protection of the right to non-discrimination.

In almost all the countries under review in this study, experts spoke of the central role which trade unions had played in achieving legislative reform on equality and non-discrimination. In South Africa, for instance, one expert observed:

Some groups can enjoy more protection than others. If you look at labour laws, the organized sectors enjoy more rights than unorganized sectors that are employed on minimum wages that are statutorily determined, not bargained. The organized sectors are able to claim rights and move beyond that.

Yet it is arguably in the workplace itself that trade unions play the most essential role. Through organisation, workers' voices are amplified, they acquire collective bargaining power, and they are able to negotiate for equal pay and conditions, transparency around decisions on hiring and promotion, and equality measures that may go beyond the minimum requirements of existing national law.

In India, for example, the Self-Employed Women's Association has organised workers in the informal economy and engaged with bargaining to secure minimum-wage protections for those previously beyond the reach of the law. More broadly, those with whom we spoke confirmed that, through collective bargaining and negotiations, trade unions can mainstream equality concerns in the workplace, demonstrating to employers the need to consider the potentially discriminatory impacts of their policies before such impacts occur.

Beyond this, trade unions can play an important role in identifying workplace discrimination and bringing legal challenges through the courts. As trade unions are better resourced than individual workers, the support that trade unions can provide for legal proceedings is often essential to empowering an individual to pursue a claim. In individual enforcement action, power imbalances between workers and employers can undermine the possibility of fair and effective proceedings. Trade unions can help address this imbalance. In some cases, trade unions can themselves also seek enforcement of the law, enabling them to challenge systemic issues, or those which individual workers are not able to challenge. Unions can also help identify broader patterns of discrimination across workplaces and sectors. Experts in South Africa explained that trade unions play a critical role in supporting individual rights claims: they both represent workers before the Commission for Conciliation, Mediation and Arbitration – the primary labour dispute resolution body in South Africa – and provide legal assistance to individuals whose rights have been violated to bring litigation. In Brazil, one expert spoke of the impact of class-action lawsuits, brought with the support of trade unions, in securing institutional remedies. In Great Britain, several respondents explained that trade unions engage directly with equality bodies both to advance workers' rights generally and specifically promote non-discrimination within the workplace.

Throughout the research, experts highlighted the essential role of trade unions and civil society organisations in both advocating for changes to law, policy and institutions and using existing laws to bring enforcement action. Through organising, workers' voices are amplified, meaning that workers can be more effective in challenging discriminatory attitudes, practices and policies, whether in the workplace or at the level of law and policy. As such, they can be both reactive and proactive, both supporting victims to challenge discriminatory practices after they have occurred

and promoting awareness of discrimination and challenging systemic and institutional issues.

It is critical that States promote and realise the rights to associate and to bargain for all workers, in line with obligations under international law, including workers in non-standard forms of employment and workers in the informal economy.

Where trade unions are enabled to operate, sensitised to the needs of the diversity of their constituent members and afforded the resources, training, and support necessary to fulfil their mandate, they can be very effective in overcoming decent-work deficits within the informal economy. Respondents from a range of jurisdictions shared examples of positive practice on this front. In India, for example, the work of the Self-Employed Women's Association (SEWA) was spotlighted. Since its establishment, SEWA has helped promote the rights of domestic workers, with success limiting working hours, among other notable achievements.<sup>31</sup> Elsewhere in India, respondents noted the success of trade unions in facilitating compensation from government for unpaid wages due to the Coronavirus pandemic<sup>32</sup> and in ensuring better prices for growers within the tea value chain.<sup>33</sup> In Great Britain, respondents noted the success of trade unions in negotiating for better anti-discrimination policies within large social care employers.<sup>34</sup> Similarly, in Colombia, it was noted that "internal non-discrimination policies" had been developed within the palm and sugar industries as a consequence of strong union activity and support.<sup>35</sup> In Brazil, positive practice was identified in respect of the self-organisation of platform workers. It was noted that this form of organisation can help overcome patterns of discrimination, as "in the end, it is the workers themselves who establish the rules of the game."<sup>36</sup>

It is clear that many of the protections workers have today are the result of advocacy by workers, their representatives and their unions. It is equally clear that the gaps, limitations and problems identified throughout this report will be addressed only by further collective action focused on ensuring equal work for all.

Yet it is also essential to not overstate the role of trade unions, civil society organisations and other non-governmental movements. Eliminating discrimination and ensuring equality in the workplace are roles and the responsibilities of the State. Trade unions and other social actors have an essential role to play in documenting and exposing inequalities; identifying patterns of discrimination and barriers to equal participation; developing and demonstrating good-practice approaches to inclusion; and promoting and advocating for change. States must create conditions that enable robust civil society participation and consult and engage with these movements if they are to establish legal regimes which are comprehensive and effective in prohibiting and preventing discrimination.

Nevertheless, the obligation to establish such regimes rests with the State itself. It cannot be discharged or disregarded because trade unions or civil society organisations are – proactively, and voluntarily – delivering programmes, providing support or undertaking work which fills a gap in legal protection. Ultimately, good-practice approaches developed by trade unions and other organisations should be seen as exemplars and models for States to support, adopt or replicate. Trade unions should be seen as social partners, with a critical role to play in the proper development and functioning of effective laws and policies. It is the obligation of the State to establish and enforce such an effective system and to fully engage trade unions in doing so.

<sup>31</sup> Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samooha, an informal women's collective, India.

<sup>32</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>33</sup> Equal Rights Trust interview with J. John, member of the Grassroots Tea Corporation, India.

<sup>34</sup> Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>35</sup> Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia.

<sup>36</sup> Equal Rights Trust interview with Olívia Pasqualetto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil.

This, in turn, points to the final overarching lesson identified through the research: the need for States to take their responsibilities and commitments seriously and the **need for governments to take all appropriate measures to the elimination of discrimination in the workplace**, in line with their international legal obligations and commitments. Alongside identifying barriers and obstacles, the report also spotlights good practices and promising proposals from a wide variety of jurisdictions – including, but not limited to, the six which are the primary focus of the study – which demonstrate how some of the challenges identified can be addressed through improvements to law, policy and practice. Among the most promising of these are statutory requirements on employers in Northern Ireland to audit their workforce, identify disparities and take effective affirmative action measures to remove barriers and accelerate participation for under-represented religious and political communities. These and other good practices and promising proposals demonstrate that while tools, approaches and practices have been developed to address the factors which prevent the enjoyment of the right to non-discrimination in the workplace, these approaches are not being used because States have not prioritised the issue. As Professor Christopher McCrudden, Professor of Human Rights and Equality Law at Queen's University Belfast and one of the architects of the regime in Northern Ireland, told us: “We know what is needed (...) it's a question of political will.”

### Promising Practice: Equality and Non-Discrimination in the Labor Reform Proposal in Colombia, Supported by the Labor Movement

In 2023, the Colombian Government presented the most ambitious labor law reform of the last thirty-three years, aiming to implement constitutional labor principles, the foremost of which is “equality of opportunity” for workers. Additionally, it seeks to incorporate recommendations from the International Labour Organization's supervisory system, labor and constitutional jurisprudence of the high courts in Colombia and decisions of the Inter-American Court of Human Rights that have been reiterated over the years. A significant portion of this jurisprudence focuses on the realization of the right to equality and non-discrimination in employment.

The government's bill<sup>37</sup> largely incorporate the proposal put forward by the united trade union movement of Colombia's three most representative labor unions: Central Unitaria de Trabajadores de Colombia (CUT), Confederación de Trabajadores de Colombia (CTC), and the Confederación General del Trabajo (CGT). These unions have been building their social justice agenda for years, and for the first time, they saw an opportunity for it to be included in legal initiatives promoted by the government. The bill also incorporates proposals made during various regional meetings with unions of different levels and sectors.

Among the proposals of the labor law reform specifically aimed at equality and non-discrimination are articles that:

1. Recognize the same working conditions and social benefits for subcontracted workers as those received by direct employees. Subcontracting has been widely utilized in Colombia to deny workers, particularly workers with marginalized identities, access to legal rights and protections due to direct employees.
2. Require employers to implement various actions, with the support of the public employment service, to eliminate any barriers to access or retention, and to encourage hiring without any form of discrimination, especially for women, LGBTIQ+ individuals, and ethnic communities,

<sup>37</sup> See Congreso de la Republica de Colombia, Camara de Representates, REFORMA LABORAL, <https://www.camara.gov.co/reforma-laboral-1> (last accessed February 5, 2024). (The bill was originally presented on March 16, 2023. You can find the complete text and the process it went through at the following link: <https://www.camara.gov.co/reforma-laboral>. However, it was archived without achieving a first debate before the end of the legislative session. It was presented again by the national government on August 24, 2023, to the parliament with some changes in its wording. You can check the status of its progress at the following link: <https://www.camara.gov.co/reforma-laboral-1>.)

among others.

3. Establish objective criteria for wage assessment to eliminate salary inequality between men and women.
4. Promote the participation and inclusion of women on equal terms in employer and labor organizations.
5. Incorporate the guidelines of ILO Convention 190 on Violence and Harassment in the World of Work into labor legislation while awaiting its ratification.
6. Increase paternity leave to avoid reflecting societal stereotypes regarding childcare, by ensuring equal access to parental leave for men, and thus, reducing the employment discrimination that women face due to longer maternity leave.
7. Protect against discrimination by explicitly prohibiting discrimination against women in their diversities through direct actions or omissions, as well as racism and xenophobia, and any form of discrimination based on political ideology, religious beliefs, sexual orientation, gender identity, and/or expression in the workplace. It also prohibits generating, inducing, or promoting discriminatory practices against workers who identify with non-binary genders and diverse sexualities or dismissing workers who are victims of gender-based violence for reasons associated with this abuse.
8. Recognize wage, benefits, and social security rights for migrant workers, without distinction based on their migration status.
9. Recognize maternity and paternity leave for same-sex adopting couples.
10. Establish a hiring quota for workers with disabilities for companies with fifty or more employees, among other measures.

The bill is in the early stages of the legislative approval process and is expected to progress toward approval in the coming months.

# 4. Addressing Discrimination in the Informal Economy

Legal frameworks are essential to the enjoyment of rights, including the right to non-discrimination. Where there is no effective legal regulation, discrimination can and does occur without constraint: rights-holders have no recourse to law and so are unable to challenge the unfair treatment or impacts they experience, while duty-bearers are under no obligation to respect, protect or guarantee rights.

In its General Comment No. 23, the CESCR Committee has emphasised that the “right to just and favourable conditions of work is a right of everyone, without distinction of any kind.”<sup>38</sup> The use of the word “everyone” under Article 7 of the Covenant “reinforces the general prohibition on discrimination” set out under Article 2(2), and makes clear “that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal economy, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.”<sup>39</sup> A range of human rights mechanisms, including the CESCR, CRPD, CEDAW and CMW Committees have expressed concern regarding the lack of legal protections for individuals engaged in informal work,<sup>40</sup> emphasising the need for a wide range of targeted measures designed to redress disadvantage, address legislative gaps, prevent formal work from becoming informal, and “promote and accelerate” the transition to the formal economy.<sup>41</sup>

The informal economy is a key part of the economy across the globe, with “more than 60 per cent of all employed people,” or around 2 billion individuals, relying on informal work as a source of income.<sup>42</sup> The ILO has defined the term informal economy to include “all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements.”<sup>43</sup> This covers both the informal economy – “units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned” – as well as informal employment in both the formal or informal economies.<sup>44</sup> Rates of informality differ significantly between regions, accounting for

<sup>38</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 5.

<sup>39</sup> *Ibid.*, Committee on Economic, Social and Cultural Rights, para. 5.

<sup>40</sup> See, for instance, *ibid.*, Committee on Economic, Social and Cultural Rights; Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8 (advanced unedited version), 2022, paras. 3, 4, 25, 28, 37, 66, 77 and 79; Committee on the Elimination of Discrimination against Women, General Comment No. 34, UN Doc. CEDAW/C/GC/34, 2016, paras. 41(a), 48 and 52; and Committee on Migrant Workers, General Comment No. 1, UN Doc. CMW/C/GC/1, 2011, paras. 23 and 26(b).

<sup>41</sup> See, in particular, *ibid.*, Committee on the Rights of Persons with Disabilities, para. 37.

<sup>42</sup> ILO, *Future of Work, Emerging Sectors and the Potential for Transition to Formality*, 2022, p. 7.

<sup>43</sup> ILO, *Transition from the Informal to the Formal Economy Recommendation No. 204*, 2015, para. 2(a).

<sup>44</sup> See Organisation for Economic Co-operation and Development and the ILO, *Tackling Vulnerability in the Informal Economy*, Development Centre Studies, OECD Publishing, Paris, 2019, pp. 155–56. The term “informal employment” covers both informal self-employment, such as employers and own account workers in informal enterprises, and informal wage employment “in a diverse range of sectors and occupational groups.” See further, Pamhidzai Bamu-Chipunza, “Extending Occupational Health and

approximately 85.8 per cent of all employment in Africa; compared with 68.6 per cent in Arab States, 68.2 per cent in Asia and the Pacific, 40 per cent in the Americas, and 25.1 per cent in Europe and Central Asia.<sup>45</sup> While the rate of informal work among men and women differs from State to State, informality has a clear gendered dimension,<sup>46</sup> and the informal economy is marked by the overrepresentation of disadvantaged groups.<sup>47</sup>

The ILO, UN Treaty Bodies and other human rights actors have urged States to facilitate a transition to the formal economy and to prevent formal work from becoming informal.<sup>48</sup> Some positive, albeit modest, progress has been made on this front, with an estimated 5 per cent drop in the total rate of informal employment recorded between 2004 and 2019.<sup>49</sup> However, the Coronavirus pandemic has largely reversed this trend,<sup>50</sup> with almost 1.6 billion people “significantly affected,” resulting in an estimated 60 per cent drop in earnings.<sup>51</sup> Pandemic recovery has been “driven by informal jobs,” with around “two thirds of the job gains between 2020 and 2022” in the informal economy.<sup>52</sup> While some of the more “traditional” forms of informal work have declined, the rise of the gig economy has meant that new forms of informality and associated means of non-compliance have emerged.<sup>53</sup> These patterns have caused concern among international organisations, with the ILO noting that “the upward trend of informality could be prolonged over the medium term.”<sup>54</sup> Even if the global economic outlook were to improve, it is clear that “informal employment is not going away any time soon.”<sup>55</sup>

The existence of the informal economy is a key cause and driver of discrimination and inequality within work and wider society. Those we spoke to for this report consistently affirmed that groups exposed to discrimination are more likely to be in informal employment. This is a result of social inequalities, prejudice, stigma and stereotype, and systemic discrimination, all of which make formal employment unattainable for many marginalised groups. Instead, many of those exposed to discrimination are effectively forced to work within the informal economy. As a result, decent-work deficits that define informal work – such as lack of sick pay, absence of annual leave provision, lack of protection from arbitrary dismissal, to give just a few examples – disproportionately affect women, ethnic and religious minorities, and other groups exposed to discrimination. These differences in pay, conditions and decent-work protections are, as such, indirectly discriminatory in nature.

Furthermore, the research confirms that while in informal work, these workers are more likely to experience further instances of discrimination and mistreatment. As explained below, interviewees frequently highlighted instances of discrimination which occur within the informal economy. This ranges from direct and indirect discrimination to sexual harassment. Informal workers are unable to challenge the discrimination they experience: they are outside the scope of the existing legal framework and so do not have access to the legal protection and enforcement mechanisms. As a result of all these factors, the existence of the informal economy must be seen as a major cause and enabler of discrimination in the workplace.

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Safety Law to Informal Workers: The Case of Street Vendors in South Africa,” University of Oxford Human Rights Hub Journal, Vol. 1, 2018, p. 62; and Martha Alter Chen, “The Informal Economy: Recent Trends, Future Directions,” *New Solutions*, 2016, Vol. 26(2), pp. 158-59.

<sup>45</sup> ILO, *Women and Men in the Informal Economy: A Statistical Picture*, 2018, pp. 13-14.

<sup>46</sup> See ILO, “Engendering informality statistics: gaps and opportunities,” ILO Working Paper 84, 2022, pp. 10-11.

<sup>47</sup> See the discussion in Section 3.2.2 of this report.

<sup>48</sup> See the discussion in Section 3.3 of this report.

<sup>49</sup> ILO, *World Employment and Social Outlook*, 2023, p. 12.

<sup>50</sup> *Ibid.*

<sup>51</sup> ILO, *E-Formalization in Europe*, 2021, p. i. This pattern was also noted by respondents. In Brazil, for instance, it was observed that “more than 700,000 domestic jobs were lost” as a consequence of the pandemic. See Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil.

<sup>52</sup> ILO, *World Employment and Social Outlook*, 2023, pp. 43-44.

<sup>53</sup> ILO, *E-Formalization in Europe*, 2021, p. iv.

<sup>54</sup> ILO, *World Employment and Social Outlook*, 2023, pp. 43-44.

<sup>55</sup> ILO, “Engendering informality statistics: gaps and opportunities,” ILO Working Paper 84, 2022, p. 9.



## 4.1 Exclusions and Limitations

A range of factors may drive individuals towards informal work; however, the mechanics of exclusion bear a distinctly legal component. Historically, labour legislation has centred upon the identification of an employment relationship, which is often narrowly defined to include workers “under the control of an employer” – typically those “who do not supply the capital or take the risks of loss or the chance of profit.”<sup>56</sup> A worker who does not meet the definition of an “employee” under national law often falls outside of the scope of legal protection.<sup>57</sup> While definitions of the employer–employee relationship are often constructed with the aim of excluding genuinely independent workers, in practice, they may also limit rights protections for certain categories of “vulnerable workers, who do not have a contract of employment which fits the definition.”<sup>58</sup> As one respondent explained, “legal rules that appear to be legitimate [may] exclude from protection various categories of workers who are already in a position of disadvantage.”<sup>59</sup> There is also evidence from various jurisdictions that certain employers design relationships to escape the legal obligations and duties owed to employees, misclassifying workers as, for example, independent contractors, suppliers or subcontractors when they are in fact in a dependent relationship.

Because labour law typically governs *direct* employment relationships, agency work and the contracting out or “externalization” of services may also result in protection gaps.<sup>60</sup> This issue was raised in **Brazil**, where respondents noted that outsourcing and agency work had been used to diminish labour rights and, in some cases, had led to the true nature of the legal relationship between an employer and worker being “disguised.”<sup>61</sup> Despite their legal entitlements, some workers “end up giving in,” one interviewee noted: “these are people that, in fact, need this monthly salary (...) they end up (...) accepting to be paid on the side, accepting to work without an employment bond.”<sup>62</sup> Similar concerns were raised in **India**,<sup>63</sup> **Colombia**<sup>64</sup> and **Great Britain**,<sup>65</sup> each in respect of different types of work and areas of the informal economy.

<sup>56</sup> Sandra Fredman, *The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal: Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life*, 2014, p. 43.

<sup>57</sup> Other issues, ranging from the setting of eligibility criteria, the exclusion of specific types of work, and narrow definitions of work that omit, for instance, unpaid and domestic work, may also contribute towards a lack of legal protection. See *ibid*, pp. 43–45. For further discussion on this point, see Section 3.3.1, below.

<sup>58</sup> *Ibid*, p. 43.

<sup>59</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>60</sup> Sandra Fredman, *The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal: Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life*, 2014, pp. 43–44.

<sup>61</sup> One interviewee from this country noted that labour reforms in 2017 had “expanded the possibility of outsourcing,” with a resultant impact on labour rights protections. See, non-exhaustively, Equal Rights Trust Interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil; Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>62</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>63</sup> In India, an interviewee gave the example of “choultry” workers operating in Bangalore. These women, it was noted, “are employed through multiple layers of contractors, moved from one task to another depending on the function and the hall contracting out work.” Their “payment is determined by the contractor and work is dependent on the availability of contracts. The women employed are the poorest and most vulnerability sections of society (...) with no bargaining power. They can only take what they get.” See Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samooha, an informal women's collective, India.

<sup>64</sup> In Colombia, it was noted that food production is often outsourced: “there are no companies here that promote or engage in formal work.” See Equal Rights Trust interview with Luz Dary Molina, President of the Association of Small and Medium Producers, Colombia.

<sup>65</sup> In Great Britain, particular concern was raised regarding the outsourcing of care work. As one respondent described: “in health for the low paid workers, you very much [have] a 2-tier workforce. You've got those who are directly employed (...) and then you have [a] range of outsourced workers (...) with the precarious nature of their employment, it makes them much more vulnerable.” A second respondent expressed similar views. See: Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain; and Equal Rights Trust interview with a senior official at Unison, Great Britain.

Where individuals do not fit the definition of an employee, labour protections and other legal entitlements are often limited. Respondents from each of the jurisdictions examined for this research expressed concern regarding the status of workers engaged in forms of informal employment. In **Tunisia**, for instance, it was noted that “people working in the informal sector are deprived of the enjoyment of certain rights, often affiliated to social security (...) [because] they work in a framework that is not protected by law.”<sup>66</sup> In **Brazil**, another respondent concurred: “I don’t really have any rights, any protection.”<sup>67</sup> An interviewee in **Colombia** identified a similar trend,<sup>68</sup> while in **Brazil** and **India**, the lack of protection for informal workers stemmed from the “limited” nature of labour legislation that protects only formal workers, despite their being the minority of the workforce.<sup>69</sup> Meanwhile, in both **South Africa** and **Great Britain**, a concern was raised that it is often the “most precarious workers” in particular need of protection who are excluded.<sup>70</sup> In these jurisdictions, it is the absence of comprehensive labour and non-discrimination legislation overall that impacts upon informal workers the most.

It has been noted that the use of non-standard work arrangements is often a deliberate strategy on the part of employers to evade the law. Even where workers are found to be employed, organisations are “adept at reconfiguring their conditions of work to avoid the legal definition of employee.”<sup>71</sup> This is a particular challenge for workers misclassified as independent contractors, such as platform workers. Platforms can adjust their operating structures to exclude certain workers from qualifying as employees under the law, and these workers may be required to launch fresh legal action to establish that they still meet the definition of an employee under national law in order to benefit from established legal protections. Several respondents made similar remarks in regard to platform work and the lengths that employers may go to in order to evade discussing workers’ rights and the applicability of the law.<sup>72</sup> The failure by States to regulate non-traditional types of employment allows employers to exploit gaps and expose workers to exploitation and vulnerability.

#### 4.1.1 Particular Forms of Work

Formalisation is a process, rather than an outcome. And while – – to differing extents – every State under review has sought to regulate forms of informal work,<sup>73</sup> there remain significant disparities in rates of formality both between and within countries, depending on location and the type of work involved. While each

<sup>66</sup> Equal Rights Trust interview with Hatem Kotrane, Emeritus Professor at the Faculty of Juridical, Political and Social Sciences, University of Tunis, Tunisia.

<sup>67</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>68</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia.

<sup>69</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil; Equal Rights Trust interview with Arvind Narrain, President of the People’s Union for Civil Liberties, India. It was noted that there are few laws governing specific sectors, which are often overrepresented by disadvantaged groups. As a result of “the absence of regulation” in these sectors, individuals are particularly “vulnerable” to abuse. Even where legal guarantees are established, one interviewee noted, “the State enforcement machinery is very poor for workers in the informal sector.” See, non-exhaustively, Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samoocha, an informal women’s collective, India; Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India; Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India; Equal Rights Trust interview with Shaik Salauddin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India; and Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India.

<sup>70</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain. Equal Rights Trust interview with Omar Parker, a trade union leader, South Africa. As a second respondent observed: there are “limitations of the labour statute in South Africa. These workers are discriminated because they are treated differently. They don’t have access to the same broad benefits that an employee would have.” Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa.

<sup>71</sup> Platforms are proficient at “fragmenting their corporate structure to evade the jurisdiction of courts in the region where workers in fact find themselves.” In such cases, workers may find that they are effectively precluded from bringing legal action. See Sandra Fredman et al., “Thinking out of the Box: Fair work for platform workers,” 2022, pp. 1-3.

<sup>72</sup> See Chapter 3.3.1 of this report. See also Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa; and Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>73</sup> See further the discussion in Section 3.3.1 of this report.

country has developed a complex and distinct set of standards governing labour rights protection, it is clear that certain forms of work, such as domestic work, agricultural work and platform work, are particularly likely to fall outside the scope of States' regulatory frameworks. While the forms of harm experienced by workers in these fields differs significantly by sector and country, patterns of exclusion also share a number of commonalities.

### (a) Domestic and Care Workers

In a range of countries examined as part of this report, respondents expressed concern regarding the status of domestic and care workers. This sector can cover a wide variety of forms of employment, from domestic servants in India to agency workers working with the national health services. While specific aspects of these types of work differ, our interviews show that workers in this sector are in similarly vulnerable positions. Despite positive efforts to formalise domestic work in several jurisdictions,<sup>74</sup> inequalities persist,<sup>75</sup> and a large number of workers remain outside the scope of formal legal protection.<sup>76</sup> It was noted in interviews that the socially isolated nature of domestic work contributes to the exclusion of domestic workers from legal protection, as they are “hidden from regulators and cut off from support networks.”<sup>77</sup> As one respondent described, “the privacy of the home becomes a cloak behind which the employer is emboldened to treat the domestic worker in whatever manner he/she desires.”<sup>78</sup>

A combination of these factors means that, in many States, domestic workers are placed outside the scope of legal protection and experience decent-work deficits. In **India**, for example, a respondent from Delhi noted that domestic workers were denied a guaranteed minimum wage, leave entitlements and associated benefits, including a lack of provision for working hours, and payment for overtime.<sup>79</sup> Even where entitlements are established under law, a need for income and lack of equal bargaining power,<sup>80</sup> may mean that some workers accept positions that deny their legal rights. Charlene May, an attorney with the Women's Legal Centre in **South Africa**, explained:

*I'll give you examples of how that plays out. We are contacted by some domestic workers that are made salary offers and want to know whether it is fair because they have concerns. Our advice in most instances would be that she should be concerned and are completely right. We provide the amount she is entitled to be paid, including that the employer must contribute towards [the Unemployment Insurance Fund] and [the Compensation for Occupational Injuries and Diseases Act] as social security. So now you have someone that understands the legal framework, right? But if we're looking at a 2020 scenario, the COVID scenario, work is so scarce; the economy is so bad. Someone*

<sup>74</sup> See further the discussion in Section 3.3.1.

<sup>75</sup> Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil.

<sup>76</sup> Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil. In India, it was noted that workers in “low paying formal sector jobs” and those engaged in informal work are faced with “similar [patterns of] discrimination” due to the lack of recognition of skills and the value of work performed. The devaluing of women's work within this sector was also mentioned by a second respondent. See Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samooha, an informal women's collective, India; and Equal Rights Trust interview with two members of the Self-Employed Women's Association, India.

<sup>77</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa. ILO, “Engendering informality statistics: gaps and opportunities,” ILO Working Paper 84, 2022, pp. 10-11. Respondents noted that the location of domestic work within private settings may also create challenges for effective oversight and inspection. See Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil.

<sup>78</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>79</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India. Similar concerns were raised regarding the treatment of migrant domestic workers in Great Britain, who may find themselves “excluded from many labour law protections such as working time [and] at times the minimum wage.” See Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>80</sup> As one interviewee described, domestic workers have “stepped into a profession historically where women have been exploited and black women in particular (...) women don't have the bargaining power to negotiate with an employer who could easily ask the next person.” See Equal Rights Trust interview with Charlene May, an attorney at the Women's Legal Centre, South Africa.

*is prepared to step into that workspace, knowing that they are not getting what they are entitled to in law.*<sup>81</sup>

As a result of their precarious status, domestic workers are particularly vulnerable to patterns of discrimination and abuse, including at the hands of public officials.<sup>82</sup> As discussed further below, many of these patterns have a clear gendered dimension, because of the concentration of women within this field of work. However, gender may also interact with other characteristics, resulting in specific forms of disadvantage. In **India**, Geeta Menon, a representative of the Domestic Workers Rights Union in Bangalore, noted that many domestic workers are young Adivasi, a collective term for the tribes of the Indian subcontinent.<sup>83</sup> In some cases, these women “are not allowed to eat or drink from the same utensils as used by the house owners or their family; they often are not allowed to use the same toilet facilities meant for the family they work for.”<sup>84</sup> It was noted that “there have been cases of live-in domestic workers being ill-treated, starved, and even sexually exploited.”<sup>85</sup> Other patterns of abuse were identified by respondents, ranging from the denial of access to drinking water<sup>86</sup> to unjustified allegations of theft,<sup>87</sup> which often resulted in dismissal.<sup>88</sup> The exclusion of these domestic workers from the formal economy places them in situations where they are particularly vulnerable to discrimination and do not have the support or resources to challenge it.

In **Great Britain**, a number of respondents expressed concern regarding the status of care workers.<sup>89</sup> These workers are often hired through agencies on temporary or zero-hour contracts – a type of employment contract in which the employer is not obliged to provide any minimum number of working hours to the employee – which leads to more precarious employment.<sup>90</sup> Agency care workers are funded through the State to provide support to people with specific care needs, such as persons with disabilities and older persons. Members of this group – many of whom are women from ethnic and racial minority backgrounds – “end up being excluded from various protective rules,”<sup>91</sup> either as a consequence of gaps and shortcomings in the existing legal framework or because of issues of non-enforcement and implementation.<sup>92</sup> The precarious nature of workers’ contracts may prevent individuals from raising complaints and challenging unfair labour practices. As one respondent observed, there are “an awful lot of hurdles to go through (...) it’s a lot easier to just find another job.”<sup>93</sup> Respondents noted disparities in the situation of care workers across the United Kingdom, which may also differ depending on the type of work conducted.<sup>94</sup> As a collective, howev-

<sup>81</sup> Equal Rights Trust interview with Charlene May, an attorney at the Women’s Legal Centre, South Africa.

<sup>82</sup> Equal Rights Trust interview with Pinky Mashiane, President of the United Domestic Workers of South Africa, South Africa.

<sup>83</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>84</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India. Similar patterns were identified by other respondents from India. See Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India; and Equal Rights Trust interview with J. John, member of the Grassroots Tea Corporation, India.

<sup>85</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>86</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India; and Equal Rights Trust interview with a member of a domestic workers union, India.

<sup>87</sup> Equal Rights Trust interview with a member of a domestic workers union, India; Equal Rights Trust interview with Mariem Klouz, appeal lawyer, Tunisia; Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil.

<sup>88</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India.

<sup>89</sup> See Equal Rights Trust interview with a Labour Law and Human Rights academic at University College London, Great Britain; Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain; and Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>90</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain.

<sup>91</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain. See also Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>92</sup> As one respondent explained, “the national minimum wage (...) is not enforced properly by the body that’s responsible for it – that is HMRC. This is an issue that hugely, disproportionately, affects women workers in the social care sector (...) Black and minority workers (...) [are often] low paid.” See Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>93</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain.

<sup>94</sup> See, for instance, Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain; Equal Rights Trust interview with a senior official at Unison, Great Britain, discussing differences in approaches to care work in England, Scotland, Wales and Northern Ireland.

er, respondents noted that care workers are a significantly “disadvantaged group” who are often “seriously exploited.”<sup>95</sup>

## (b) Agricultural Workers

The agricultural sector is characterised by a high degree of informality in every region of the world. Data collected by the ILO indicates that “almost all of the agricultural sector in Africa is informal,” standing at 97.9 per cent, compared with 94.7 per cent in Asia and the Pacific, and 71.6 per cent in Europe and Central Asia.<sup>96</sup> While some States have adopted laws regulating specific forms of agricultural work, in many countries respondents expressed concern regarding gaps in the legal framework.<sup>97</sup> As Henk Smith, a human rights and public interest litigation attorney, noted in the **South African** context: “legislation and labour laws have not really touched their circumstances (...) we have umbrella equality protections, but it does not reach farming.”<sup>98</sup>



Tea plantation workers in Bangladesh. Credit: Solidarity Center / Hasan Zobayer

Many respondents also indicated that workers within the agricultural sector experience decent-work deficits. Disparities in minimum-wage entitlements were identified in different regions of **India**,<sup>99</sup> while in **South Africa** it was noted that seasonal workers are denied entitlements to different types of leave.<sup>100</sup> In **Great Britain**, respondents explained that migrant workers on seasonal work visas – a type of visa that allows workers to stay in the UK for only a limited time and for specific types of work – frequently “live in isolation” and sometimes “do not understand their contracts or payslip” as a result of language barriers.<sup>101</sup> In **Colombia**, concern was raised about the financial risks attached to crop loss that are often borne by farmers,<sup>102</sup> who

<sup>95</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>96</sup> ILO, *Women and Men in the Informal Economy: A Statistical Picture*, 2018, pp. 30, 38 and 43.

<sup>97</sup> See, for instance, in India, discussion of the Plantation Labour Act. Equal Rights Trust interview with J. John, member of the Grassroots Tea Corporation, India. In Colombia, one respondent noted that “we do not have a particular legal framework to deal with discrimination in the countryside.” Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia.

<sup>98</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.

<sup>99</sup> Equal Rights Trust interview with J. John, member of the Grassroots Tea Corporation, India.

<sup>100</sup> Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa.

<sup>101</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>102</sup> Equal Rights Trust interview with Luz Dary Molina, President of the Association of Small and Medium Producers, Colombia.

may be poorly positioned to deal with the impacts because of a lack of social security or insurance coverage. In both **Great Britain** and **India**, respondents noted that labour practices were sufficiently exploitative that they raised concerns about the possibility of forced labour.<sup>103</sup>

Several respondents noted that unique aspects of agricultural work rendered such workers particularly dependent upon employers and therefore vulnerable to mistreatment. Because many farm workers live on the land, they were described by one respondent as “doubly vulnerable,” as they often “depend on their employment not just for remuneration, but also for their homes.”<sup>104</sup> The seasonality of farm work may also place workers in a precarious position. In **Great Britain**, even where agricultural workers are provided with a minimum wage, it was noted that a large portion of their salary may end up going back to their employer, in exchange for transportation or the provision of sub-standard accommodation.<sup>105</sup> In **South Africa**, Dr Lali Naidoo, Director of the East Cape Agricultural Research Project – a developmental non-governmental organisation (DNGO) which focuses on questions around land redistribution – explained: “sexual harassment and abuse is very prevalent in the Citrus sector [but] very hidden.” The main concern for women is “to secure jobs [for] the next season.”<sup>106</sup> These factors make farm workers particularly dependent upon their employers, and so their work is especially precarious. Not only does this make them vulnerable to decent-work deficits, but it also discourages workers from raising complaints or pursuing claims against employers.<sup>107</sup> Even where protections are established under national law, respondents highlighted challenges in enforcing rights,<sup>108</sup> which may be further impeded by a lack of adequate investigatory and oversight mechanisms.<sup>109</sup>

### (c) Platform Work and the Gig Economy

A further area of work characterised by informality is that of platform work and the “gig economy.” The ILO defines platform work and the gig economy as including “online, web-based platforms and location-based platforms such as transport and delivery platforms.”<sup>110</sup> The emergence of this area has been described by the ILO as “one of the most important new transformations in the world of work,” generating opportunities of employment for many people.<sup>111</sup> However, because of the traditional focus of labour legislation on direct employment relationships and traditional places of employment, platform workers often find themselves falling outside of States’ legal frameworks, either because of a lack of regulation or as a consequence of the misclassification of workers as self-employed.<sup>112</sup> As Dr Jason Brickhill, a human rights and public litiga-

<sup>103</sup> See Equal Rights Trust interview with an independent human rights expert, Great Britain; and Equal Rights Trust interview with J. John, member of the Grassroots Tea Corporation, India.

<sup>104</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>105</sup> As one respondent described, “workers may get the minimum wage, but then so much is deducted, for accommodation and taxes. When labour providers are being checked (...) it looks like workers are getting the minimum wage. But (...) half of it is going straight back to the employer in return for a ramshackle of a caravan that’s falling down.” See further, Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>106</sup> Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa.

<sup>107</sup> Equal Rights Trust interview with Kate Roberts, Head of Policy at Focus on Labour Exploitation, Great Britain.

<sup>108</sup> As one respondent from South Africa noted, farm workers “find it very difficult to stand up and understand and enforce their social rights.” Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa. See also Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa.

<sup>109</sup> This point was raised by a number of respondents. See, respectively, Equal Rights Trust interview with Hatem Kotrane, Emeritus Professor at the Faculty of Juridical, Political and Social Sciences, University of Tunis, Tunisia; Equal Rights Trust interview with Kate Roberts, Head of Policy at Focus on Labour Exploitation, Great Britain; Equal Rights Trust interview with representatives of Unite the Union, Great Britain; and Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

<sup>110</sup> ILO, “World Employment and Social Outlook: Trends 2021,” accessed July 2023, available at: [https://www.ilo.org/global/research/global-reports/weso/trends2021/WCMS\\_795453/lang--en/index.htm](https://www.ilo.org/global/research/global-reports/weso/trends2021/WCMS_795453/lang--en/index.htm), p. 90.

<sup>111</sup> ILO, “Digital labour platforms,” accessed January 2023, available at: <https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm>.

<sup>112</sup> This point was raised by several respondents. See, for instance, Equal Rights Trust interview with Shaik Salauddin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India; Equal Rights Trust interview with Olívia Pasqualetto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil; Equal Rights Trust interview with an economist and leader of a gig economy platform, Brazil. In Great Britain it

tion attorney with particular expertise in domestic work, explained in the **South African** context, “our legal framework is still lagging behind some technological developments, for example, platform work (...) and so (...) what has tended to happen is that particular sections of the economy are either carved out of that regulation or given lesser protection under it.”<sup>113</sup>

A range of respondents discussed the decent-work deficits associated with platform work. In **India**, for instance, it was noted that platform workers may be denied access to their contracts or forced to accept terms and conditions that operate to indemnify the platform against potential legal action.<sup>114</sup> Respondents from **Brazil**, **India** and **South Africa** expressed concern regarding the arbitrary dismissal of platform workers, as well as the failure of platforms to respond adequately to workers’ complaints about service users.<sup>115</sup> Several interviewees indicated that platform drivers experienced threats to their physical security,<sup>116</sup> and, in at least one instance, drivers reportedly had vehicles towards which they had contributed financially confiscated by the platform operator.<sup>117</sup>

While some respondents noted that the flexible nature of informal work may benefit particular workers,<sup>118</sup> it was also emphasised that those who are most likely to benefit from this flexibility, including persons with childcare responsibilities, are often “already in a vulnerable position.”<sup>119</sup> In this context, a member of Unite the Union from **Great Britain** suggested that the notion “platform working gives you the power and control” is misleading, as there are few “opportunities to actually impact the conditions [of work].”<sup>120</sup> Similar views were expressed in **Brazil**. Far from granting autonomy, informality may in fact lead to dependence that reduces the opportunity to gain a living by work freely chosen.<sup>121</sup> Multiple respondents indicated that platform workers depend on this type of work as a primary source of income, a situation exacerbated by economic instability and high levels of unemployment.<sup>122</sup>

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was noted that the emergence of the platform economy had resulted in a “push to create greater insecurity” in work by prompting “people to become gig workers.” While it was noted that workers falling within this category do enjoy some labour rights, the same respondent warned of a “race to the bottom” following the UK’s departure from the European Union, which brought a risk that certain rights currently afforded to individuals in precarious forms of work may be removed. See Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>113</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>114</sup> Equal Rights Trust interview with Shaik Salaudhin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India; and Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India.

<sup>115</sup> See Equal Rights Trust interview with Omar Parker, a trade union leader, South Africa; and Equal Rights Trust interview with Olívia Pasqualeto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil. In India, an interviewee discussed an instance of discrimination experienced by a driver at the hands of a passenger. After the issue was raised, the platform reportedly “refused to take any responsibility,” indicating that it was “merely a virtual marketplace and not an employer.” See Equal Rights Trust interview with Shaik Salaudhin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India.

<sup>116</sup> See, for instance, Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India; and Equal Rights Trust interview with Faiza Haupt, an activist for workers’ rights in the platform sector, South Africa. One respondent noted, “I was hijacked. They took my car, they took my phones, they took everything (...) I spoke to lawyers. They told me that if I take it to court, it’s going to have to go through High Court (...) and it’s going to cost more than R300,000 to sue [the platform operator] (...) it’s been two months almost and they still haven’t even given the details to the police officers.” See Equal Rights Trust interview with Faiza Haupt, an activist for workers’ rights in the platform sector, South Africa.

<sup>117</sup> See Equal Rights Trust interview with Shaik Salaudhin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India.

<sup>118</sup> See, for example, Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>119</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>120</sup> *Ibid.* This critique is applicable to the informal economy more broadly: for instance, in India it has been noted that women agricultural workers have at times chosen “informal work, rather than higher-earning activities,” because it has allowed them to meet their childcare responsibilities. As set out below, similar concerns were raised by respondents as part of this study. See further, ILO and WIEGO, *Policy Brief No. 1: Quality Childcare Services for Workers in the Informal Economy*, 2019, p. 5.

<sup>121</sup>

<sup>122</sup> See Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India; and Equal Rights Trust interview with an economist and leader of a gig economy platform, Brazil.

Labour legislation in many jurisdictions has not kept pace with the growth of platform work and often misclassifies or excludes platform workers entirely, thus depriving them of necessary rights protection. While platform work can be beneficial to certain individuals, the research makes clear that this is frequently not the case and underlines that care must be taken to ensure that any benefits do not come at the expense of workers' rights or legal protection.

#### 4.1.2 The Impacts of Exclusion

Informal work is often associated with severe decent-work deficits, ranging from lower levels of remuneration, unsafe working conditions and limited social protection to "a lack of organisation, voice and representation in policymaking."<sup>123</sup> Certain groups are overrepresented within informal employment,<sup>124</sup> and because of an absence of legal protection, existing situations of inequality may be exacerbated. A member of the Unite the Union, a British and Irish trade union, explained:

*Informal workers (...) are disproportionately people who are already suffering forms of discrimination. They're likely to be younger; they're likely to be women in certain industries; they're likely to be Black in certain industries and areas, or ethnic minority in some other way; or migrant workers (...). There's also LGBT+ workers who in my experience can sometimes be concentrated in particular sectors or areas or shifts or bits of work (...) And that can also mean that people are more vulnerable to discrimination, and so, more likely to be informal.<sup>125</sup>*

The relationship between informal work and discrimination is multi-faceted and mutually reinforcing. As a result of systemic inequalities and structural discrimination, groups already exposed to discrimination – including, but not limited to, women; members of ethnic, religious and linguistic minorities; and LGBTQI+ persons – are more likely to be forced to take up informal work. This, in itself, may reflect a discriminatory denial of their right to undertake work freely chosen. Moreover, given the overrepresentation of certain groups in the informal economy, the decent-work deficits which characterise informal work disproportionately affect these groups. Furthermore, as informal workers, members of these groups are more exposed to acts of discrimination while undertaking work. Finally, because those engaged in informal work are excluded from the scope of legal protection, they cannot challenge discrimination when it occurs. Even in States where strong anti-discrimination provisions exist, informal workers are beyond the reach of these protections and unable to claim such rights as they have due to the precarious nature of their work, reinforcing and exacerbating inequality.

#### (a) Gender Inequality

Interviewees from several countries highlighted patterns of gender inequality within the informal economy. For instance, in **South Africa**, it was noted that an employer will often only "consider certain jobs for men (for instance driving a tractor or lorry), [and] other jobs for women." On the whole, "men are appointed in the better-paid positions."<sup>126</sup> Similar patterns were identified in **Brazil**, where it was noted that pay disparities between men and women in the informal economy contributed to broader inequalities in society: "women [are] receiving at least 20% less than men, and this contributes to the fact that we have women dying in the country for feminicide, because they cannot get out of the situation of violence, because they cannot find a job, since many of them have small children."<sup>127</sup>

According to the ILO, women are "disproportionately represented" in the domestic work sector and face specific challenges and vulnerabilities associated with the "invisibility that comes with working in an em-

<sup>123</sup> ILO, "Engendering informality statistics: gaps and opportunities," ILO Working Paper 84, 2022, p. 9.

<sup>124</sup> For instance, it has been noted that "women are disproportionately represented in the informal paid care economy and domestic work, particularly migrant domestic workers." See ILO, Resolution concerning inequalities and the world of work, 11 December 2021, para. 9.

<sup>125</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>126</sup> Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa.

<sup>127</sup> Equal Rights Trust interview with Andriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work, Brazil.



ployer's private home or their own home."<sup>128</sup> Women are not only disproportionately affected by the decent-work deficits that affect all informal workers in the care sector but are also uniquely vulnerable to acts of discrimination within work.

However, gender discrimination was also reported in respect of other types of work. In **Great Britain**, for instance, there are disparities in the distribution of work within the agricultural sector. While "farm work tends to be male dominated," certain tasks, such as fruit picking, are usually fulfilled by women, one respondent observed.<sup>129</sup> This de facto labour market segregation disadvantages women workers; because the harvesting of fruit takes place seasonally, men are more likely to "get jobs throughout the winter."<sup>130</sup> Different respondents from Great Britain noted with concern the lack of any legal obligation for farmers to provide separate spaces, such as accommodation and washing facilities, for women.<sup>131</sup> It was also noted that women working within the sector may be particularly vulnerable to discrimination and abuse.<sup>132</sup> As one respondent noted: "women (...) seem to be victimised in a certain way and are overlooked for the better paid jobs. And we are aware that, quite often, women are asked for sexual favours in return for getting the better jobs or getting overtime."<sup>133</sup> Similar patterns were observed in other jurisdictions. In **India**, women are limited to the "lowest and poorest paying" roles and are not given the same opportunities for career progression as men,<sup>134</sup> and in **Colombia**, women routinely face discrimination in the recruitment process.<sup>135</sup>

Within the platform economy, a range of respondents identified specific challenges faced by women workers. Work within this sector is highly correlated with gender and, in most countries, there appeared to be a greater representation of men than women.<sup>136</sup> However, women face unique challenges, and their needs are often unmet.<sup>137</sup> In **India**, it was noted that women drivers "face security issues especially working at nights and delivering to remote areas" and are harassed by customers.<sup>138</sup> Similar concerns were raised in **South Africa**. As Ms Faiza Haupt, an activist and employer in the platform economy, described: "for a female driver, you feel discriminated all the time. You do get sexual harassment from your riders (...) I had to make myself look ugly (...) because I'm too scared that there will be riders that will hit on me."<sup>139</sup> The same respondent indicated that they had experienced discrimination at the hands of their colleagues.<sup>140</sup> In **Brazil**, it was observed that prejudices within wider society may also impact the perceived value of women's work on platforms: "female or black app drivers [tend to be] rated worse than white men."<sup>141</sup>

Where platform workers do experience discrimination, it was noted that women may be discouraged from seeking redress: "women are reluctant to report (...) as they also fear that if their families come to know, they will not be allowed to go out to work."<sup>142</sup> Few women are likely to make complaints to public author-

<sup>128</sup> ILO, "Engendering informality statistics: gaps and opportunities," ILO Working Paper 84, 2022, pp. 10-11.

<sup>129</sup> Equal Rights Trust interview with a senior lecturer in law at the University of Bristol, Great Britain; Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>130</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>131</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain; and Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

<sup>132</sup> Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

<sup>133</sup> Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>134</sup> Equal Rights Trust interview with J. John, a member of the Grassroots Tea Corporation, India.

<sup>135</sup> Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia.

<sup>136</sup> See, for instance, Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India; Equal Rights Trust interview with Faiza Haupt, an activist for workers' rights in the platform sector, South Africa.

<sup>137</sup> For example, different respondents identified the lack of availability of restroom facilities for women as a barrier to participation. See Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India; Equal Rights Trust interview with Aline Riera, Founder of the Senhoritas Courier Collective, Brazil.

<sup>138</sup> Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India.

<sup>139</sup> Equal Rights Trust interview with Faiza Haupt, an activist for workers' rights in the platform sector, South Africa.

<sup>140</sup> Equal Rights Trust interview with Faiza Haupt, an activist for workers' rights in the platform sector, South Africa.

<sup>141</sup> Equal Rights Trust interview with Olívia Pasqualetto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil.

<sup>142</sup> Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India.

ities.<sup>143</sup> This forms part of a broader trend within the informal economy. As one respondent from **Tunisia** observed: “female victims do not file complaints because they need to work. Between dignity and salary, women choose the salary.”<sup>144</sup>

## (b) Race, Nationality and Migrant Status

Discrimination on the basis of race and nationality in sectors characterised by high levels of informality was highlighted by respondents in several jurisdictions. In **Tunisia**, for instance, it was observed that certain groups were more likely to be awarded work than others: “there is racial profiling on the basis of national origin (...) between a person from Cameroon and one from the Ivory Coast one will opt for a Cameroonian because they are considered stronger.”<sup>145</sup> Racial inequalities in some countries, such as **South Africa**, also extended to levels of remuneration.<sup>146</sup> In **India**, respondents identified the specific challenges experienced by Dalits in accessing land. A respondent explained that land was distributed to members of the Dalit community during the era of British colonisation, occupation and exploitation but was later illegally transferred to individuals and families from other castes, with attempts to secure its return having been frustrated by discriminatory policies and corruption.<sup>147</sup>

In comparison, Geeta Menon, a representative of the Domestic Workers Rights Union in Bangalore, highlighted issues of caste-based segregation and prejudice, which resulted in the exclusion of members of this group from the formal economy, and their disproportionate representation in low-paying jobs, particularly in forms of domestic work.<sup>148</sup> In **Brazil**, Renan Bernardi Kalil, labour prosecutor at the Labor Public Prosecutor’s Office, cited statistics indicating that “seventy-five per cent” of the “one and a half million” individuals working via digital platforms are “black (...) and mixed race.”<sup>149</sup> This data, according to the respondent, demonstrated the clear need for regulation: “if we create a law that allows hiring these people with fewer rights, we will be reproducing discriminatory patterns.”<sup>150</sup> Therefore, Mr Kalil emphasised the fact that the disproportionate presence of marginalised groups within the informal economy facilitates and perpetuates discrimination, as they are more vulnerable to discrimination within the informal economy.

In a majority of the countries under review, respondents highlighted the particular situation of migrant workers, who experienced additional barriers to protection as a result of national law and policy. In **Great Britain**, it was noted that visa arrangements may place migrant workers in a particularly vulnerable position.<sup>151</sup> To fulfil their visa requirements, workers are often reliant on employers for proof of work or sponsorship,<sup>152</sup> and this can dissuade them from raising discrimination complaints or challenging unfair work practices.<sup>153</sup> This means that migrant workers have less autonomy in choosing work and are less able to enforce their rights.<sup>154</sup>

Several respondents in **Great Britain** also expressed concern regarding discrimination against migrant workers.<sup>155</sup> Within the agricultural sector, “individuals may be allocated different ‘productivity areas’ based

<sup>143</sup> Equal Rights Trust interview with Aline Riera, Founder of the Senhoritas Courier Collective, Brazil.

<sup>144</sup> Equal Rights Trust interview with Hafidha Chekir, Professor of Public Law at the University of Tunis, Tunisia.

<sup>145</sup> Equal Rights Trust interview with a senior officer of a non-governmental organisation working for the protection of migrants, Tunisia.

<sup>146</sup> Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa.

<sup>147</sup> Equal Rights Trust interview with a member of a civil rights organisation working on land rights issues, India.

<sup>148</sup> See, in particular, Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>149</sup> Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>150</sup> Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>151</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>152</sup> Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

<sup>153</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain; Equal Rights Trust interview with a senior lecturer in Law at the University of Bristol, Great Britain.

<sup>154</sup> Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain; and Equal Rights Trust interview with Kate Roberts, Head of Policy at Focus on Labour Exploitation, Great Britain.

<sup>155</sup> As one noted, “there is inherent discrimination in the hiring of workers because of their immigration status.” See Equal Rights Trust interview with an independent human rights expert, Great Britain.

on their nationality: while some “are given poor tunnels of blueberries (...) others get good ones, however, they have to meet the same quotas.”<sup>156</sup> Cultural stereotypes may also inform the allocation of work: “there was a recent case of Indonesians and East Asians being employed to peel prawns because of their ‘nimble fingers.’”<sup>157</sup> While inspection mechanisms have been put in place to address this, it was noted that the focus of these schemes is often on ensuring immigration compliance and targets relating to returnees as opposed to the rights of the migrants: “the welfare aspects are lighter touch enforced.”<sup>158</sup>



International Migrants Day in Bangladesh. Credit: Sommlito Garments Sramik Federation / Awaj Foundation

Similar patterns were present in **South Africa**,<sup>159</sup> where some respondents noted that their legal status means migrant workers may be disproportionately concentrated in particular forms of work and experience unique challenges in these areas.<sup>160</sup> For instance, within the platform economy, examples of discrimination ranged from racially motivated vehicle stops to the impoundment of vehicles.<sup>161</sup> Within the domestic work sector, one interviewee explained that their organisation receives “frequent reports” about employers making threats to “call the police because the domestic worker is not documented.”<sup>162</sup> In one instance, a case was filed with the Commission for Conciliation, Mediation and Arbitration (CCMA) – a public body that aims to promote social justice and fairness in the workplace by delivering ethical, qualitative, innovative and cost-effective dispute resolution services – alleging a violation of a worker’s labour rights. The employer was contacted to set a hearing date and was informed that “if the worker is not documented [they] can have her deported, and the employer doesn’t have to go to the hearing.” According to the respondent, this guidance “came [directly] from the CCMA, which is horrendous.”<sup>163</sup>

<sup>156</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>157</sup> Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>158</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>159</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>160</sup> For instance, one respondent noted that migrant workers had an “ease of entry” into platform work because of the lack of a need for a work permit. Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa. The same respondent noted that “migrant workers (...) feel the impact of exploitative conditions (...) differently from South Africans or permanent residents.” Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa.

<sup>161</sup> Equal Rights Trust interview with Omar Parker, a trade union leader, South Africa.

<sup>162</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>163</sup> See Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

Discrimination against migrant workers appeared particularly prominent in **Tunisia**. Within this State, non-nationals are largely concentrated in domestic work but may also work in other areas “where they cannot be seen” such as “farms, agriculture, fishing, buildings” and “construction.”<sup>164</sup> Conditions of work for members of this group are often hard and may be exacerbated by the dynamics of social isolation.<sup>165</sup> As one respondent noted: “the vulnerability of the migrant makes the abuse greater, a national worker can leave and return home, but the migrant is in a situation where he cannot.”<sup>166</sup> A number of respondents spoke of migrant workers having their passports confiscated by their employers.<sup>167</sup> Other serious human rights abuses, including “sexual and physical” exploitation<sup>168</sup> and being fed “animal’s food” were also reported.<sup>169</sup> One respondent gave an example in which a sub-Saharan migrant worker was given “acid shampoo to wash her hair,” which her employer considered to be “too frizzy!” There are employers “who make them sleep in the toilets, the basement or the garage. For them [they are] not human beings.”<sup>170</sup>

Respondents in all the jurisdictions examined in this report identified migrant workers both as more likely to work within the informal economy and particularly vulnerable to persecution and discrimination within the workplace. Migrants are often dependent upon their employer to maintain their legal migrant status and, in some instances identified by respondents, to provide accommodation and other necessities. This makes them not only particularly vulnerable but also unable to challenge discriminatory conduct and other rights violations.

### (c) Other Affected Groups

Patterns of discrimination affecting other disadvantaged groups were also identified by respondents. In **Tunisia**, particular concern was expressed regarding the status of LGBTQI+ workers. As one respondent explained, LGBTQI+ individuals are excluded within society and so placed in “difficult socio-economic situations” which may lead to engagement in precarious and informal employment.<sup>171</sup> When members of this group experience rights violations, they may then find it difficult to make complaints or prove instances of discrimination or mistreatment and are “often dismissed because of the situation of vulnerability.”<sup>172</sup>

Several respondents discussed the interrelationship of informal work and socio-economic disadvantage. An academic with University College London specialising in labour law and human rights explained that poorer individuals are often “required to accept (...) precarious jobs.”<sup>173</sup> She also explained that this also has a racialised aspect: there “is evidence from unions and other organisations, evidence I’ve read, that these people often belong to racial minorities. They’re very poor, they apply for social benefits, and they end up in very precarious work.”<sup>174</sup> This trend was also noted in **Brazil**, where it was observed that “the poorest are usually the racialized, non-white workers, a lot of women.”<sup>175</sup> In **India**, it was observed that many platform workers

<sup>164</sup> Equal Rights Trust interview with an advisor for an international organisation with expertise on the right to work and migrants in North Africa, Tunisia.

<sup>165</sup> See Section 3.2.1(a).

<sup>166</sup> Equal Rights Trust interview with an advisor for an international organisation with expertise on the right to work and migrants in North Africa, Tunisia.

<sup>167</sup> See, for example, Equal Rights Trust interview with a senior officer of a non-governmental organisation working for the protection of migrants, Tunisia; Equal Rights Trust interview with Mariem Klouz, appeal lawyer, Tunisia; and Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

<sup>168</sup> Equal Rights Trust interview with a senior officer of a non-governmental organisation working for the protection of migrants, Tunisia.

<sup>169</sup> Equal Rights Trust interview with Mariem Klouz, appeal lawyer, Tunisia.

<sup>170</sup> Equal Rights Trust interview with a senior officer of a non-governmental organisation working for the protection of migrants, Tunisia.

<sup>171</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>172</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>173</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>174</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>175</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

“come from socially and economically less privileged sections of society.” The lack “of any regulation manifests in poor bargaining power, ultimately resulting in many workers being economically impoverished.”<sup>176</sup> In **South Africa**, Amy Tekie, co-founder of IZWI Domestic Workers Alliance – a network of domestic workers in Johannesburg – focused on the role of informal work in perpetuating class-based discrimination,<sup>177</sup> and in **Colombia**, Diana Paola Salcedo, the ILO national officer for the implementation of the peace process, explained the distinction between rural “peasant” workers and other rural workers and the discrimination suffered by the former within the informal economy.<sup>178</sup>

These responses reflect the reality of informal work as enabling and perpetuating a cycle of socio-economic disadvantage within the workforce for groups exposed to discrimination. The lack of legal protection within the informal economy means that disadvantaged groups must work hard, but employers are not under the same obligations to provide protections they must give formal employees. This in turn creates a situation in which employers essentially have an incentive to maintain the position of certain groups in informal work.

In some cases, interviewees noted the prevalence of intersectional discrimination in the informal economy. In **India**, for instance, Chirayu Jain, a labour lawyer and trade union activist in Delhi, discussed “caste and religion-based discrimination” affecting domestic workers.<sup>179</sup> He also noted that employers are more likely to “dismiss older workers as they are considered a liability,” further noting that, because of the high concentration of women within this field, such dismissal is likely to have disproportionate impacts on older women workers.<sup>180</sup> In **Tunisia**, the interaction between migrant worker status, disability and pregnancy was highlighted: “domestic servitude for migrants goes as far as trafficking,” the respondent noted. The “manipulation begins in the country of origin, which means that the vulnerability is doubled. Already there is a racial profiling (...) [if an employer] realizes that the person has a disability or she is pregnant, they [will] throw her away.”<sup>181</sup>

According to a recent report of the United Nations Department of Economic and Social Affairs, persons with disabilities “disproportionately face precarious situations in comparison to the general population” and “in most countries (...) are more likely to be employed in the informal sector and to be self-employed.”<sup>182</sup> This trend has also been recognised by UN treaty bodies. In its recent General Comment No. 8, for instance, the CRPD Committee notes that “persons with disabilities are more likely to earn lower wages than persons without disabilities and are more likely to be in vulnerable employment, including being employed in the informal sector.”<sup>183</sup> While some interviewees referred to the situation of members of this group in broad terms, few mentioned the specific exclusion of persons with disabilities from the formal economy, indicating that they may be especially invisible and exposed to a risk of harm.

## 4.2 Transitioning Towards the Formal Economy

To address the human rights implications of informal work, both the ILO and the UN treaty bodies have urged States to facilitate the transition of individuals engaged in informal work to the formal economy.<sup>184</sup> In

<sup>176</sup> Equal Rights Trust interview with Shaik Salauddin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India.

<sup>177</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>178</sup> Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia. *See also* Equal Rights Trust interview with Luz Dary Molina, President of the Association of Small and Medium Producers, Colombia, and, in the Brazilian context, Equal Rights Trust interview with Ney Strozake, a lawyer and member of the National Coordination of Human Rights of Brazil's Landless Workers Movement, Brazil.

<sup>179</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India.

<sup>180</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India.

<sup>181</sup> Equal Rights Trust interview with a senior officer of a Non-Governmental Organisation working for the protection of migrants, Tunisia.

<sup>182</sup> United Nations Department of Economic and Social Affairs, Disability and Development Report, 2018, p. 155.

<sup>183</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8 (advanced unedited version), 2022, para. 4.

<sup>184</sup> *See, for example*, Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8 (ad-

2015, the General Conference of the ILO adopted a Recommendation in this area.<sup>185</sup> The Recommendation provides guidance on the measures that are needed for States to discharge their international law obligations,<sup>186</sup> which should include the adoption of “coherent and integrated strategies” and the development of a holistic legal and policy framework that places the elimination of discrimination and the promotion of equality at its heart.<sup>187</sup>

In order to facilitate a successful transition, the Recommendation calls on States to recognise the “diversity of characteristics, circumstances and needs” of those engaged in the informal economy, with particular attention paid “to those who are especially vulnerable to the most serious decent work deficits,” such as women, indigenous communities, migrants, older persons and persons with disabilities.<sup>188</sup> Interventions should also place close attention to the situation of other disadvantaged groups and those engaged in particular forms of work.<sup>189</sup> The Recommendation makes a number of specific recommendations in this regard. The most important of these is the need to expand legal coverage to include informal workers. Paragraph 9 of the Recommendation calls on States to “adopt, review and enforce national laws and regulations (...) to ensure appropriate coverage and protection of all categories of workers.” The Recommendation also explains the need to address the structural inequalities which force individuals into informal work and notes the importance of trade unions in formalising the informal economy.

However, as experts in all of the jurisdictions in which we conducted our research explained, the formalisation of informal work is a challenging task, and informal work remains prevalent in all countries under review – though to varying degrees. The challenges of formalisation are both exacerbated by, and contribute to the perpetuation of, discrimination in the sector. While some of those we spoke to highlighted specific, limited areas in which informal workers had successfully obtained legal protection or better working conditions, there remain significant barriers to formalisation in all countries. Given the close interrelationship between informal work and discrimination, and the impossibility of ensuring the right to non-discrimination in the absence of legal protection, these issues need to be addressed if the right is to be effective. Below, we examine States’ progress in addressing some of the barriers to formalisation of work.

#### 4.2.1 Expanding Legal Coverage

In several jurisdictions, some limited progress towards formalisation of work in certain sectors has taken place, either through judicial decisions<sup>190</sup> or through the adoption of legislation that seeks to extend human rights protections. However, respondents noted that even these measures fall short. In **Brazil**, for instance, respondents highlighted the importance of amendments made to the Constitution in 2013, recognising the rights of domestic workers.<sup>191</sup> Individuals from different regions of **India** also discussed the enactment of laws extending minimum-wage entitlements to provide coverage for domestic workers. However, issues in

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vanced unedited version), 2022, para. 37; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 47(d).

<sup>185</sup> ILO, Transition from the Informal to the Formal Economy Recommendation No. 204, 2015.

<sup>186</sup> See *ibid.*, Recommendation No. 204, para. 40, and the legal instruments listed in Annex 1.

<sup>187</sup> ILO, Transition from the Informal to the Formal Economy Recommendation No. 204, 2015, paras. 7(h) and (i), 11, and 16(d).

<sup>188</sup> *Ibid.*, para. 7(i).

<sup>189</sup> *Ibid.*, para. 7(i).

<sup>190</sup> See, in particular, the discussion of the *Malanghu* decision below. Other cases were also identified by respondents for their positive impacts. In India, for instance, it was noted that the Delhi government had been ordered to make good on a promise to pay house rent on behalf of domestic workers. It was, however, noted that the government “did not comply” with the order, “instead choosing to appeal against the Court decision.” In South Africa, one respondent noted a recent “successful judgment for waste reclaimers” in the Gauteng High Court, which recognised “the right to livelihood” for members of this group “in the context of attempts to evict them.” See Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India; and Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>191</sup> Constitution of Brazil, 1988, Article 7 (sole paragraph). See Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil. New legislation had been passed in 2022 relating to platform work, although it was noted that there is no general regulation in this area, and the scope of the law is particularly narrow. See Equal Rights Trust interview with Olívia Pasqualetto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil.

the implementation of these laws were also noted,<sup>192</sup> and the rate of pay was considered insufficient.<sup>193</sup> In **Tunisia**, one respondent discussed the adoption of new legislation governing domestic work. However, the same respondent indicated that the law “is not applied to migrants,” therefore creating a protective gap.<sup>194</sup> Respondents from different countries also expressed concern regarding the detrimental effects of recent labour reforms<sup>195</sup> and the potential for proposed reforms to have adverse impacts.<sup>196</sup>

Several respondents in different jurisdictions highlighted both the challenges and the importance of regulating platform work specifically. Interviewees explained that, as an emerging area of the economy, platform work is not effectively regulated in many jurisdictions, generating legal uncertainty regarding a person’s employment status.<sup>197</sup> Respondents then explained that there is a clear need to address decent-work deficits within this field,<sup>198</sup> and to ensure the application of existing labour standards.<sup>199</sup>

As explained above, platform workers often fall outside the scope of labour legislation and so are denied the same legal rights that other workers benefit from.<sup>200</sup> One respondent from **South Africa** identified this as a particular issue in regard to the enforcement of rights: “even if we were to take up a case now, in terms of the Employment Equity Act, we would face jurisdictional questions: this is not a worker, he’s not defined as an employee in terms of the Act.”<sup>201</sup> Robin Allen KC, a barrister from **Great Britain** specialising in equality and discrimination law, went further and explained that even where individuals have legal protection and can enforce their rights, a lack of clarity in their status can prevent them from bringing a claim:

*Equality legislation works where people have confidence in their status as workers, so there’s no doubt that the more informality that there is, the easier it is for an employer to get away with it (...) the more informal, the more precarious, and the more precarious, the less the law touches [upon] those situations.*<sup>202</sup>

In some countries legal action has been initiated seeking to recognise the rights of platform workers.<sup>203</sup> In **Great Britain** and **Brazil**, respondents highlighted examples of litigation that have been successful in chal-

<sup>192</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India; and Equal Rights Trust interview with a member of a domestic workers union, India.

<sup>193</sup> Equal Rights Trust interview with a member of a domestic workers union, India.

<sup>194</sup> Equal Rights Trust interview with an advisor for an international organisation with expertise on the right to work and migrants in North Africa, Tunisia.

<sup>195</sup> For example, regarding 2017 labour reforms in Brazil and the impacts of new labour codes on the effectiveness of welfare boards in Tamil Nadu, India. See Equal Rights Trust interview with Delaïde Arantes, Justice at the Superior Labor Court and National Coordinator of the Managing Committee of the Safe Work Program, Brazil; Equal Rights Trust interview with a member of a domestic workers union, India.

<sup>196</sup> See, for instance, in respect of proposals requiring informal traders to have work permits in the Gauteng province of South Africa: Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>197</sup> See further the discussion in Section 3.2.1(c), above.

<sup>198</sup> As one respondent from Brazil noted in respect of delivery work, “One must regulate [this area], because it is necessary to guarantee labour rights to app workers. To guarantee transportation vouchers, food vouchers, vacations (...) it is necessary to start looking at issues that were not observed before, like the regulation of how many kilos you are carrying in each delivery, how many hours you are riding the bike, if the bike is ideal for your body size,” etc. See Equal Rights Trust interview with Aline Riera, Founder of the Senhoritas Courier Collective, Brazil.

<sup>199</sup> See, for instance, Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>200</sup> See Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa; Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil; and Equal Rights Trust interview with an economist and leader of a gig economy platform, Brazil. See also Section 3.2.

<sup>201</sup> Equal Rights Trust interview with Omar Parker, a trade union leader, South Africa.

<sup>202</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>203</sup> See, for instance, in India, seeking the legal recognition of and extension of social security benefits to platform workers: Equal Rights Trust interview with Shaik Salauddin, President of the Telangana Gig and Platform Workers Union and the National General Secretary of the Indian Federation of App-Based Transport Workers, India.



Platform worker protest in the Philippines. Credit: RIDERS-SENTRO

lenging the classification of platform workers as self-employed.<sup>204</sup> Other cases that seek to bring workers within the legal definition of an “employee” and thereby within the remit of existing labour law protections have had mixed results. In a 2020 decision, for instance, **Brazil’s** Superior Court of Justice held that Uber drivers were independent contractors due to a lack of subordination characteristic of the employment relationship.<sup>205</sup> This case, and others like it, demonstrate the challenges of working within existing employment law classifications to facilitate decent work.<sup>206</sup> Respondents made it clear that formalising the informal economy by expanding legal coverage is not a simple task. In many cases, labour law is preoccupied with traditional concepts of employment relationships rather than new and emerging types of work. This presents a serious barrier to formalising informal work and shows the inadequacy of existing labour law.

In line with the need to challenge fundamental understandings of employment law, the regulatory challenges associated with platform work caused some to question the role of the law.<sup>207</sup> As one respondent explained: “laws for regulation alone might not address the more complex non-standard employment relations in informal work. The fight has to be on the basis of ethics, not adversarial relations alone.”<sup>208</sup> In some cases, positive progress towards addressing decent-work deficits have been achieved through non-legal means and co-operation with employers. In **India**, for instance, a representative of the not-for-profit Azad

<sup>204</sup> See, for example, Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain, referring to the cases of *Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent)*, [2018] UKSC 29; and *Uber BV and others (Appellants) v Aslam and others (Respondents)*, [2021] UKSC 5. In Brazil, one respondent noted the successful identification of an employment relationship between a driver and the logistics company Loggi. See Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>205</sup> See further, Jurist, “Brazil court rules Uber drivers are independent contractors,” 6 February 2020, available at: <https://www.jurist.org/news/2020/02/brazil-court-rules-uber-drivers-are-independent-contractors/>.

<sup>206</sup> See Sandra Fredman et al., “Thinking out of the Box: Fair work for platform workers,” 2022, p. 1.

<sup>207</sup> Although some interviewees questioned whether these challenges are, in fact, novel. As one respondent from Brazil explained, progress has been made in bringing other groups within the scope of law’s domain: “there are a lot of professionals in the health sector, in education, security guards, who have employment relationships with many companies. This has never been an obstacle to recognize the employment relationship.” Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>208</sup> Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samooha, an informal women’s collective, India.



foundation explained that they had worked with a social enterprise to formalise the status of women taxi drivers. In addition to statutorily determined employment and social security benefits, the company has reportedly undertaken initiatives to ensure the safety of women drivers, including through the establishment of a twenty-four-hour call centre, GPS location tracking, training for employees, and the integration of an app-based alarm button.<sup>209</sup>

In other cases, however, work with private enterprises has produced fewer positive outcomes. As one respondent from **Brazil** explained, “companies generally do not sit down at negotiating tables to formalise agreements with digital platform workers.”<sup>210</sup> Renan Kalil, a prosecutor at the Labour Prosecutor’s Office, believed that legislation was essential.<sup>211</sup> A similar view was expressed by Abigail Osiki, a labour law academic from **South Africa**, in stronger terms: “platforms are vehemently against anything that shifts platform workers from their independent contractor status. (...) they (...) always look for ways to lobby around it.”<sup>212</sup> She gave a recent example related to her by the facilitator of an event in which stakeholders came together to discuss emerging challenges in the informal economy, with a view to developing policy recommendations for regulating the working conditions of platforms. According to the meeting’s facilitator, “all platform owners walked out.”<sup>213</sup>

### Promising Practice: Rajasthan Legislation

#### The Rajasthan Platform-Based Gig Workers (Registration and Welfare) Act, 2023

The Rajasthan Assembly in India recently passed a significant bill aimed at extending social security benefits to platform-based gig workers. With this Rajasthan has become the first State in India to pass legislation ensuring social security for platform-based gig workers.

The new bill aims to address the lack of protection and benefits for gig workers, who were previously classified as “partners” or “users” rather than employees in companies like Ola, Uber, Swiggy, Zomato and Amazon. The primary objective of the bill is to extend social security and welfare benefits to gig workers operating in the State.

The bill mandates the registration of all gig workers with the State government to bring them under the ambit of labour regulations. The State government will maintain a comprehensive database of all gig workers operating in Rajasthan, with each gig worker assigned a unique ID, which will facilitate tracking their employment history and entitlements.

Gig workers will be granted access to a range of social security schemes. These schemes may include health insurance, accident coverage, and other welfare measures to provide financial support during emergencies.

The bill also ensures that gig workers have the right to be heard and address any grievances they may have. This provision seeks to protect the rights of gig workers and provide them with a platform to resolve work-related issues.

The bill establishes a Platform-Based Gig Workers Welfare Board for overseeing the welfare and rights of gig workers in the State. Welfare Board — comprising State officials, five representatives each from gig workers and aggregators, and two others (“one from Civil Society and another who

<sup>209</sup> Equal Rights Trust interview with a manager in an all-women taxi aggregator company, India.

<sup>210</sup> Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>211</sup> Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor’s Office, Brazil.

<sup>212</sup> Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa.

<sup>213</sup> Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa.

evince interest in any other field"). At least one-third of the nominated members should be women.

The bill introduces a Platform-Based Gig Workers Fund and Welfare Fee to finance the social security measures for gig workers. The fund will be utilised to provide financial support and welfare benefits to gig workers during challenging times. Aggregators will be required to pay a fee for each transaction involving a platform-based gig worker. The specific percentage of the fee will be determined by the State government to contribute to the welfare fund.

For non-compliance, the State government can impose fines of up to Rs 5 lakh for the first contravention and up to Rs 50 lakh for subsequent violations of the Act by aggregators.

Whatever legal or non-legal solutions are identified to the challenges of informal work, it is clear that for the transition to the formal economy to be meaningful, legal protections within the formal economy must be robust and robustly implemented. A case in point is the 2020 judgement of the Constitutional Court of **South Africa** in *Mahlangu*, which held the exclusion of domestic workers from the Compensation for Occupational Injuries and Diseases Act (COIDA) to be unconstitutional, inter alia, on account of its discriminatory impact on Black women.<sup>214</sup> While this decision was welcomed by a number of respondents, it was also noted that issues of enforcement and implementation continue to be prominent barriers to the formalisation of the informal economy. Several respondents from South Africa explained that, despite this judgment and the enactment of other laws that seek to protect domestic workers and others in the informal economy, there are still significant enforcement and implementation issues.<sup>215</sup>

#### 4.2.2 Addressing Structural Inequalities

The ILO Recommendation also acknowledges that structural inequalities contribute to the existence of the informal economy, the rights abuses which occur within it, and the persistence of discrimination. As such, it calls on States to address the underlying conditions of inequality that force individuals into the informal economy. This point was echoed by several respondents who also highlighted the role that structural inequalities play in perpetuating informal work and preventing formalisation.

Different experts interviewed for this study highlighted the need to address the structural causes of inequality that may drive informal work.<sup>216</sup> A wide variety of barriers were identified by respondents including lack of education and skills,<sup>217</sup> lack of economic independence and ability to manage one's own resources,<sup>218</sup> socio-economic disadvantage,<sup>219</sup> lack of access to digital technologies,<sup>220</sup> lack of access to public services,<sup>221</sup>

<sup>214</sup> See *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24.

<sup>215</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa; Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa; and Equal Rights Trust interview with Pinky Mashiane, President of the United Domestic Workers of South Africa, South Africa.

<sup>216</sup> As one interviewee from South Africa noted: "we need to understand what (...) the drivers of discrimination [are] (...) We need to look at how the labour market is conceived." See Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa.

<sup>217</sup> See, for instance, Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa; and Equal Rights Trust interview with Ney Strozake, a lawyer and member of the National Coordination of Human Rights of Brazil's Landless Workers Movement, Brazil.

<sup>218</sup> Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia.

<sup>219</sup> See, for instance, Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa; and the discussion in Section 3.2.2(c).

<sup>220</sup> Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa.

<sup>221</sup> Equal Rights Trust interview with Andriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work, Brazil. In this regard, a separate respondent from Brazil stressed the importance of public education: "from there, from inside the school, we start to create a

and finance.<sup>222</sup>

In several jurisdictions, gender-based violence was identified as both a cause and consequence of informality, with a disproportionate impact on women workers. As a result of their engagement in the informal economy, interviewees noted that women were more likely to encounter forms of violence to which male workers were not exposed.<sup>223</sup> Submissions from respondents in **India** stressed that patterns of gender-based violence were “structural” in nature<sup>224</sup> and “embedded in the caste and patriarchal stereotypes within society.”<sup>225</sup> One respondent noted that, while legislative protections against forms of gender-based violence had been established in some States, issues of enforcement and implementation impeded their effectiveness, with a resultant impact on those engaged in informal work. As a result: “in sectors employing predominantly women, violence against women is not uncommon.” While the law covers “establishments and workers in the informal sector,” if legislation is “not effective in the formal sector, it does not have much to offer to workers in the informal sector.”<sup>226</sup> For such legislation to become effective, the interviewee noted, “other means” are needed to ensure “structural equality at the workplace.”<sup>227</sup>

A similar observation was made by Ney Strozake, a representative of the Landless Workers Movement in **Brazil** – a mass social movement formed by rural workers fighting for land reform and against injustice and social inequality in rural areas – who identified the need for a wide range of action: “only public policy, education, and increased income can enable (...) women [to] overcome their violent reality,” they remarked.<sup>228</sup>

A separate barrier identified by participants concerns the availability of care for family members. In the context of deeply embedded social norms and gender stereotypes, women frequently bear the disproportionate burden of unpaid care work for family members, such that the lack of available, accessible and affordable care is a discriminatory barrier to participation in work. As noted by the ILO, “for many, entering employment depends on being able to manage paid work with family responsibilities. Paid informal activities can be the only choice for people who (...) need flexible work arrangements that allow them to work in or close to home.”<sup>229</sup> Regina Stela Corrêa Vieira, an academic at the Law School of the Federal University of Pernambuco and the University of West of Santa Catarina in **Brazil**, explained in detail how lack of access to childcare can limit women’s equal participation in work:

*I think that the last paradigm for us to really achieve structural changes in terms of discrimination is, without a doubt, the debate on care. I don't think we can avoid it, especially in terms of the market, because there is no way, no matter how much we make rules for affirmative action, no matter how much we prohibit discrimination, no matter how much we say we have to equalize salaries, we*

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society formed in understanding, not in hate, but in a society that respects people, that does not discriminate (...) I think that this is very important.” See Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>222</sup> Equal Rights Trust interview with an independent human rights expert, Great Britain.

<sup>223</sup> As one respondent from Brazil noted in respect of platform workers: “when a biker goes out on the street to make deliveries, she suffers a lot more violence for being a woman, like sexual harassment. Besides traffic violence and gender violence, she also suffers from social violence, you know? There is, for example, the possibility of being mugged.” Equal Rights Trust interview with Aline Riera, founder of the Senhoritas Courier Collective, Brazil.

<sup>224</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India; and Equal Rights Trust interview with Luz Dary Molina, President of the Association of Small and Medium Producers, Colombia.

<sup>225</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>226</sup> Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India.

<sup>227</sup> Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India. A second respondent raised similar concerns: “law is the last resort when addressing domestic violence. One of the early interventions from the women’s movement was the provision of safe homes for women requiring to escape their homes and families. Now the State has understood the importance and provides shelters for women. What we learn is that the legal machinery alone is not sufficient; women have to be enabled to access it.” See Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, Feminist activists and members of the Gamana Mahila Samoocha, an informal women’s collective, India.

<sup>228</sup> Equal Rights Trust interview with Ney Strozake, a lawyer and member of the National Coordination of Human Rights of Brazil’s Landless Workers Movement, Brazil.

<sup>229</sup> ILO, “Engendering informality statistics: gaps and opportunities,” ILO Working Paper 84, 2022, p. 15.

*know that for women in Brazil, especially the poorest women, the burden of care is very impactful. For the market, then, access to income is limited by the number of children, access to income is limited by the fact that an elderly woman needs to take care of her grandchild. Access to education is limited by the fact that the older daughter needs to take care of the younger children so that the mother can work precariously, wherever that may be. So, care is the ultimate paradigm (...) in my view (...). If we don't change caregiving, if we don't value domestic work, and if we don't think of (...) ways of providing access to policies that actually make a difference in [women's] daily life [we will not see the change we desire in our society].<sup>230</sup>*

Similar issues were identified in other jurisdictions.<sup>231</sup> In **Colombia**, for instance, a former member of the Colombian Farmers Society noted that “rural women [have] two roles, that of a worker and that of a housewife (...) domestic work is not paid, it is not recognized. The recognition of care economy is something that is necessary, especially for rural women, because they are not going to stop fulfilling both roles.”<sup>232</sup> In some countries, significant disparities in the availability of paid leave for men and women following the birth of a child were identified that may exacerbate these issues.<sup>233</sup> While Madhu Bhushan and Shakun Mohini, two members of Garmana Mahila Samoocha, an informal women's collective in **India**, noted that the State had undertaken special measures aimed at facilitating women's participation in work, including through the provision of crèche facilities, they questioned the framing of these measures, which they suggested may reinforce harmful stereotypes regarding the role and responsibilities of women within the family:

*The State mandates special provisions to help women join the labour market. These could include crèche facilities at home. Unions of informal workers also make similar demands, for instances crèche facilities at construction sites. But why should this demand be for women workers alone? Further, why should the demand be for the crèche facility to be where the woman works, and not where men work? Does this not reinforce the stereotype of care being the exclusive responsibility of the women in the family? Should the demand not be for socialised care provisions that shifts the sole responsibility away from women?<sup>234</sup>*

In addition to the limited availability of care, an absence of social security generally may impede access to formal work.<sup>235</sup> According to recent data “many of the workers in the informal economy are among the 55 per cent of the global population who do not enjoy access to social protection at all, while many others are only partially protected.”<sup>236</sup> As a result of a lack of coverage, workers “cannot count on access to health care and a basic level of income security.” Consequently, many “are locked in a vicious cycle of vulnerability, poverty and social exclusion, which constitutes an enormous challenge (...) to their individual welfare and enjoyment of human rights.”<sup>237</sup>

These and similar issues were raised by several respondents. In **Colombia**, for instance, it was observed that “more than 80 per cent of rural workers are informal,” meaning that “they do not contribute to social security.” Despite the adoption of positive legislation regulating the entitlements of formal workers, “these do

<sup>230</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>231</sup> In Great Britain, for instance, one respondent noted: “the role of women in the home is not where I would particularly like it to be. But you know the role of childcare, infrastructure to support women, to be able to succeed in the workplace – those perennial barriers that still face women.” See Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>232</sup> Equal Rights Trust interview with a former member of the Colombian Farmers Society; and Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia.

<sup>233</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>234</sup> Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, feminist activists and members of the Gamana Mahila Samoocha, an informal women's collective, India.

<sup>235</sup> See, for example, Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

<sup>236</sup> ILO, *Extending Social Security to Workers in the Informal Economy: Lessons from International Experience*, 2021, p. 3.

<sup>237</sup> *Ibid.*, p. 3.

not apply to the countryside due to the (...) problem of informality.<sup>238</sup> In **Tunisia**, one respondent noted their engagement with a person who had lost a finger while working as a machinist. Nothing “came out of it,” they explained. A worker is unable to receive support “because she works without contract, she does not have social security, she is exploited.”<sup>239</sup> Particular concern was raised regarding the situation of migrant workers; Tunisian respondents explained that migrants are often prevented from accessing formal employment and so work informally, thus being excluded from social security measures.<sup>240</sup>



A member of the Zimbabwe Chamber of Informal Economy Association working in her home. Credit: Solidarity Center / Jemal Countess

A range of factors may contribute towards workers' exclusion from social security programmes, many of which mirror exclusions from formal work.<sup>241</sup> This includes, inter alia, restrictive entitlement provisions tied to the demonstration of an “identifiable employment relationship”; a lack of rights awareness; weak enforcement and implementation; fragmentation of the legal framework; and a lack of organisation.<sup>242</sup> Without sufficient social security guarantees, many individuals may rely upon informal work as a means to generate income. This, in turn, may exacerbate situations of vulnerability. Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries of the State of São Paulo from **Brazil**, explained that if an informal worker “doesn't have social protection, he doesn't have social security. If he falls off his motorcycle and is away for a month, his salary is zero. Food is zero.”<sup>243</sup>

In some States, respondents indicated that social security benefits had been made available to individuals

<sup>238</sup> Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia. To address these issues, the same respondent identified the need for universal social protection.

<sup>239</sup> Equal Rights Trust interview with a senior officer of a Non-Governmental Organisation working for the protection of migrants, Tunisia.

<sup>240</sup> Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

<sup>241</sup> See further the discussion in Chapter 4 of this report.

<sup>242</sup> ILO, *Extending Social Security to Workers in the Informal Economy: Lessons from International Experience*, 2021, pp. 12-14.

<sup>243</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil. See also Equal Rights Trust interview with Olívia Pasqualetto, Professor of Labour and Social Security Law at FGV São Paulo Law School, Brazil.

working in particular fields. However, there were also significant disparities in the level of entitlement between those engaged in formal and informal work. In **Brazil**, for instance, it was noted that unemployment insurance for common urban employees was double that available to domestic workers<sup>244</sup> Disparities may also exist within the informal economy, with particular forms of work – such as domestic work – undervalued as a consequence of harmful gender stereotypes. As one respondent from **India** explained:

*There is [a] substantial difference between what welfare entitlements are [available] for workers in various categories of informal work. Among informal workers, the stereotypes in society, informed by patriarchal values, play out in the manner in which welfare is defined. Thus, women are viewed essentially as having a secondary role within the family as economic providers; their role is essentially seen as care givers. Therefore, in sectors employing primarily women, as is the case with domestic work, the work is seen as unskilled and not bringing much value. Consequently, wages are low. This stereotype also informs social welfare for women. As they are considered as 'dependent', they are not considered on par with men in the family for welfare entitlements. Thus, for instance, women who are restricted to the home because they have to provide care for [persons with disabilities] are provided Rs.600 per month under the State Aswasakiranam scheme. This is a gross devaluation by the state of the task provided by these women.<sup>245</sup>*

While several respondents from different regions of **India** were able to identify certain forms of social security that informal workers could benefit from, many also noted the difficulties that individuals experience in trying to gain access to these benefits in practice. As Chirayu Jain, labour lawyer and trade union activist, explained: “while all workers in the informal sector in Delhi are eligible for pension of Rs.2500 per month, the reality is that many workers are not able to avail of the benefit. The workers require the certification of the local Parliamentary Member in the state government (MLA); the MLAs work on a system of quota of certificates issued.”<sup>246</sup> A second respondent, Geeta Menon with the Domestic Workers Rights Union, noted the difficulties they had experienced in trying to increase social security guarantees for informal workers based in Karnataka. While groups within the region had been advocating for the establishment of a “domestic workers board” to oversee social security and related concerns, the Labour Department had reportedly refused to earmark funds for the constitution of this board because of a lack resources.<sup>247</sup> In at least one case, respondents also expressed concern about forms of social security that had been made available by the State, noting that they may have the effect of reinforcing gender-based stereotypes.<sup>248</sup>

The discriminatory practices and inequalities that informal workers face in their work are heavily influenced by broader societal, structural inequalities. Respondents identified these structural inequalities as having a significant effect on the ability of certain groups to enter into work, the type of work they can choose, and how they are treated while working. These social factors both force individuals into the informal economy and then serve to impede formalisation.

### 4.2.3 The Role of Trade Unions

In addition to legal and policy measures, the ILO has noted the importance of trade unions in facilitating decent work for those within the informal economy. Recommendation 204 calls on States to “create an enabling environment for employers and workers to exercise their right to organize and to bargain collectively and to participate in social dialogue in the transition to the formal economy.”<sup>249</sup>

<sup>244</sup> Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil.

<sup>245</sup> Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India.

<sup>246</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi, India.

<sup>247</sup> Equal Rights Trust interview with Geeta Menon, Joint-Secretary of the Domestic Workers Rights Union in Bangalore, India.

<sup>248</sup> As noted by one respondent from India, “the Prathyasha [social security] scheme of the government provides a fixed financial assistance to the women getting married; the implicit assumption is the woman’s main objective is to get married and become a good caregiver. This is the stereotype that the state welfare scheme in effect reinforces, denying her key role as economic contributor to the family and the state economy.” Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India.

<sup>249</sup> ILO, Transition from the Informal to the Formal Economy Recommendation No. 204, 2015, para. 32.

The importance of trade unions in asserting workers' rights and in advancing the protection, enforcement and implementation of the right to non-discrimination was noted by a number of respondents<sup>250</sup> and is discussed in some detail above, in Chapter 3 of this report. It is difficult to secure these benefits for workers in the informal economy because of the challenges associated with unionisation in an unregulated part of the economy. The nature of informal work – which is frequently individualised, dispersed or isolated – means that unionisation or collective organising can be very difficult to achieve.<sup>251</sup> Moreover, while international law establishes clear rights to form, join and participate in trade unions,<sup>252</sup> national legal frameworks sometimes prevent their establishment and operation – in particular in the informal economy – resulting in exclusion from “social dialogue institutions and processes” and the denial of “access to a range of other rights at work.”<sup>253</sup>

In many jurisdictions, respondents noted that individuals engaged in informal work face difficulties organising. Many types of informal work are characterised by power imbalances, dependence and social isolation, all of which present serious barriers to workers organising and attempting to alter their conditions of employment. Many workers are technically self-employed or otherwise work separately from others. This makes communicating between themselves and organising particularly difficult. This is then exacerbated as the precarious nature of informal work and certain aspects of the types of work in the informal economy – such as the provision of accommodation, visa sponsorship or exclusion from the public eye – make workers more dependent on their employers. Workers cannot risk losing these benefits and so are reluctant to unionise out of fear of employer retaliation. Furthermore, because informal workers are situated outside the legal framework, the law does not guarantee them the same rights to form trade unions as it does those in the formal economy.

There are also significant external challenges to organisation that undermine the possibility of collective action. A number of interviewees described what one called “extreme employer hostility to unionisation.”<sup>254</sup> In **Colombia**, Diana Paola Salcedo, the ILO national officer for the implementation of the peace process, noted that there are “systemic anti-union behaviours” within the banana agricultural sector. When a union is established, “they make calls to the families of the workers, the supervisor calls the wife or mother so that the women of the families of these men can persuade them not to unionise.” In respect of the flower sector, this respondent noted that “women who join unions are persecuted.”<sup>255</sup> Other respondents indicated that employers would deny access to trade union representatives as a means to impede organisation efforts.<sup>256</sup>

In the absence of trade union organising in the informal economy, workers lack an essential mechanism to challenge discriminatory treatment. Delaíde Arantes, Justice at the Superior Labor Court and National Coordinator of the Managing Committee of the Safe Work Program in **Brazil**, explained that “there is no association of informal workers. So, the informal workers [...] don't have a communication channel.”<sup>257</sup> Similarly, in **South Africa**, a respondent explained that while “some workers not belonging to unions might know their rights and can stand up against infringements [...] most won't.”<sup>258</sup> The need for unionisation was also

<sup>250</sup> See, for instance, Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>251</sup> Sandra Fredman, *The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal: Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life*, 2014, p. 45.

<sup>252</sup> See, for instance, ICESCR, Article 8.

<sup>253</sup> ILO, Resolution and Conclusions Concerning Decent Work in the Informal Economy, ILC, 90th Session, 2002, Conclusions, para. 17.

<sup>254</sup> Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>255</sup> Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia.

<sup>256</sup> See, for example, Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa; and Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>257</sup> Equal Rights Trust interview with Delaíde Arantes, Justice at the Superior Labor Court and National Coordinator of the Managing Committee of the Safe Work Program, Brazil.

<sup>258</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

stressed by other respondents in these two countries and by interviewees in Great Britain.<sup>259</sup> Where individuals are not unionised, it may be difficult to initiate legal challenges<sup>260</sup> or overcome the power imbalances that may exist between workers and employers.<sup>261</sup>

### Promising Practice: The Self-Employed Women's Association

The Self-Employed Women's Association (SEWA) is a registered trade union of self-employed women working in the informal economy in India. SEWA supports the organisation of women and their campaigns for fair conditions of employment and recognition of the work they do as worthy of adequate compensation. SEWA has been involved in many advancements in labour rights for self-employed women, including the ILO Home Work Convention and the Street Vendor's Act in India.

Nalini Nayak, General Secretary of SEWA Kerala, explained to us that the organisation works to advance the rights of women in two main ways. First, it supports the collectivisation of women in the informal economy, helping workers in the informal economy to form unions to enhance their visibility and voice in the labour market. They also collectivize to increase their activity and protect their incomes by forming cooperatives, or producer companies. Second, the Union works on lobbying and campaigning to change laws and improve their implementation. SEWA conducts interventions and research to support these efforts by illustrating the issue and evidencing effective solutions.

SEWA's work demonstrates the potential of trade unions in improving protections for informal workers. Ms Nayak highlighted several specific examples of SEWA's impact. One example related to obtaining minimum-wage protection for domestic workers. Ms Nayak explained that the type of work that many of SEWA's member do – cooking, cleaning, laundry services or care of the old and children in another's home – were not protected by minimum-wage laws. This is because this type of labour was not considered "work" that was worthy of a wage and generally done by women in their own homes. As it is often women who undertake these jobs, the domestic work they did was considered in to be in some ways the "same" as the activities they would undertake for their families. Alternatively, these women are not viewed as the primary breadwinners and so not in need of compensation in the same way as men. By creating their own collectives and after a minimum training to professionalize their services, the domestic workers are able to secure minimum-wages, timely payments and dignified treatment to address a major driver of gender discrimination in the workforce.

Another success arose through SEWA's work to advocate for improved protections from workplace sexual harassment laws – specifically the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act (POSH) – and their application to the informal economy. Ms Nayak explained that informal workers were not originally protected under this law to the same degree that formal workers are, as the laws were not intended to apply to the informal economy, and the private home was not considered a workplace as in the case of domestic workers, and the street as in the case of street vendors. There were also significant issues with the enforcement of POSH. Primarily, the Act requires employers to establish an internal complaints system for

<sup>259</sup> See Equal Rights Trust interview with a senior official at Unison, Great Britain; Equal Rights Trust interview with Dr Abigail Osiki, a post-doctoral research fellow at the Fairwork Project, South Africa; and Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor's Office, Brazil.

<sup>260</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain.

<sup>261</sup> As one expert from South Africa noted, "employers are very well organised. It is very easy and not very expensive for even small employers to buy legal expertise and services. But for the poorer sections, farm workers, seasonal workers, domestic workers, there is no way of accessing services." See Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa,



formal workers, but it also provides for an alternative enforcement mechanism in Local Complaints Committees (LCC) for informal workers. Ms Nayak explained that sexual harassment claims are rarely raised by informal workers, and the LCC lacks the knowledge to effectively challenge harassment in the informal economy. SEWA, alongside other organisations, identified this issue and started a campaign to raise awareness of the existence of workplace harassment laws and began to conduct research to present to enforcement mechanisms to help them identify instances of workplace harassment within the informal economy.

Through collective action, organising to undertake awareness-raising campaigns, advocacy and research, SEWA has played – and continues to play – a vital role in improving the working conditions of women domestic and informal workers and thus in addressing gender discrimination in the workplace.

Many respondents highlighted the role that trade unions play in improving the rights of workers and their conditions of employment. Unionisation is an important means through which workers can advocate for change against both their employers and the State. Where they can be established, unions can be similarly beneficial to workers in the informal economy; but for the reasons outlined above, it is extremely difficult – if not impossible – for informal workers to organise. As part of the formalisation of the informal economy, States must enable workers to collectivise by addressing those barriers which exist and providing full legal protection for participation in trade unions.

### **CONCLUSION: The Informal Economy**

Through their affirmation of the 2030 Agenda for Sustainable Development and their ratification of UN human rights instruments and ILO conventions, States have made clear commitments to respect, protect and fulfil the right to work and employment, which should be afforded to all persons on a basis of equality.

Unfortunately, in many States, individuals find themselves engaged in informal work, which is characterised by decent-work deficits ranging from unregulated working hours and dangerous working conditions to the denial of a range of work-related benefits and rights entitlements. As labour laws have evolved around the identification of an employment relationship, individuals who do not meet the legal definition of an employee, and those whose services are procured on a contractual or agency basis, often find themselves outside the scope of formal legal protections. For domestic and care workers, the devaluation of work traditionally associated with women and the socially isolated nature of their employment often leave them forgotten by labour legislation and outside the scope of the legal framework. In the case of agricultural workers, they are often especially dependent upon their employers and are unable to challenge decent-work deficits. Finally, labour legislation has not developed fast enough to protect platform workers and those workers who do not comfortably fit the traditional employer–employee model and does not provide them adequate protection. There has been a failure to recognise and redress misclassification and ensure non-standard workers, including platform workers, can access and enjoy their rights. While positive progress towards formalisation has been made in some States, certain forms of work are particularly likely to fall outside the scope of regulation. Because of broader inequalities within society, disadvantaged groups are often highly represented within these fields, and are left unable to challenge discrimination where it occurs; exacerbating the harms they experience.

To address these gaps, the ILO and UN treaty bodies have urged States to facilitate the transition of individuals engaged in informal work to the formal economy. This requires a concerted range of action, including the development of a holistic legal and policy framework that places the elimination of discrimination and promotion of equality at their centre. In principle, equality legislation can help facilitate this process by challenging discriminatory exclusions and drawing attention to the different situations of differently situated groups. If the transition to formality is to be successful, however, it is clear that protections within the formal economy must be robust and robustly implemented. In practice, a range of factors impede equal work outcomes, ranging from the definitions of discrimination adopted under national law through to issues of

enforcement, implementation, knowledge and awareness.

## RECOMMENDATIONS

- ▶ States should both increase the protection of workers in the informal economy and formalise informal work, in line with the ILO's Transition from the Informal to the Formal Economy Recommendation.
- ▶ States must expand legal coverage to include informal workers and ensure that they are subject to comprehensive and effective legal protection on the same basis as those in the formal economy.
  - ▷ States must take measures to promote and realise the fundamental principles and rights at work for those in the informal economy, including the right to non-discrimination, all rights guaranteed in the fundamental ILO conventions and under international human rights law.
  - ▷ Where necessary, laws must be revised to reflect and respond to the current and new forms of employment to ensure that no workers are left unprotected.
  - ▷ All informal workers should be granted social security, minimum-wage protection, maternity protection and other decent working conditions and public services on an equal basis and in line with those available to formal workers.
- ▶ States must take effective measures to address the structural inequalities that force individuals into the informal economy. This includes, but is not limited to:
  - ▷ Adopting welfare and social security policies that enable participation in the formal economy, including affordable and accessible childcare and other care services, education and training opportunities.
- ▶ States must empower workers to form trade unions and other collective groups and ensure they are able to freely challenge discriminatory and unfair labour practices, including through taking measures to promote and realise the right of freedom of association, creating an enabling environment for workers to exercise their right to organise.
- ▶ States must also adopt and effectively implement comprehensive anti-discrimination laws, consistent with the requirements of the United Nations *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, in order, inter alia, to provide a framework to address the patterns of discrimination which force individuals into informal work.

# 5. Comprehensive Protection from Discrimination

To be guaranteed in practice, these rights must be protected in law: if workers are to enjoy the right to non-discrimination in work and employment, the legal framework must provide effective and comprehensive protection from discrimination. This requires that the law prohibit all forms of discrimination, on the basis of all – and any combination of – grounds recognised at international law. It requires that discrimination be prohibited in all areas of life regulated by law, including all aspects of work and employment. Any restrictions on the right to non-discrimination must be established by law and must represent a necessary and proportionate means of achieving a legitimate aim.

In 2023, the Office of the UN High Commissioner for Human Rights published the *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*.<sup>262</sup> The Guide is the first definitive, comprehensive guidance from the United Nations on the laws which States must pass to meet their legal obligations in respect of the rights to equality and non-discrimination. Marking the launch of the Guide, a group of more than thirty UN Special Procedure Mandate Holders issued a joint statement urging all UN member States to “prioritise enacting, enforcing and implementing anti-discrimination legislation” to give effect to their international legal obligations.<sup>263</sup>

The Guide establishes clearly that “States must enact comprehensive anti-discrimination legislation in order to meet their obligations under international human rights law to respect, protect and fulfil the rights to equality and non-discrimination for all.”<sup>264</sup> It sets out the core minimum standards States must meet if their legal frameworks are to be effective in eliminating all forms of discrimination and achieving equality for all. As it sets out, international human rights law requires that anti-discrimination legislation:

- ▶ Prohibit all forms and manifestations of discrimination on the basis of an extensive and open-ended list of grounds and in all areas of life regulated by law.
- ▶ Provide explicit definitions of all forms of discrimination that are consistent with the definitions recognised under international human rights law.
- ▶ Explicitly permit, require and provide for the adoption of positive action measures designed to make progress towards the realisation of equality for persons and groups that experience or are exposed to discrimination and disadvantage.
- ▶ Operationalise the rights to equality and non-discrimination within the public and private spheres by ensuring accessibility and establishing equality duties.
- ▶ Provide for: effective remedy, including sanctions that are effective, dissuasive and proportionate; recognition, compensation and restitution for survivors; and relevant institutional and societal rem-

<sup>262</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023.

<sup>263</sup> OHCHR, “Comprehensive anti-discrimination legislation must be a priority, say UN experts ahead of Universal Declaration anniversary,” 7 December 2022.

<sup>264</sup> *Ibid.*, p. x.

edies.

- ▶ Establish the necessary procedural safeguards and adjustments to ensure access to justice, including, but not limited to, provision for the shifting of the burden of proof after a prima facie case of discrimination has been made by a complainant and provision for the prohibition of victimisation.
- ▶ Provide for the establishment of an independent, specialised equality body with sufficient resources, functions and powers to ensure its effectiveness.
- ▶ Mandate the adoption of other implementation measures necessary to address structural discrimination and make progress towards equality. This should include the use of equality impact assessment in all aspects of public law and policy to identify and avert any discriminatory policy impacts before they occur and to assess and ensure the necessary impacts on realising equality.<sup>265</sup>

These specific elements of the legal framework can be grouped into three overarching requirements. **First**, the law should prohibit all forms of discrimination in all areas of life regulated by public authorities on the basis of an open-ended and extensive list of characteristics.<sup>266</sup> **Second**, the law should ensure effective access to justice, remedy and sanction for rights-holders, through the establishment of enforcement institutions;<sup>267</sup> the development of accessible, accountable, available, affordable and good quality justice mechanisms; the adaptation of rules of evidence and proof; and the provision of “effective and timely remedies.”<sup>268</sup> **Finally**, national legislation should expressly permit, mandate and facilitate the adoption of positive action<sup>269</sup> and preventative measures – including equality duties and equality impact assessments – designed to “identify and avert any discriminatory policy impacts before they occur and ensure the necessary impacts on realising equality.”<sup>270</sup>

## 5.1 Scope of the Right to Non-Discrimination

This new UN guidance sets out unequivocally that it is only through dedicated, comprehensive anti-discrimination law that States can fulfil the full range of their legal obligations to respect, protect and fulfil the right to non-discrimination. To this extent, the Guide reflects a growing consensus on the need for comprehensive anti-discrimination legislation which has been developing at the international and regional levels for more than two decades. The ILO has called for the adoption of such a law to address discrimination within the employment sphere and to challenge broader inequalities in society that may impede decent-work outcomes.<sup>271</sup> Each of the nine core UN human rights treaty bodies has issued similar recommendations, noting the necessity of comprehensive anti-discrimination legislation to fulfil the requirements of their respective conventions.<sup>272</sup>

Yet despite this clear international consensus, it is estimated that less than half of all States in the world have enacted comprehensive anti-discrimination laws. Many States have constitutions prohibiting discrimination, and a large group have also enacted laws prohibiting discrimination or aiming to advance equality for specific groups, such as women or persons with disabilities. Some States include non-discrimination pro-

<sup>265</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. xi.

<sup>266</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 17-55.

<sup>267</sup> *Ibid.*, pp. 88-90 and 101-14.

<sup>268</sup> *Ibid.*, pp. 88-90 and 75-84. See also Committee on the Elimination of Discrimination against Women, General Comment No. 33, UN Doc. CEDAW/C/GC/33, 2015, broadly and para. 11.

<sup>269</sup> *Ibid.*, pp. 56-74, 115-20, and 190-201.

<sup>270</sup> *Ibid.*, pp. xi, 66-74, 117-19, and 192-201.

<sup>271</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109, available at: [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf).

<sup>272</sup> See United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 4-5. See also Committee against Torture, Concluding Observations: Mongolia, UN Doc. 2011, CAT/C/MNG/CO/1, paras. 25(a) and (c); and OHCHR, “Comprehensive anti-discrimination legislation must be a priority, say UN experts ahead of Universal Declaration anniversary,” 7 December 2022.

visions in laws governing particular areas of life, including in particular in the area of work and employment. However, in the absence of dedicated, comprehensive anti-discrimination legislation, the legal frameworks in these countries are characterised by gaps and inconsistencies in protection. In effect, the scope of the right to non-discrimination is limited, meaning that States fail to prohibit and provide protection from all forms of discrimination.

The scope of the right to non-discrimination can be considered along four dimensions: (1) the personal scope of the right and the grounds of discrimination; (2) the forms of discrimination and prohibited conduct; (3) the material scope of the right and the areas of life in which discrimination is prohibited; and (4) the provisions for justification and exceptions or limitations on the right. In many States, discrimination is prohibited on the basis of a narrow range of grounds in limited areas of life. While a large number of States prohibit discrimination in employment, in many cases, such laws list only a small number of grounds of discrimination, meaning that certain groups enjoy little or no protection. Equally, many non-discrimination provisions in labour legislation do not define and prohibit all forms of discrimination, resulting in restrictive interpretations of the right by enforcement bodies, and the failure to provide effective protection from indirect discrimination, for example. Moreover, in States without comprehensive anti-discrimination legislation, the material scope of the right can be limited, either because laws guaranteeing equality for certain groups do not extend to all areas of employment, or because certain roles, sectors or types of employment are the subject of exceptions or exclusions in the area of work and employment, or through a failure to prohibit discrimination in other areas of life that undermines the effectiveness of rights protections. More broadly, failure to prohibit discrimination in all areas of life regulated by law can result in inequalities such as a lack of social security, the absence of childcare or a lack of education, each of which can negatively impact the capability of individuals to gain their living through work "freely chosen or accepted."

In order to meet their international law obligations, States must provide comprehensive protection from discrimination. This means prohibiting all forms of discrimination – direct discrimination, indirect discrimination, harassment, failure to make reasonable adjustments and segregation – on the basis of an extensive and open-ended list of grounds of discrimination and in all areas of life regulated by law.<sup>273</sup> Legal frameworks which fail to prohibit discrimination on the basis of all – and any combination – of the grounds recognised at international law, which do not define and prohibit all forms of discrimination, or which do not apply in all areas, aspects and stages of employment leave gaps which prevent those exposed to discrimination from accessing justice and remedy.

To differing extents, each of the States examined as part of this report has adopted legislation prohibiting discrimination, including in the area of work and employment. In practice, however, there is a variety of practice among States in how they legislate to protect and enforce the right, and so give effect to their international law obligations. In all but one of the countries under review, non-discrimination or equality guarantees are included under the national constitution, although in practice disparities may exist in the enforceability of these provisions.<sup>274</sup>

Two States have adopted dedicated, multi-ground anti-discrimination legislation that applies in multiple areas of life. In **Great Britain**, discrimination is prohibited under the Equality Act, which was brought into force in 2010, consolidating hundreds of different laws into a single piece of legislation.<sup>275</sup> In addition to constitutional protection, **South Africa** has adopted two principal equality laws: the Promotion of Equality and Prevention of Unfair Discrimination Act, and the Employment Equity Act, which specifically regulates the area of employment. In **Brazil** and **Colombia**, prohibitions of discrimination are set out in relevant employment legislation that is combined with constitutional provisions, specific equality legislation relating to particular groups, and criminal law prohibitions. Comparatively, the lowest levels of protection are afforded in **India** and **Tunisia**. While both States have constitutional equality guarantees and laws that prohibit discrimination on certain grounds in particular areas of life, these laws are patchwork and fragmented, and respondents from

<sup>273</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 17-55.

<sup>274</sup> The exception being Great Britain, which does not have a single paramount constitutional document.

<sup>275</sup> A different legal framework is operative in Northern Ireland, the discussion of which falls beyond this report.

each jurisdiction expressed concern regarding the overall strength of these legal frameworks.<sup>276</sup>

## 5.2 Personal Scope

Anti-discrimination law “centres on protection from harm that arises in connection with a status, identity, characteristic or belief – collectively referred to as ‘grounds’ of discrimination.”<sup>277</sup>



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The first human rights conventions listed a relatively small number of protected characteristics – the ICESCR, for example, states that the rights in the Covenant – including the right to work – should be guaranteed without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>278</sup> This list contained a number of notable omissions, including age, disability and sexual orientation. Over time, the Committee on Economic, Social and Cultural Rights and other UN expert bodies responsible for interpreting and overseeing the implementation of international human rights instruments have recognised many other grounds as forms of “other status.” Summarising these developments, the OHCHR’s Practical Guide identifies over thirty different grounds that are expressly listed under the core UN human rights treaties or recognised as forms of other status in recent treaty body general comments on the rights to equality and non-discrimination.<sup>279</sup> In addition to explicitly listing these characteristics, States should maintain an “open-ended” list of grounds, allowing courts and other enforcement bodies to recognise characteristics which are not explicitly listed.<sup>280</sup> Where national legal frameworks do not prohibit discrimination on all internationally recognised grounds, or use a closed or exhaustive list of grounds which does not permit the recognition of new characteristics, there will inevitably be gaps in protection: any individual subject to discrimination on an unrecognised ground will be unable to challenge the harm they have experienced and receive remedy, while duty-bearers will have little incentive to prevent or

<sup>276</sup> In India, for instance, it was noted that “there are no regulations to address discrimination in employment (...) based on religion or disabilities.” A second respondent explained that “while the State has laws to follow to prevent discrimination in employment, and violence at work, the legal machinery is very weak.” In Tunisia, one respondent noted that “the labour code is general, it does not give any specific standard concerning the protection of minorities or persons subject to discrimination. The only text we have is Law No. 50 and (...) it is a law that remains very poorly applied in Tunisia until now.” Similar concerns were expressed by other interviewees. See, respectively, Equal Rights Trust interview with an expert on labour law and regulations, India; Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India; and Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Court of Cassation, Tunisia.

<sup>277</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 19.

<sup>278</sup> ICESCR, Article 2(2).

<sup>279</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. xii and 23.

<sup>280</sup> *Ibid.*, pp. xii, 19, and 20-23.

eliminate discriminatory policies or practices on this basis.

Across the six jurisdictions, respondents identified a diverse practice regarding the personal scope of anti-discrimination provisions. The range of characteristics recognised in each State varies significantly. In some countries, such as **India**, a relatively small list of explicit grounds is set out under the national Constitution, with additional grounds – such as pregnancy and maternity, gender identity, disability (including genetic conditions) and health status – identified under discrete pieces of national legislation. In other countries, such as **South Africa**, an expansive list of characteristics is included under national law, clarifying the equality and non-discrimination obligations of duty-bearers towards members of these groups.

In those countries that do not possess dedicated, multi-ground anti-discrimination legislation, different legal protections may be established for different groups under different laws. As a result of this fragmentation of the legal framework, normative gaps may occur – meaning that certain groups are entitled to protection in some areas of life, but not others, while some groups may find themselves excluded from the scope of protection entirely. Because of the different enforcement mechanisms and remedies established under these laws, certain groups may also have comparatively better or worse experiences of justice than others.

It must be noted that, in some jurisdictions, the exclusion or omission of certain protected grounds from anti-discrimination laws or provisions is accompanied by the existence of laws and policies which are themselves discriminatory. At their most severe, discriminatory laws criminalise certain groups. Tunisia, for example, criminalises same-sex sexual activity between men and between women.<sup>281</sup> In addition to directly violating the right to non-discrimination, such laws act as discriminatory barriers to the non-discriminatory enjoyment of the right to work by preventing LGBT+ persons from participating in society on an equal basis. Provisions in labour laws in various countries can also be directly and indirectly discriminatory: in India, for example, women are prohibited from undertaking certain forms of work in factories, ostensibly in the interests of their own safety.<sup>282</sup>

The maintenance of laws which discriminate – directly or indirectly – is in direct contravention of States' obligation to respect the right to non-discrimination by refraining from engaging in discrimination. States must take immediate measures to repeal and replace laws and policies which discriminate, alongside measures to ensure that anti-discrimination laws provide comprehensive protection on all grounds recognised at international law.

These issues were highlighted by respondents in different jurisdictions but were most apparent in those with patchwork protections. In **Tunisia**, interviewees noted that migrant workers, religious minorities and members of the LGBTQI+ community are de facto excluded from the scope of anti-discrimination law due to gaps in national legislation, with a resultant impact on their right to work.<sup>283</sup> Interviews went on to highlight the consequences of this exclusion: "we often see dismissals of work contracts based on sexual orientation."<sup>284</sup> A separate interviewee noted that LGBTQI+ workers may "try to hide their sexual orientation" in order to avoid discrimination,<sup>285</sup> an issue compounded by the absence of legislative protection. In **India**, it was noted that the Constitution does impose obligations on the State to "ensure equality for all citizens." However, one respondent explained that these legal provisions have not been "developed to become suffi-

<sup>281</sup> For further discussion see Human Dignity Trust, *Country Profile: Tunisia*, available at: <https://www.humandignitytrust.org/country-profile/tunisia/>

<sup>282</sup> The Factories Act, 1948, Act No. 63 of 1948, as amended by the Factories (Amendment) Act, 1987, Act 20 of 1987, sections 27 and 66.

<sup>283</sup> As one respondent explained, "The labour code devotes a section to the conditions for hiring foreign employees, but it focuses more on the conditions of their hiring than their protection. [...] In the event of discrimination because of their nationality, they cannot invoke this difference to seek protection." Another added, "religious minorities, LGBT have no law that protects them. Laws that protect against racism or GBV have not included other groups. Nor do the laws protect migrants in Tunisia." See, respectively, Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation; and Equal Rights Trust interview with Rachad Massoud, President and co-founder of Ettalaki.

<sup>284</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>285</sup> Equal Rights Trust interview with Mariem Klouz, appeal lawyer, Tunisia.

ciently effective" in practice.<sup>286</sup>

In those countries where discrimination is prohibited only under ground specific equality legislation, or where the list of grounds is closed, national enforcement actors may be precluded from considering claims brought in respect of other grounds. This point was raised by a number of respondents from **Great Britain**. Under the Equality Act 2010, nine characteristics are expressly recognised as protected: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation, and pregnancy and maternity. Respondents noted the inadequacy of this list,<sup>287</sup> with some suggesting the inclusion of new characteristics – such as socio-economic or poverty status, class, and migration status – to address shortcomings in the existing legal regime.<sup>288</sup> Other participants expressed concern regarding the use of terminology within the Act. In particular, one respondent noted that the listing of "gender reassignment" as a protected characteristic, rather than the internationally recognised "gender identity" or "gender expression,"<sup>289</sup> was outdated.<sup>290</sup> In this connection, it was suggested that the term should be updated "to make it clear that the medical model [of gender recognition] is discriminatory and not acceptable."<sup>291</sup>

Even in those States that maintain open lists of grounds, the omission of a particular characteristic can have practical consequences. For instance, the Office of the UN High Commissioner for Human Rights has noted that the failure of many international human rights instruments to expressly list "age" among the list of protected grounds may "send the message that [it] is of lesser importance than the listed grounds and may [therefore] be subjected to less rigorous scrutiny."<sup>292</sup> Similar concerns were expressed by respondents at the national level. In recent judicial decisions, **South African** courts have recognised "poverty status" as a protected characteristic. Yet, despite these positive developments, one interviewee explained: "we've got that recognition, but it hasn't really been followed up by other cases; it hasn't really been taken up in any significant way. And given how unequal our society is, you would really expect class-based discrimination or poverty-based discrimination to play a role in many more cases."<sup>293</sup>

International law recognises that discrimination may occur on the basis of a single ground, or on the basis of a combination of grounds. Multiple discrimination may be cumulative – that is, occurring "on two or more, separate, grounds" – or intersectional, where multiple grounds "interact with each other in a way" that results in "distinct and specific discrimination."<sup>294</sup> Individuals may also experience discrimination because of a perception that they belong to a protected group (discrimination based on perception) or because of their association with such a group (discrimination based on association). If anti-discrimination law is to be effective, each of these particular manifestations of discrimination should be prohibited under national law.<sup>295</sup>

In particular States, some of these manifestations of discrimination are directly covered by national legislation. For instance, the **South African** Employment Equity Act prohibits discrimination on the basis of "one or more grounds," thereby extending protections against forms of intersectional discrimination. In other

<sup>286</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

<sup>287</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>288</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain; Equal Rights Trust interview with a senior lecturer in law at the University of Bristol, Great Britain; Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>289</sup> See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 21 and 34.

<sup>290</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>291</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>292</sup> See Office of the UN High Commissioner for Human Rights, Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law in Relation to Older Persons: Working Paper, 2021, para. 106.

<sup>293</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>294</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. xii and 27-28.

<sup>295</sup> *Ibid.*, pp. xii and 25-26.



countries, such as **Great Britain**, national courts have identified protections against discrimination based on association or perception in the adjudication of individual disputes.<sup>296</sup> However, it is clear that a lack of recognition within national legislation can present barriers to litigants. As one respondent from **Brazil** explained, “there is nothing explicit in the law that covers” intersectional discrimination or discrimination based on association. While “there is room for certain approaches to be possible,” judges are often “accused of judicial activism,” which limits the possibility of creative judicial interpretations.<sup>297</sup>

Several respondents from **Great Britain** discussed the failure of the State to bring into force sections of the Equality Act dealing with intersectional discrimination, which may operate as a significant barrier to protection. As a senior official of Unite the Union explained, “we have had examples of cases, particularly of Black women, whose discrimination is an element of both race and gender, and the defence of the employer was: well, white women are treated the same, so it’s not sex discrimination, and black men are treated the same, so it’s not race discrimination, which is just not acceptable.”<sup>298</sup> While, the interviewee noted, it might be possible to challenge this type of discrimination by bringing a case under one ground or another, “it shouldn’t be like that, because it’s clear it’s a particular form of discrimination that needs to be acknowledged and recognised.”<sup>299</sup> A separate respondent noted the practical challenges of establishing rules governing intersectional discrimination claims. However, the same respondent suggested that it was nonetheless important to try: “even if we get it slightly wrong in the first place, it would be better to start getting some hard cases decided in order to work forward.”<sup>300</sup>

In all of the jurisdictions where research for this study was conducted, experts identified gaps in the personal scope of the right, though there are differences of degree: in South Africa, for example, the open-ended list of grounds allows for close conformity with international law. Few experts in this jurisdiction identified the narrow personal scope of the right as a key barrier to the enjoyment of the right to non-discrimination. Conversely, in India and Tunisia, States without comprehensive anti-discrimination laws, large swathes of the population are left without effective protection, because the law omits or excludes certain grounds. Where the personal scope of the right to non-discrimination is limited in this way, it will be the pre-eminent barrier preventing the enjoyment of the right for many.

### Promising Practice: Stop the Discrimination Coalition

The Stop the Discrimination Coalition (STDC) is an alliance of civil society organisations in the Philippines which have come together to promote the adoption of comprehensive anti-discrimination law, in line with international legal standards. The members of the coalition – who together represent a range of different groups exposed to discrimination – recognise the need for a unified, holistic, comprehensive and intersectional protection from discrimination. The members of the coalition work together to enact legislation that prohibits all forms discrimination, on all grounds and in any sector, and which contains a strong implementation and regulatory framework.

Ging Cristobal, co-chair of the STDC, explained the work of the coalition, and its impacts. As set out above, without comprehensive anti-discrimination legislation, gaps and inconsistencies within the law prevent the effective implementation of non-discrimination guarantees. This was a point reiterated by Ms Cristobal, who explained that the patchwork nature of anti-discrimination legislation in the Philippines creates significant deficiencies in the legal framework. There

<sup>296</sup> See, for example, *Chief Constable of Norfolk v. Coffrey* [2019] EWCA Civ 1061.

<sup>297</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>298</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>299</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>300</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

are region-specific anti-discrimination ordinances and some anti-discrimination provisions in laws governing particular areas of life, but these are in the minority and do not cover the whole of the Philippines. Even laws which nominally have the purpose of advancing equality for particular groups – such as women – do not define and prohibit all forms of discrimination and provide access to remedy. To rectify these issues, the members of the STDC are working to build consensus on the need for the adoption of comprehensive anti-discrimination legislation.

The STDC has made significant progress in advocating for comprehensive anti-discrimination legislation and has developed a draft bill. The bill has not yet been enacted into law, and the STDC is working to obtain the political support necessary to do so. Ms Cristobal explained that there are several barriers to obtaining this support and adopting the bill into law.

The main challenge identified is a lack of support and understanding among politicians as to the need for this comprehensive approach. Parallel campaigns for new legislation focusing on addressing discrimination on the basis of sexual orientation and gender identity divided politicians' attention, created confusion and led to resistance from some quarters. Ms Cristobal also highlighted a more general "apathy" among political actors towards comprehensive anti-discrimination legislation. Many do not understand why such legislation is necessary or lack the will to support it through to enactment.

Currently, the STDC is focused on building political support for the legislation. Ms Cristobal noted that the STDC is developing a strategy for supporting regional and community civil society organisations to petition Congress representatives at the constituency level, and "presenting that anti-discrimination is an issue of different sectors (...)" in order to build a political consensus on the need for the new law.

### 5.3 Prohibited Conduct

Providing comprehensive and effective protection from discrimination requires the prohibition of all recognised forms of discrimination. Many of the earliest human and labour rights instruments define discrimination as any "distinction, exclusion or restriction" arising on the basis of protected grounds. From this general definition, specific forms of prohibited conduct have been identified by UN and regional human rights mechanisms that reflect improved understanding of the different ways in which discrimination can occur. In its General Comment No. 6, the Committee on the Rights of Persons with Disabilities identified four "main forms" of discrimination: (a) direct discrimination; (b) indirect discrimination; (c) harassment (which may include ground-based and sexual harassment); and (d) the denial of a reasonable accommodation.<sup>301</sup> Across the UN and regional human rights systems, relatively uniform definitions of these forms of prohibited conduct have been adopted, which are synthesised in the OHCHR's Practical Guide. Accordingly:

- ▶ **Direct discrimination** occurs "when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination."<sup>302</sup>
- ▶ **Indirect discrimination** occurs "when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination."<sup>303</sup>

<sup>301</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18.

<sup>302</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. xiii and 30.

<sup>303</sup> *Ibid.*, pp. xiii and 33.

- ▶ **Ground-based harassment** occurs “when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”<sup>304</sup>
- ▶ **Denial of reasonable accommodation** occurs when “necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden” that are needed “to ensure the enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms and equal participation in any area of life regulated by law” are denied.<sup>305</sup>

In addition to these forms of discrimination, segregation – occurring when individuals sharing a protected characteristic are, “without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment”<sup>306</sup> – is a well-recognised form of discrimination, which States are required to prohibit.<sup>307</sup> Victimisation (known in some jurisdictions as reprisal or retaliation) has also been identified as a form of prohibited conduct. Because of the close relationship between this concept and effective access to justice, the prohibition of victimisation is discussed separately in Section 4.3.2(e).

In addition to explicitly prohibiting these different forms of discrimination, States must ensure that their anti-discrimination laws provide effective protection from discrimination by public and private actors in any area of life regulated by law – including the area of work and employment.<sup>308</sup> Accordingly, anti-discrimination laws should impose obligations on employers to ensure non-discrimination in the workplace. This includes imposing liability on employers for failure to prevent discrimination by co-workers, customers and clients.

Where national anti-discrimination laws fail to explicitly define and prohibit any of the recognised forms of discrimination, rights-holders and duty-bearers may be left unclear as to the scope and requirements of the law. Moreover, where laws fail to explicitly prohibit these forms of discrimination, or where they use definitions or interpretations of any of these forms of discrimination in ways not consistent with international standards or use a general definition of discrimination that does not cover these forms of conduct, the scope of protection provided by the laws may be excessively narrowed, limiting the enjoyment of the right to non-discrimination in practice. In the context of laws which do not prohibit all forms of discrimination – or where definitions give rise to a lack of certainty regarding the different forms of discrimination which must be prohibited – employers will lack clarity regarding the scope of their obligations. This in turn can fuel a culture of non-compliance and – ultimately – impunity.

The extent to which each of these forms of discrimination is properly recognised, defined and prohibited under national law varies significantly between States, with many countries omitting certain forms of conduct from their anti-discrimination provisions, establishing inconsistent protections between laws, or omitting definitions altogether. The strongest protections are afforded in those States with dedicated anti-discrimination legislation. In **Great Britain**, discrete definitions of direct and indirect discrimination are set out under Sections 13 and 19 of the Equality Act. Denial of reasonable accommodation is defined and prohibited under Sections 20–21, although it is limited in scope to the ground of disability. While harassment is not listed as a form of discrimination, it is nonetheless considered a form of prohibited conduct and is defined under Section 26.<sup>309</sup> In **South Africa**, direct and indirect discrimination are prohibited under Section 6(1) of the Employment Equity Act. Harassment is covered by Section 6(3), while reasonable accommodation is listed as a form of positive action, which is mandated for employers under Section 15(2). Unlike in Great Britain, the Act does not define the various forms of discrimination, leaving scope for the development of these concepts

<sup>304</sup> *Ibid.*, pp. xiii and 36. Sexual harassment shares a similar definition. However, it is not ground-based and relates specifically to conduct that is sexual in nature. See *ibid.*, pp. xiii and 37.

<sup>305</sup> *Ibid.*, pp. xiii and 39.

<sup>306</sup> *Ibid.*, pp. xiii and 42.

<sup>307</sup> *Ibid.*, pp. 42–46.

<sup>308</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 47–51.

<sup>309</sup> The same is true of victimisation, which is defined separately under Section 27.

to the courts. Despite these issues, few concerns were raised by respondents in this area, although some interviewees from Great Britain did express their dissatisfaction with the repeal of provisions prohibiting third-party harassment.<sup>310</sup> As one interviewee explained:

*I think [the law is] missing a number of positive prevention steps (...) I do think that removing the third-party harassment – or not enacting properly the third-party harassment – is not acceptable (...) It's outrageous people suffer harassment because from a third party, especially in all this out-sourced mess that we live in and work in, and it's not clear who you can hold accountable for that, and it affects people's livelihoods and everything else.*<sup>311</sup>

There is no dedicated, comprehensive anti-discrimination law in **Brazil** or **Colombia**. Instead, in each State, several different pieces of legislation protect against discrimination either on the basis of specific grounds or in particular areas of life. While some of these laws do include discrete definitions of certain forms of prohibited conduct, practice is inconsistent both within and between legislation, generating a risk that certain forms of discrimination may fall outside of the scope of legal protection. As Estefanni Barreto, a representative of the legal department of the Central Workers Union in **Colombia**, explained: “although the laws have regulatory parameters that are useful in matters of discrimination, they have omissions, they have gaps, [and] on the other hand they are not effectively enforced.”<sup>312</sup> In **Brazil**, it was noted by Regina Vieira, a professor at several Brazilian law schools, that jurisprudence has advanced in recent years, creating “room for manoeuvre to debate direct and indirect discrimination (...) and the several ways of presenting harassment.”<sup>313</sup> However, the same respondent warned of the limits of judicial creativity,<sup>314</sup> and others noted that an absence of clear definitions can present challenges when bringing cases to court:

*[We] have a great confusion, because people, when you talk about discrimination, they always think of direct discrimination (...). If I am not mistaken, we have indirect discrimination, which is included in the racial equality statute [or] it is in the convention that deals with racial discrimination that was recently approved, [but it is only in one of these laws], so we often end up having to use analogical application, bringing a rule to another situation.*<sup>315</sup>

These issues are even more pronounced in those countries with patchwork protections. In **India**, legislation does not typically list forms of prohibited conduct or provide express definitions of direct discrimination, indirect discrimination, or (ground-based) harassment. Instead, anti-discrimination provisions are framed to address discrimination relating to specific characteristics; and legislation governing discrimination in the workplace mainly focuses on issues of recruitment and the termination of an employment contract. While direct discrimination is clearly prohibited under the Constitution, recognition of the concept of indirect discrimination has only been recognised relatively recently within the jurisprudence of the Supreme Court and has been described as being at a “nascent stage” of development.<sup>316</sup>

In **Tunisia**, there are very few legal protections against discrimination in employment, and those that do exist – for instance under Law No. 50 of 2018 relating to the elimination of all forms of racial discrimination – do not expressly define or list different forms of prohibited conduct.<sup>317</sup> As a result of these shortcomings

<sup>310</sup> See, for instance, Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>311</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>312</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia.

<sup>313</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>314</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>315</sup> Equal Rights Trust interview with Andriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work, Brazil.

<sup>316</sup> Supreme Court of India, *Nitisha v. Union of India*, 25 March 2021.

<sup>317</sup> While Article 2 of Law No. 50 of 2018 prohibits all forms of discrimination “as defined by the ratified international conventions,” it does not list or define these forms itself.

in the legal framework, a large number of respondents expressed concerns regarding the discriminatory treatment of particular groups. As one interviewee noted, because of an absence of accessibility measures, funding for accommodations, skills development and commitment from companies, persons with disabilities experience several barriers to work.<sup>318</sup> Individuals who acquire an impairment on the job are often denied accommodations and may be moved to new positions within a company against their own wishes:

*Disability can happen during the life of a person when he is employed. In the Tunisian law for the question of employment there is a recategorization of the employee to try to find a job that meets his needs and his situation, but generally it will be a degradation at the professional level, the person will not return to occupy the same level of position if he has had an accident at work or outside. If the person accepts, he continues to work, otherwise there is recourse for dismissal. It can be done amicably or through recourse to justice. But there are not really any special measures for people with disabilities.<sup>319</sup>*

Other examples of discrimination in **Tunisia** highlighted by respondents included instances of dismissal,<sup>320</sup> discriminatory recruitment policies<sup>321</sup> and racial harassment.<sup>322</sup> While racial discrimination is prohibited under national legislation, one respondent noted that the law needed to be “more precise and strict.” They added: “it’s a small law [Law 50], for me it remains a showcase law, to tell us ‘here you have what you want, that’s enough.’ Assistance measures do not exist, assistance and protection mechanisms. If we had these mechanisms, we could go further.”<sup>323</sup>

As testimony from experts in India and Tunisia underlines, where States’ legal frameworks do not define and prohibit each of the different forms of discrimination, the effectiveness of the right is compromised. International law recognises indirect discrimination, harassment and failure to make reasonable adjustment as discrete forms of discrimination requiring prohibition, because a prohibition on direct discrimination alone is insufficient to protect individuals. Where the law proscribes only direct discrimination, many discriminatory harms will fall beyond the scope of the law, leaving victims without protection. Even where the law provides a general definition of discrimination which is – in theory – broad enough to encompass indirect discrimination and other forms of discrimination, this requires judicial interpretation of government guidance, resulting in a lack of certainty for rights-holders, duty-bearers and those responsible for the enforcement of the law. Failure to establish explicit requirements on employers to address and prevent all forms of discrimination will undermine duty-bearers’ understanding of their obligations, reduce incentives to comply with the law, and foster inaction and impunity.

## 5.4 Justification and Exceptions

Not every differentiation will result in a finding of discrimination. International law recognises that “it may be both necessary and appropriate to differentiate between groups or to implement a policy or practice that

<sup>318</sup> Equal Rights Trust interview with a representative of a non-governmental organisation working with persons with disabilities, Tunisia.

<sup>319</sup> Equal Rights Trust interview with a representative of a non-governmental organisation working with persons with disabilities, Tunisia.

<sup>320</sup> As one respondent noted in respect of persons with disabilities, “from the moment the employee is within the company, to my knowledge there are no particular protective measures with regard to dismissal or beforehand for refusal of employment.” Similar issues were raised in respect of racial discrimination in recruitment. See Equal Rights Trust interview with a representative of a non-governmental organisation working with persons with disabilities, Tunisia; Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia.

<sup>321</sup> One respondent noted, “at the recruitment level, it [discrimination] happens, in the interviews it happens, but at this level we have no right to appeal and do something legally.” Another gave an example of racial discrimination: “we have all experienced the following situation: ‘a production company is looking for young women and men, between 18 and 35 years old.’ People apply, they are asked for the photos, or ‘do you have a Facebook page’ and then they don’t receive a reply anymore (...) We can’t file a complaint.” See Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia; and Equal Rights Trust interview with Saadia Mosbah, President and co-founder of Mnenmy, Tunisia.

<sup>322</sup> Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia.

<sup>323</sup> Equal Rights Trust interview with Saadia Mosbah, President and co-founder of Mnenmy, Tunisia.

has the effect of disadvantaging on group more than others.<sup>324</sup> To distinguish these circumstances from those that may give rise to unlawful discrimination, it is essential to establish a clear justification test in law. At the international level, the different facets of this test have been distilled into three central components. First, measures adopted must pursue a legitimate aim. For instance, this could include the protection of public safety. Second, adopted measures must be necessary. Where less restrictive measures could achieve substantially the same outcome, this limb of the test has not been satisfied. Finally, adopted measures must be proportionate: "the harm caused by such a measure [must] not outweigh the benefit of achieving its objective."<sup>325</sup> Direct discrimination "may be justified only very exceptionally."<sup>326</sup>

Within the employment field, a slightly different approach to justification is sometimes adopted. For instance, under Article 1(2) of the ILO Discrimination (Employment and Occupation) Convention, a specific exception to the prohibition of discrimination is introduced based around "genuine occupational requirements." According to that provision: "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination." A similar exception is included under the European Union Framework Employment Directive.<sup>327</sup> In determining whether an occupational requirement is genuine, the Court of Justice of the European Union has adopted a materially similar approach to justification as in other cases, and the differences between these approaches should not be overstated. As the OHCHR notes in its Practical Guide: "in situations in which a policy or measure falls within the scope of an exception under national law, it must still be shown to be necessary and proportionate to its aim."<sup>328</sup>

The approach to justification adopted in **Great Britain** combines elements of both of these approaches. Indirect discrimination is prohibited under Section 19 of the Act, save where it can be demonstrated that a differentiation constituted a "proportionate means of achieving a legitimate aim." There is no general justification for direct discrimination, although, in the area of work, some specific exceptions are set out under Schedule 9 of the Act relating to occupational requirements. The Act departs from this general rule in one respect: under Section 13, the same justification test for indirect discrimination cases is applied to direct age discrimination claims. This point was noted with concern by Robin Allen KC, an equality and discrimination barrister, who explained:

*We do have laws against age discrimination in the workplace. The major problem is that when they were introduced in 2006, government didn't take the time to work through what could be specific, justified defences to age discrimination, and so just left in the possibility of it being justified direct-age discrimination. I think it's understandable that it should have done it, but I don't think it should stay there. I think that needs to be revisited.*<sup>329</sup>

Section 6 of the Employment Equity Act of **South Africa** prohibits "unfair" discrimination. Whether discrimination will be deemed "unfair" depends on a range of factors, and while one respondent noted that the asymmetrical nature of the test is designed to "focus on the most vulnerable," the same respondent also indicated that recent cases have marked a departure from "the correct understanding of our equality jurisprudence and (...) unfair discrimination."<sup>330</sup> According to Section 6(2) of the Act, "it is not unfair discrimination to (...) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job." While

<sup>324</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 51.

<sup>325</sup> *Ibid.*, pp. xiv and 51-56.

<sup>326</sup> *Ibid.*, pp. xiv and 51.

<sup>327</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 4.

<sup>328</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 54.

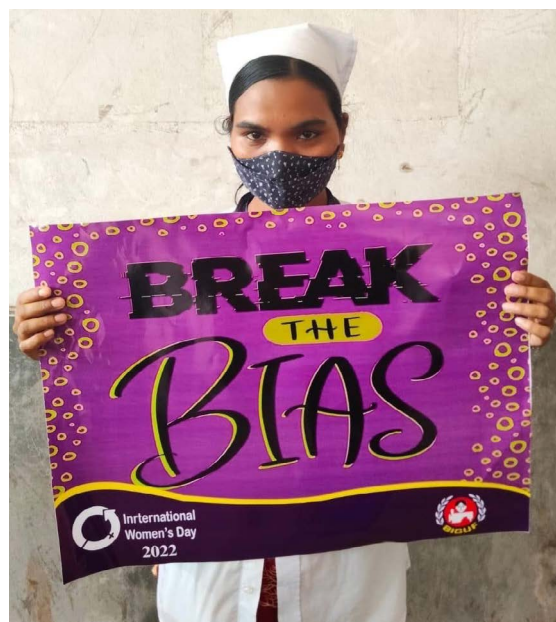
<sup>329</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>330</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

this provision largely mirrors the wording used in the ILO Discrimination (Employment and Occupation) Convention, one respondent indicated that the test had been used to justify discrimination against particular groups, which would otherwise be prohibited:

*Some say (...) they feel that that part of the legislation is actually driving the process of discriminating even though the law tells us there is fair discrimination. If I am nine months or eight months pregnant and there is a job that requires me to lift heavy boxes or heavy building blocks, and it is an inherent requirement of the job, I am precluded from getting into that job (...) There have [also] been situations where that's been used (...) to discourage and to preclude [the employment of] people with disabilities.<sup>331</sup>*

The benefits of adopting a clear justification test in law are clear: the test requires careful scrutiny and an examination of the reasons behind an employment decision and can help uncover latent stereotypes that may inform decision-making. Where decisions are based on non-objective criteria, they are unlikely to meet the requirements of international law. For instance, the Committee on Economic, Social and Cultural Rights has called for the adoption of "objective standards for hiring, promotion and termination" that focus on "achieving equality."<sup>332</sup> Respondents from several countries expressed concern regarding the reliance on stereotypes within the employment field. In **India**, for instance, it was noted that women are often viewed as a "special category needing protection," a notion which reinforces and perpetuates their exclusion from the formal labour market.<sup>333</sup> Similarly, in **Brazil**, Regina Stela Corrêa Vieira, an academic specialising in gender and care work, explained:



Credit: Bangladesh Independent Garment Workers' Federation

*We deal with women's bodies as more fragile in legislation (...) so women can't carry 20 kg, more than 20 kg, and men can carry up to 60 kg, as if bodies didn't vary. As if there were not much stronger women [and] much weaker men. And this conception that women are more fragile is reproduced in several norms (...) discriminating against them and, at the same time (...) we reproduce the logic that women have to be peremptorily kept away from XYZ jobs. So, at that point, there are still a lot of gender stereotypes applied to legislation (...) occupational health and safety standards (...) could be updated.<sup>334</sup>*

Unfortunately, in some States exclusion from employment is affected by discriminatory laws and policies. In **Tunisia**, particular concern was raised regarding the criminalisation of consensual same-sex sexual relations under Article 230 of the Penal Code. In its 2020 Concluding Observations, the Human Rights Committee urged the State to repeal this provision while providing "law enforcement officials with training on respect for diverse sexual orientations and gender identities."<sup>335</sup> Unfortunately, despite a country visit by UN special procedures in June 2021, this provision remains in force.<sup>336</sup> Respondents noted that the current

<sup>331</sup> Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

<sup>332</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 33.

<sup>333</sup> Equal Rights Trust interview with Madhu Bhushan and Shakun Mohini, Feminist activists and members of the Gamana Mahila Samooha, an informal women's collective, India.

<sup>334</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>335</sup> Human Rights Committee, *Concluding Observations: Tunisia*, UN Doc. CCPR/C/TUN/CO/6, 2020, paras. 19-20.

<sup>336</sup> OHCHR, "Preliminary observations on the visit to Tunisia by the Independent expert on protection against violence and discrimi-

legal situation exposes LGBTQI+ individuals to an increased risk of harm. As one noted, "LGBT people (...) are repressed by [Article] 230 and therefore suffer discrimination in the name of this legal prohibition."<sup>337</sup> Another **Tunisian** interviewee, Hammadi Henchiri, a lawyer whose practice focuses on discrimination based on sexual orientation, gender identity and expression, added:

*There are several cases of dismissal based on Art. 230 [of the penal code]. For instance, last year, we had a flagrant case. He works in a private institution at the admin level. He had a case against him based on Art. 230, he was in jail, and he was fired. Now the case is before the labour tribunal judge, we will see if he will consider this ground as a legitimate one for dismissal. [...] there is no jurisprudence so far on this. [...] Legally speaking, if someone has criminal procedures against him, he can be fired without any rights. But considering the specificity of Art. 230 and considering the human rights standpoint, it could be rejected as a ground so I'm waiting impatiently for this judgement because it could be very important jurisprudence.*<sup>338</sup>

Respondents from Tunisia indicated that barriers to employment are affected by rules in national legal frameworks that are based on paternalistic or stereotyped criteria. Several Articles of the Labour Code restrict women's employment in certain occupations ostensibly deemed hazardous to their health, including work in mines and jobs requiring a twenty-four-hour continuous work regime. The CEDAW Committee has held similar restrictions to be discriminatory.<sup>339</sup> This situation is undoubtedly complicated by the fact that historically ILO Conventions introduced gendered restrictions on certain forms of work, including night work, which is prohibited for Tunisian women under Article 68 of the Labour Code, with some exceptions. As early as 2001, the CEACR urged States to move towards the denunciation of these instruments, noting that they are "manifestly of historical importance only."<sup>340</sup> According to the CEACR, the Night Work (Women) Convention – is a "rigid instrument, ill-suited to present-day realities concerning working schedules, industrial production and composition of the labour force."<sup>341</sup> Attention should instead be paid to improving conditions of work more broadly.<sup>342</sup>

Self-evidently, if the promise of non-discrimination in the workplace is to be realised, then the right must be guaranteed and protected in all aspects of work and employment. Laws which omit or exclude certain sectors, roles, types of work or employment situations from the prohibition on discrimination establish a permissive environment. As the examples above indicate, in the absence of comprehensive protection from discrimination in all areas and aspects of employment, and with limitations only where justified with reference to legitimate aims pursued by means which are necessary and proportionate, the right to non-discrimination will not be effective.

## SUMMARY: The Right to Non-Discrimination

If States are to meet their international legal obligations, they must adopt legislation that provides comprehensive protection against discrimination. The requirements of comprehensive anti-discrimination legislation have been elaborated by the UN treaty bodies and are captured in the *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, the recent definitive guidance issued by the Office of the UN High Commissioner for Human Rights.

To meet the requirements of international law and to be both comprehensive and effective, the Guide makes clear that national anti-discrimination laws must meet a number of essential criteria. In respect of

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nation based on sexual orientation and gender identity," 18 June 2021.

<sup>337</sup> Equal Rights Trust interview with Hafidha Chekir, Professor of Public Law at the University of Tunis, Tunisia.

<sup>338</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>339</sup> See, for instance, in relation to perceived safety risks, Committee on the Elimination of Discrimination against Women, *Medvedeva v. Russia*, UN Doc. CEDAW/C/63/D/60/2013, 2016, para. 11.3.

<sup>340</sup> Committee of Experts on the Application of Conventions and Recommendations, Report III (1B)-2001-Final Remarks, 2001, para. 193, available at: <https://www.ilo.org/public/english/standards/reim/ilc/ilc89/rep-iii1b-f.htm#Protection%20and%20equality>.

<sup>341</sup> *Ibid.*, Committee of Experts on the Application of Conventions and Recommendations, para. 193.

<sup>342</sup> *Ibid.* Committee of Experts on the Application of Conventions and Recommendations.



the **scope and definition of the right to non-discrimination** itself, States must ensure that the law explicitly defines and prohibits all forms of discrimination, on the basis of all grounds recognised at international law, and in all areas of life regulated by law.

First, the law should prohibit discrimination on the basis of an **extensive range of grounds** in all areas of life regulated by public authorities. States should maintain an open-ended list of characteristics, through the inclusion of an “other status” or equivalent provision, to ensure that the legal framework is sufficiently adaptable and responsive to developments at the national level. National legislation should prohibit discrimination occurring on the basis of a single ground, and multiple grounds, including where particular characteristics intersect to produce distinct and specific harm (intersectional discrimination). International law recognises that discrimination may occur because of a perception that a person belongs to a protected group, or because of their association with members of a protected group; there is no requirement that a person possess a characteristic in order to benefit from protection. In this regard, the law must provide effective protection against discrimination based on perception and association.

Second, the law should define and prohibit all **forms of discrimination** recognised under international law, including **direct discrimination, indirect discrimination, denial of reasonable accommodation, ground-based and sexual harassment, segregation, and victimisation**. Where these forms of conduct are not expressly prohibited, or are prohibited only in particular areas, protective gaps may emerge, meaning that certain forms of harm are not effectively addressed, or are addressed only in certain areas of life, or in respect of particular groups, or both.

Finally, the law must establish a clear **test to determine whether discrimination has occurred**. Acts otherwise constituting discrimination may be justified only where they pursue a legitimate aim, and are appropriate, proportionate, and necessary to that aim, meaning that no less restrictive means could achieve the same outcome and that the benefit of the adopted measure is not outweighed by its impact. Direct discrimination can rarely be justified. Clear justification tests play an essential role in scrutinising decision-making by bringing stereotypes and prejudices to the fore. Where such tests are not set out in national legislation, there is a risk that discriminatory policies and practices may be adopted, including those designed with the ostensible purpose of protecting particular groups.

Respondents have identified that in practice those States with more developed legal frameworks on equality offer the greatest levels of protection against discrimination. While there are notable gaps within these frameworks – for instance, including the failure to explicitly define forms of prohibited conduct (South Africa), to maintain open-ended lists of grounds, or to recognise the specificities of intersectional discrimination (Great Britain) – these laws offer the most consistent levels of protection across groups and areas of life. In States with employment-specific (Colombia and Brazil) or patchwork (India and Tunisia) approaches to protection, normative gaps are evident. While modes of addressing discrimination vary significantly between countries, there is a clear correlation between the barriers to comprehensive and effective legal protection identified, and the relative development of anti-discrimination legislation, in each State reviewed.

## RECOMMENDATIONS

- ▶ States must repeal laws which discriminate, directly or indirectly, on any, or any combination of, grounds recognised at international law. This includes, but is not limited to, laws which criminalise activities connected to particular grounds – including laws which criminalise same-sex sexual activity and those which criminalise the profession of religious beliefs – and laws which prohibit women, older persons and other groups exposed to discrimination from undertaking certain forms of work.
- ▶ States must enact comprehensive anti-discrimination legislation, in line with the requirements set out by the United Nations in its *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*.
- ▶ States’ anti-discrimination legislation should prohibit discrimination arising on the basis of all – and any combination of – the grounds recognised at international law. Accordingly, States must ensure that their anti-discrimination laws:

- ▷ Prohibit discrimination on the basis of age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion, including human rights defender status, trade union membership or political affiliation; pregnancy; property; race; refugee or asylum status; religion or belief; sex and gender; sex characteristics; sexual orientation; social origin; social situation; or any other status.
  - ▷ Permit the possibility of recognising additional grounds of discrimination, through the inclusion of an “other status” or similar provision.
  - ▷ Prohibit discrimination arising on the basis of perception and discrimination on the basis of association.
  - ▷ Prohibit multiple and intersectional discrimination – discrimination occurring on the basis of a combination of two or more grounds.
- ▶ States’ anti-discrimination legislation should prohibit all forms of discrimination. Accordingly, States must ensure that their anti-discrimination laws explicitly define and prohibit direct and indirect discrimination, harassment, failure to make reasonable accommodation, segregation, and victimisation, using the definitions accepted at international law:
- ▷ Direct discrimination occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.
  - ▷ Indirect discrimination occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.
  - ▷ Ground-based harassment occurs when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment.
  - ▷ Reasonable accommodation means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.
  - ▷ Segregation occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.
  - ▷ Victimisation occurs when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or proceedings aimed at enforcing equality provisions.
- ▶ States’ anti-discrimination legislation must prohibit discrimination in all areas of life regulated by law, including, but not limited to, all areas of work and employment, at all stages of the employment relationship, in all forms of work and in all aspects of work.
- ▶ States’ anti-discrimination legislation must ensure that discrimination can be justified only against clear criteria, established in comprehensive anti-discrimination legislation. These criteria should include the existence of a legitimate aim and confirmation that the means of achieving such an aim are appropriate, necessary and proportionate. A legitimate aim may never be justified by reference to discriminatory stereotypes. Certain forms of prohibited conduct (including harassment, sexual harassment and victimisation) cannot – by definition – be justified. Direct discrimination may be justified only exceptionally, on the basis of strictly defined criteria.

# 6. Effective Protection from Discrimination

## 6.1 Access to Justice, Enforcement and Remedy

For the right to non-discrimination to be effective, individuals exposed to discrimination must be able to access justice and to seek and secure remedy for the harm they have experienced and sanction for those responsible for discrimination.

Ensuring effective **access to justice** “requires the adoption of a wide range of legal and practical measures designed to ensure, and remove barriers to, justice and enable victims to secure remedy.”<sup>343</sup> In practice, ensuring access to justice requires the State to establish a system of judicial or other enforcement bodies which are independent, impartial, well-resourced and accessible.<sup>344</sup> It requires the State to ensure that rights are **justiciable** and that the system of justice meets the requirements of availability, accessibility, quality and accountability.<sup>345</sup>

Ensuring **availability** and **accessibility** requires that courts or other enforcement bodies are established throughout the State, in both urban and rural areas,<sup>346</sup> and that procedures are simple and easy to navigate for rights-holders.<sup>347</sup> It also requires that enforcement mechanisms be affordable, that provision is made for legal aid<sup>348</sup> and that barriers to access – whether financial, geographic, physical or linguistic – are identified and removed.<sup>349</sup> The Committee on the Rights of Persons with Disabilities has referred to measures of this type as “procedural accommodations.”<sup>350</sup>

Ensuring **quality** and **accountability** necessitates the establishment of enforcement mechanisms which are independent and impartial, competent, and efficient. The Committee on the Elimination of Discrimination against Women, for example, has noted that “all components of the system [should] adhere to inter-

<sup>343</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 87. The duty to ensure access to justice is well-established at international law. See, for instance, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 31 (b) and 73 (h); Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 1; E/C.12/NPL/CO/3, para. 11 (f); CCPR/C/SVK/CO/4, para. 11; and CERD/C/POL/CO/22-24, para. 8 (b).

<sup>344</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14 (a). See also International Covenant on Civil and Political Rights, art. 2 (3) (b); CERD, art. 6; CEDAW, art. 2 (c); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (h); Human Rights Committee, general comment No. 31 (2004), para. 15; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>345</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14.

<sup>346</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 34; see also Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 16(a).

<sup>347</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 87.

<sup>348</sup> See, illustratively, CEDAW/C/ERI/CO/6, paras. 25–26; E/C.12/BGR/CO/6, paras. 12–13; CRPD/C/HTI/CO/1, paras. 24–25; CCPR/C/CZE/CO/2, para. 16; and CERD/C/KEN/CO/5-7, para. 16 (b).

<sup>349</sup> See, for example, Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 17.

<sup>350</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 25 (d). See also the discussion of justifications in section I.A.4 of part two of the Practical Guide, cited above.

national standards of competence [and] efficiency." These systems should be "gender-sensitive," "contextualized, dynamic, participatory," responsive to the needs of users, and properly enforced and monitored to ensure that the objectives of justice are being achieved.<sup>351</sup> States must ensure that those involved in the determination of discrimination cases "have sufficient knowledge and understanding to ensure high quality in the administration of justice" through training and professional development.<sup>352</sup>

In addition to establishing enforcement bodies and procedures which are available and accessible and ensuring the quality and accountability of justice, the effective enforcement of the right to non-discrimination requires the adaptation of the rules regarding **evidence and proof**. The nature of discrimination complaints is that the evidence required to prove that the offence has occurred is often in the possession of the discriminating party, rather than complainant. As such, the "application of the ordinary rules of procedure in such cases, which would place the burden of proving discrimination (...) on the discriminated party, is recognised frequently to produce unfair outcomes."<sup>353</sup> As such, legal rules related to evidence and proof have evolved to produce mechanisms which are unique to anti-discrimination law, but without which the system would not function. It is now recognised at international law that the burden of proof in discrimination cases should "shift" from the complainant to the respondent, at the point at which a prima facie case has been made.<sup>354</sup>

Alongside the provision for the transfer of the burden of proof, it is widely recognised that discrimination cases should be subject to the civil, rather than the criminal, standard of proof – that is, in most jurisdictions, proof on the balance of probabilities, rather than proof beyond a reasonable doubt.<sup>355</sup> More broadly, it is recognised as best practice that ordinary discrimination claims – those not involving violence or other criminal acts – should be subject to civil or administrative sanction, rather than criminal sanction, for reasons of proportionality and fairness as well as efficiency.<sup>356</sup>

Finally, an effective system of access to justice requires the availability of effective **remedies**. For example, Article 6 of the ICERD provides an explicit right to effective remedy for racial discrimination, while the Human Rights Committee and other UN treaty bodies have recognised an obligation on States to ensure that survivors of discrimination have accessible and effective remedies.<sup>357</sup> Effective remedy has three components: sanctions for duty-bearers which are effective, dissuasive and proportionate; reparation for rights-holders which include recognition, compensation and restitution; and societal and institutional remedies necessary to prevent repetition and to address the structural drivers of discrimination.<sup>358</sup>

### 6.1.1 Justiciability

In systems with weak, limited, inconsistent or fragmented anti-discrimination laws, access to justice can be compromised in the most essential way, in that rights are simply not justiciable in law or enforceable in practice. In such contexts, questions of access to justice arise only indirectly, because of the limited possibilities in law for individuals to claim their rights.

<sup>351</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para 14 (d) and (f).

<sup>352</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 90.

<sup>353</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 93.

<sup>354</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>355</sup> "In many legal systems, the criminal standard of proof involves proving the facts beyond reasonable doubt. This standard of proof is much higher than the balance of probabilities standard commonly used in civil proceedings (...) the standard of proof required by criminal law is not appropriate in discrimination cases, given the difficulty for the claimant in accessing the evidence necessary to meet the 'beyond reasonable doubt' standard." (United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 78).

<sup>356</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 78.

<sup>357</sup> Human Rights Committee, general comment No. 31 (2004), para. 15; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 31 (f).

<sup>358</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, Part Two, Chapter II.

In **Tunisia**, for example, Hatem Kotrane, Emeritus Professor at the Faculty of Juridical, Political, and Social Sciences, University of Tunis, noted that “[t]he general system – the Labour Inspectorate – deals more with health and safety than with discrimination.” He continued:

*The Labour Code is general, it does not give any specific standard concerning the protection of minorities or persons subject to discrimination. The only law we have is Law number 50 [the Law on the Elimination of All Forms of Racial Discrimination, Law 50 of 2018] and as we know very well – we the NGOs and lawyers – that remains very poorly applied. (...) There are tribunals which are open and are free, they are frankly accessible, there are no difficulties or costs. People can act on their own and make a request. The system is accessible to all people who are confronted with discrimination, but the law does not sanction discrimination. That is the problem. Discrimination is not included as a reason for aggravated dismissal, for example. If the dismissal is discriminatory, the sanction is the same.<sup>359</sup>*

Hammadi Henchiri, a Tunisian appeal lawyer, concurred, demonstrating the challenge with reference to a specific case:

*[Discrimination occurs] at the recruitment level (...) in the interviews it happens, but (...) we have no right to appeal. There are cases of refusal of employment and even cancellation of interviews. Last year, a graduate beneficiary passed a written test, two or three phases, but at the interview, the manager told him that it was cancelled and the position was taken, just after seeing him.<sup>360</sup>*

Similarly, interviewees in **India** stated that the legal framework addressing discrimination in employment is weak, with limited explicit protections available on certain grounds and no explicit protections on others, and no provision for redress for discrimination suffered, other than in a small number of cases. It is these gaps in legal protection which are the biggest factor in limiting access to justice for victims of discrimination at work, rather than the more practical obstacles such as availability, access, cost and time. As Arvind Narrain, President of the People’s Union for Civil Liberties in Karnataka, noted:

*While Articles 14 and 15 of the Constitution enshrine equality, in reality there is no way to enforce equality in employment (...) The State has an obligation to ensure equality of all citizens: Article 15 of the Constitution requires the State to provide equality and equal protection to all, irrespective of religion, race, caste, sex and place of birth (...). This excludes some forms of marginalisation like disability or sexuality. However, case law under the equality provisions of the Constitution is not sufficiently developed to become effective (...) Employers are obliged to also follow equality principles. However, in practice there is no way to enforce these obligations.<sup>361</sup>*

Another expert concurred, talking about the inadequacy and ineffectiveness of the legal regime on non-discrimination at the State level in Kerala. Even while noting that “the situation in Kerala is much better than in other states across the country,” this expert noted that limited justiciability of rights is a major challenge.<sup>362</sup>

A necessary precondition for access to justice is that the right to non-discrimination must be enshrined within the law and justiciable, both in law and in practice. Without comprehensive anti-discrimination laws, gaps in legal protection are a predominant factor in limiting the effectiveness of the right.

### 6.1.2 Availability and Accessibility of Justice

Rights-holders can be effectively prevented from accessing justice, claiming their rights and securing remedy through a range of obstacles and barriers. Procedures for bringing claims of discrimination may be too

<sup>359</sup> Equal Rights Trust interview with Hatem Kotrane, Emeritus Professor at the Faculty of Juridical, Political and Social Sciences, University of Tunis, Tunisia.

<sup>360</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>361</sup> Equal Rights Trust interview with Arvind Narrain, President of the People’s Union for Civil Liberties, India.

<sup>362</sup> Equal Rights Trust interview with two members of the Self-Employed Women’s Association, India.

complex, difficult to understand or challenging to navigate for victims. Courts or other enforcement bodies may not be available or accessible, or there may be significant delays in procedure because of lack of funding or resources. Alternatively, any number of financial, linguistic, physical, geographical and other barriers may prevent victims from accessing enforcement mechanisms which are otherwise available in principle. Beyond these procedural and institutional barriers, fear of retaliation (referred to in anti-discrimination law as victimisation); lack of confidence in the system to provide effective justice; societal pressure and social stigma; and a range of other factors can prevent rights-holders from seeking justice. We examine these societal and attitudinal factors in subsequent sections of this report. This section examines barriers which limit the availability and accessibility of justice.

While States have positive obligations to ensure the availability and accessibility of justice and to identify and remove barriers to access, in practice, many rights-holders find it difficult to access justice and thus to vindicate their rights. This in turn renders their rights ineffective and reduces the dissuasive effect of the law, as duty-bearers have less incentive to comply with legal obligations which are unenforceable. As Tzvi Brivik, a labour law attorney and expert on the platform economy from **South Africa** set out, even in States with relatively comprehensive anti-discrimination law frameworks, ineffective access to justice can render rights guarantees illusory:

*The difficulty is not so much the law but the problem of access to justice (...) To enter through those doors, a long road must be travelled. You must first be aware of your rights (...) [then] be brave enough to contact somebody or have access to the internet to find out if a non-governmental organisation or non-profit organisation can assist you. Does the NGO have the capacity to take this on or not? If not, will they refer you on or just shut the door? (...) Perhaps an attorney will believe in your case and take your matter on for you (...) Enforceability is an issue because using the available tools is sometimes so far out of reach for an ordinary person.*<sup>363</sup>

Interviews with experts in all six jurisdictions considered for this study identified access to justice as a significant problem for the implementation of anti-discrimination laws and non-discrimination provisions, and identified a range of different barriers which limit the availability and accessibility of justice for survivors of discrimination. Experts and commentators from all jurisdictions under review highlighted the need for the system to be effective in ensuring access to justice and remedy for victims and sanction for duty-bearers if legal protections are to be meaningful. As another South African attorney, Charlene May, explained in stark terms: if victims cannot access justice, the law “means absolutely nothing.”<sup>364</sup>

### 6.1.2.1 Complexity

Legal frameworks, procedures and institutions which are excessively complex can prevent workers from enforcing their rights. In States with patchwork protections from discrimination, rights-holders are often faced with a complex map of different laws, institutions and enforcement provisions. This in turn can compromise access to justice, even for those whose rights are justiciable in principle. In **India**, for example, a senior official from the State Labour Department in Karnataka explained how the lack of comprehensive, harmonised protection and the multiplicity of responsible agencies exacerbates a situation in which it is already difficult to enforce rights:

*The Labour Department has very limited jurisdiction to formally address discrimination at workplace. Labour laws only address discrimination in payment of wages between women and men under the Equal Remunerations Act of 1976. The Labour Department also has appellate jurisdiction in dealing with workplace sexual harassment under the Prevention of Sexual Harassment (POSH) Act 2013. The POSH Act envisages all sexual harassment complaints to be addressed and resolved by the Internal Complaints Committee (ICC) that all organisations are mandated to constitute. A failure at the ICC can be taken on appeal to the Labour Department or to the Police Department as a criminal complaint (...). Issues of caste-based discrimination can only be taken up with the*

<sup>363</sup> Equal Rights Trust interview with Tzi Brivik, an attorney with expertise on the platform economy, South Africa.

<sup>364</sup> Equal Rights Trust interview with Charlene May, an attorney at the Women's Legal Centre, South Africa.

*Scheduled Castes and Scheduled Tribes Commission, or as a criminal complaint with the police under the Scheduled Castes and Scheduled Tribes Atrocities Act. There is no civil remedy. There are no regulations to address discrimination in employment rights based on religion or disabilities.<sup>365</sup>*

Lucas Pittioni, a leading lawyer in gig economy and platform work in **Brazil**, expressed similar concerns about the challenges posed to workers seeking access to justice in systems with complex or overlapping legal provisions:

*For the Brazilian context, there is a relatively low number of lawsuits against platforms. But these legal actions are divided: some seek labour justice, others seek civil justice. While we don't have a clear regulatory framework that establishes rights and obligations, there will be this kind of confusion that ends up harming the worker.<sup>366</sup>*

Other Brazilian interviewees noted that simple, accessible and low-cost enforcement mechanisms had been replaced in recent years, with a negative impact on access to justice. A majority of those interviewed from the country stated that the procedure for workers to claim their rights had become more complex and difficult to navigate following reforms to the labour law system, which “ended up creating barriers for access to justice (...) [and led to] an increase in the complexity of something that was already very difficult.”<sup>367</sup> Prior to reforms in 2017, a unique procedure – *jus postulandi* – existed under the labour law which allowed individual workers to file complaints directly, thus reducing costs and procedural barriers,<sup>368</sup> but this system was undermined by the law reforms.

### Promising Practice: The *Jus Postulandi* Principle

The *jus postulandi* principle in Brazil establishes that workers have the capacity to bring complaints before courts on an individual basis, without need for a lawyer. In principle, this reduces the reliance on lawyers and expensive legal advice and so serves to make the court more accessible.

Professor Homero Batista of the Universidade de São Paulo, an expert in labour law in the country, gave a positive assessment of *jus postulandi*, explaining that it can play an important role in making enforcement mechanisms accessible to individual workers. It reduces the financial cost, time and complexity of bringing a complaint against an employer and also means that workers do not have to seek the advice of lawyers. This means they may avoid some of the challenges associated with the knowledge and awareness of legal professionals, and it further reduces costs. Therefore, the ability for individual workers to independently bring claims through the use of this principle offers a promising solution to some of the barriers to justice identified in this report.

However, Professor Batista also explained that there are still numerous challenges facing workers when invoking the *jus postulandi* principle and that – in practice – fewer and fewer workers do so. He explained that there exist many practical and technical barriers that workers are unable to overcome. Chief among these is the complexity of the court procedures and discrimination cases. Often this complexity dissuades workers from pursuing claims or obtaining legal advice as well. Professor Batista also explained that the mere idea of institutional corruption similarly dissuades workers from pursuing claims.

<sup>365</sup> Equal Rights Trust interview with an expert on labour law and regulations, India.

<sup>366</sup> Equal Rights Trust interview with a lawyer and leader of a gig economy platform, Brazil.

<sup>367</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil. *See also* Equal Rights Trust interview with Antonio Roversi Júnior, public defender and Substitute-Chief in the São Paulo Public Defender's Office, Brazil.

<sup>368</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

*Jus postulandi* offers a potential solution to some of the barriers to access to justice that this report identifies. By empowering individual workers to bring complaints themselves, enforcement mechanisms become more accessible, and more instances of discrimination can be challenged. However, for this to be truly effective, these mechanisms must themselves be meaningfully accessible, simple to use, cheap and quick; otherwise the potential benefits of self-representation are severely undermined.

In **Great Britain**, a number of respondents noted that procedures for ensuring access to justice which had existed previously have now been discontinued, making it more difficult – rather than easier – for workers to claim their rights. One noted that employment tribunals, which were established to be “sort of informal and accessible and cheap and speedy” have now become more difficult to access for ordinary workers.<sup>369</sup> Melanie Field, a senior official with the Equality and Human Rights Commission, noted that the end to a system of simple evidentiary questionnaires had rendered it more difficult for rights-holders to access justice:

*[A] change that was made to the Equality Act after it was implemented was to remove the provision which meant (...) you could send a questionnaire to the employer and get some formal information that you could then use to either come to a settlement, or to pursue the case in the tribunal. I think that sort of practical help for claimants is arguably a helpful thing.*<sup>370</sup>

Conversely, Darcy du Toit, Emeritus Professor at the University of the Western Cape in **South Africa**, indicated that the establishment introduction of the Unfair Labour Practice (ULP) procedure, in the Labour Relations Act, 1995, provides a simple and accessible process for rights-holders to make claims:

*As I understand it the residual ULP disputes were targeted because those were disputes that were regularly heard. It was worthwhile to have a quick remedy for them in the Labour Relations Act (...) [We] make use of them quite copiously, especially for promotion and demotion. [Cases can now be] dealt with under ULP related to benefits, because ordinary workers can't litigate contractual claims because they do not have resources. You might as well not have the remedy. I see the ULP essentially as a means of access to justice in a range of fairly common disputes (...) The unrepresented worker can now go to the CCMA [Commission for Conciliation, Mediation and Arbitration]; they might not get top-quality jurisprudence but nevertheless, they can get the remedy under the ULP.*<sup>371</sup>

However, even in South Africa, a number of respondents highlighted the challenges posed by the existence of a multiplicity of legal regimes and enforcement mechanisms, resulting in confusion for claimants, their lawyers and enforcement officers themselves. Dr Brickhill, a human rights lawyer, highlighted a case which they had litigated:

*[It] involved a lot of preliminary skirmishes and transferring the matter from one court to another. So, I think there's certainly been a lack of clarity around that, and the creation of the Equality Court as a specialist court with this narrowly defined jurisdiction has caused problems and, I think, has led to that court not fulfilling the role that it was envisaged to fulfil. There haven't been nearly as many Equality Court cases as we might have expected in a country where inequality is probably our single greatest challenge (...) Those jurisdictional difficulties sap energy and resources and delay determining the important disputes in our society.*<sup>372</sup>

<sup>369</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>370</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain; Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>371</sup> Equal Rights Trust interview with Darcy du Toit, Emeritus Professor at the University of the Western Cape, South Africa.

<sup>372</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.



As these statements make clear, in order to ensure access to justice and remedy, it is essential to ensure that rights frameworks and enforcement mechanisms are sufficiently simple, understandable and navigable for rights-holders. The harmonisation of non-discrimination provisions in a single comprehensive anti-discrimination law is essential to make both the law itself and the enforcement regimes less complex and easier to understand, and thus more straightforward to navigate. Yet even in States with clear, unified legal regimes, it is necessary to create accessible and user-friendly procedures and enforcement mechanisms if rights are to be effective in practice. States' obligation is not only to prohibit and enforce the right to non-discrimination, but to eliminate discrimination in practice, including through ensuring effective access to justice for rights-holders. This in turn gives rise to a positive obligation to develop accessible and effective systems for justice and redress, including through providing clear, comprehensible rights information in accessible formats and creating processes which are simple, affordable and quick.

### 6.1.2.2 Time

One frequently cited challenge regarding access to justice for workers exposed to discrimination is the length of time which enforcement procedures take. Lengthy procedures have a dissuasive effect for claimants, in particular where workers consider that being involved in litigation impedes their ability to find other work or to secure income.

In **Brazil**, for example, Sérgio Luiz Leite, a trade union leader, noted that “justice is slow,” before describing the procedure which workers with complaints must follow:

*We have labour processes that can last 10 to 12 years. If you have a discrimination problem and it takes 12 years to resolve, then I can tell you that justice would not work.*<sup>373</sup>

Experts interviewed in **Colombia** also expressed concern about the slow progress of complaints lodged with the Ministry of Labour: a representative of the Union of Venezuelan and Returned Colombian Workers explained that months can pass before receiving any kind of response, and workers are very likely to disengage from the process before this.<sup>374</sup>

Similarly, in **Great Britain**, respondents cited “the amount of time it takes for a case to be decided” as a brake on the effectiveness of the system, noting that “sometimes workers just want to carry on working and be paid; they don't have the money, time or resources to bring cases.”<sup>375</sup> Another concurred, noting that “the delay in the tribunal process, is huge”<sup>376</sup> – a particularly damning reflection, given that employment tribunals were established in part to provide simple, low-cost and quick access to justice.

The same issues were cited in almost identical terms by experts in **South Africa**, with Lebogang Mulaisi, a representative of COSATU, noting that “the way in which our labour market institutions work doesn't always get the best out of the labour legislation,” in part because “delaying [a] person's case for two years means that they either will have lost interest or they would have settled it with the employer and will have moved on.”<sup>377</sup> Another respondent concurred,<sup>378</sup> while a third noted that where cases are taken to court, it “is a very long drawn process, where workers are at a disadvantage as they are more vulnerable to economic and social pressures.”<sup>379</sup>

Professor Hafidha Chekir, a public law academic in **Tunisia**, raised the same issues, despite the significant

<sup>373</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>374</sup> Equal Rights Trust interview with Leodis Porras, President of the Union of Venezuelan and Returned Colombia Workers, Colombia.

<sup>375</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>376</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>377</sup> Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

<sup>378</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>379</sup> Equal Rights Trust interview with an expert on labour law and regulations, India.

differences between that country and South Africa in respect of their legal frameworks on discrimination. The professor referred to the slow pace of justice as being discriminatory in itself.<sup>380</sup> A Tunisian lawyer spoke of the financial impact on claimants who cannot afford to wait for years for claims to be settled; they exemplified this with reference to a case they were involved in which began in 2020 but is still ongoing.<sup>381</sup> A lawyer at the Court of Cassation cited a case in which a claimant had settled for inadequate compensation because he could no longer afford to wait for justice to be done:

*He could not receive compensation, but only a small sum – two months' salary – which he had not received. For (...) two months he had reported to work without receiving pay (...) The court gave us the win and he won this sum. He decided to execute it, I told him that he was not obliged to accept, we could appeal and continue the battle, but he told me that he was too tired and he no longer had the strength to continue to fight.<sup>382</sup>*

These remarkably similar testimonies from experts in States with very different legal frameworks serve to underline how much of a problem lengthy and time-consuming legal procedures can be. As documented in more detail below, bringing legal proceedings for discrimination can be both distressing and expensive. Lengthy, time-consuming procedures and significant delays exacerbate these issues, with many workers simply unwilling or unable to risk their current wages or wait the excessive amount of time it takes to obtain a remedy.

### 6.1.2.3 Cost

Alongside time, the financial cost of proceedings was cited by a number of expert respondents as a disincentive for workers to file and pursue claims. In **Tunisia**, a lawyer who had been involved in legal support services managed by an international NGO, the Minority Rights Group, spoke about the difficulties of paying for a lawyer for those unable to access the free support which the clinic provided:

*If we take [a specific case is named] once the clinic withdrew (...) they could no longer honour the costs of a notary, lawyer (...) he no longer had access to the jurisdiction because he was financially limited. So, access to justice, the expenses of a lawyer, bailiff notary and intervening in the legal jurisdiction, the victims generally cannot ensure all this.<sup>383</sup>*

In **Great Britain**, Melanie Field, a senior official with the Equality and Human Rights Commission, described the issue of cost as causing an "imbalance of arms" between employees and employers in discrimination cases, thus exacerbating an imbalance of power that already exists between employees and employers:

*The way that the legal framework works in Britain is that it is based on a system of giving individuals rights that they can assert through the employment tribunal system. That system doesn't work perfectly. So there have been particular barriers. So, when fees for employment tribunals were introduced, that was a particular barrier. Employers are often legally represented. And so, there's a kind of imbalance of arms. Although employees obviously get some representation or have trade union representation, it is definitely a burden on the individual who feels they've been discriminated against that they then have to instigate and go through what can be quite an emotionally and financially costly process.<sup>384</sup>*

Another respondent in Great Britain, an expert on social care work, noted that for the lowest-paid, most vulnerable workers, cost considerations can prevent cases being brought completely.<sup>385</sup>

<sup>380</sup> Equal Rights Trust interview with Hafidha Chekir, Professor of Public Law at the University of Tunis, Tunisia.

<sup>381</sup> Equal Rights Trust interview with Hammadi Henchiri, appeal lawyer who specialises in non-discrimination law, Tunisia.

<sup>382</sup> Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia.

<sup>383</sup> Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia.

<sup>384</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>385</sup> Equal Rights Trust interview with a senior official at Unison, Great Britain.

In **Colombia**, one interviewee cited cost as the principal barrier to access to justice, noting that: “there is a lack of effective access to justice (...) many times workers do not have the means to pay for a lawyer and they lack knowledge regarding their rights.”<sup>386</sup> Another noted how employers leverage the “inequality of arms” between them and workers, stating that they “take the dismissals to the ordinary jurisdiction, which is so expensive that the unions and the workers individually cannot pursue the procedures.”<sup>387</sup> In **Brazil**, changes to the law have increased the financial burden of proceedings on individuals who are also required to take on procedural costs.<sup>388</sup> Sérgio Luiz Leite explained:

*The labour reform tried to prevent workers from going to court, because it stipulated that if they lost the lawsuit, they would have to pay the procedural costs. So, in the beginning even some labour courts here in São Paulo, if you don't lose the lawsuit, you will pay (...) This is what it boils down to: the discussion of compensation, and not a discussion, let's say, of the concept of discrimination itself as a criminal act.*<sup>389</sup>

Conversely, respondents in **South Africa** highlighted the adoption of simple, accessible procedures at the Commission for Conciliation, Mediation and Arbitration as a good practice, helping to reduce the costs of access to justice for rights-holders. The ability to pursue arbitration, rather than traditional legal proceedings, reduced the time it takes for a claim to be heard and therefore reduces costs.<sup>390</sup> Nevertheless, Lebogang Mulaisi noted that even in the CCMA, the process has become more “legalistic,” with cost implications for potential claimants:

*These were not supposed to be highly legalistic processes. A worker who is a packer at Shoprite checkers is supposed to be able to participate meaningfully in these processes but (...) even the CCMA now is looking like a mini-High Court. And that's taken away the essence of how cases have unfolded in the CCMA as well as in the Labour Court. I understand what the judge is saying. They are legal experts, and they've refined their craft over a number of years, but we really need to go back to what the Labour Court was meant for. It's not meant to be this highly legalistic process. Do you know the amount of money the trade union spent on lawyers to win some cases? (...) It was supposed to be a situation where a worker with their employer could be on an equal footing, without, you know, putting together these incredible Labour Court briefs.*<sup>391</sup>

Another expert from **South Africa**, Dr Brickhill, spoke of the lack of civil legal aid funding, which limits the ability of individuals with limited resources to meet the costs of representation and thus to access justice:

*For me, for a long time, one of the major priorities of our society ought to be civil legal aid, and it isn't. There's just very limited provision for civil legal aid, despite some judicial recognition of the right, including by the Constitutional Court in the Legal Aid South Africa v Magidiwana and Others. So, in theory, we have a right to civil legal aid. In practice, Legal Aid South Africa prioritises criminal work and devotes very few of its resources to civil work, and those are very narrowly defined, which leaves it to university law clinics and public interest law centres. Plus, the pro bono services provided by the private sector which is also still very limited.*<sup>392</sup>

<sup>386</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia.

<sup>387</sup> Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia.

<sup>388</sup> Equal Rights Trust interview with Nathalie Rosario, lawyer at SINDOMÉSTICA-SP, a trade union for domestic workers and maids in São Paulo, Brazil; Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor's Office, Brazil.

<sup>389</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>390</sup> Equal Rights Trust interview with Carlton Johnson, a Commissioner with the Commission for Conciliation, Mediation and Arbitration, South Africa.

<sup>391</sup> Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

<sup>392</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

As these statements make clear, the excessive cost of legal proceedings is a significant impediment preventing workers from challenging discrimination. In some cases, this is a primary, immovable obstacle: those who cannot afford to bring claims simply do not challenge the discrimination they experience. Even for those workers who can afford to bring a claim, the inequality of arms between rights-holders and duty-bearers will often be significant, exacerbating the imbalance of power facing those seeking to vindicate their rights.

#### 6.1.2.4 Resourcing

Closely aligned to the challenges facing individuals in respect of the costs of bringing litigation are the issues of resourcing for those bodies which are established to support claimants or ensure the enforcement and implementation of the law. A number of countries have institutions – either independent, specialised institutions such as equality bodies or national human rights institutions, or governmental mechanisms such as labour inspectorates – which have a role in facilitating access to justice for those exposed to discrimination. This could be in the form of supporting individual litigants, developing and litigating strategic or class-action cases, or undertaking independent investigation. However, in order for these institutions to be effective, they need to be adequately funded and supported.

Experts from **Great Britain**, **South Africa** and **Brazil** all noted that the institutions in their jurisdictions receive inadequate funding. In Great Britain, Robin Allen KC stated that: “the enforcement bodies are underfunded, so there are big problems with the monitoring and enforcement of labour law,<sup>393</sup> while another noted that:

*One problem at the moment is that the Equality and Human Rights Commission isn't sufficiently resourced to bring enough cases in relation to equality in the workplace – that is critically important for some of the very difficult issues that are emerging. The new issues related to artificial intelligence and historic issues in relation to pay, both of which are resource intensive, and require a great deal of assistance to bring cases effectively. So, there is an unmet legal need for assistance for people bringing cases in the employment tribunal. Law centres are decreasing in number, and the provision of assistance is too thin.<sup>394</sup>*

Experts in South Africa also expressed concern about the lack of resources for the CCMA and the impact which this is seen to have on its effectiveness.<sup>395</sup> In **Brazil**, an academic expert in labour law noted that the Public Ministry of Labour and the Labour Inspectorate both have wide-ranging powers, including the possibility to litigate class-action suits and to undertake independent investigation, but that insufficient funding compromises their effectiveness.<sup>396</sup>

The remarkable consistency in the statements of experts from jurisdictions with different legal, institutional and enforcement frameworks demonstrates the critical importance of properly funded, resourced and supported enforcement mechanisms for effective access to justice, and thus for the functioning of the system more broadly.

#### 6.1.2.5 Victimisation

International law provides that anti-discrimination legislation should include explicit protection from victimisation, a form of harm which occurs when “when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or proceedings aimed at enforcing equality provisions.”<sup>397</sup> Given the inherent imbalance of power between rights-holders and duty-bearers in the vast

<sup>393</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>394</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>395</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.

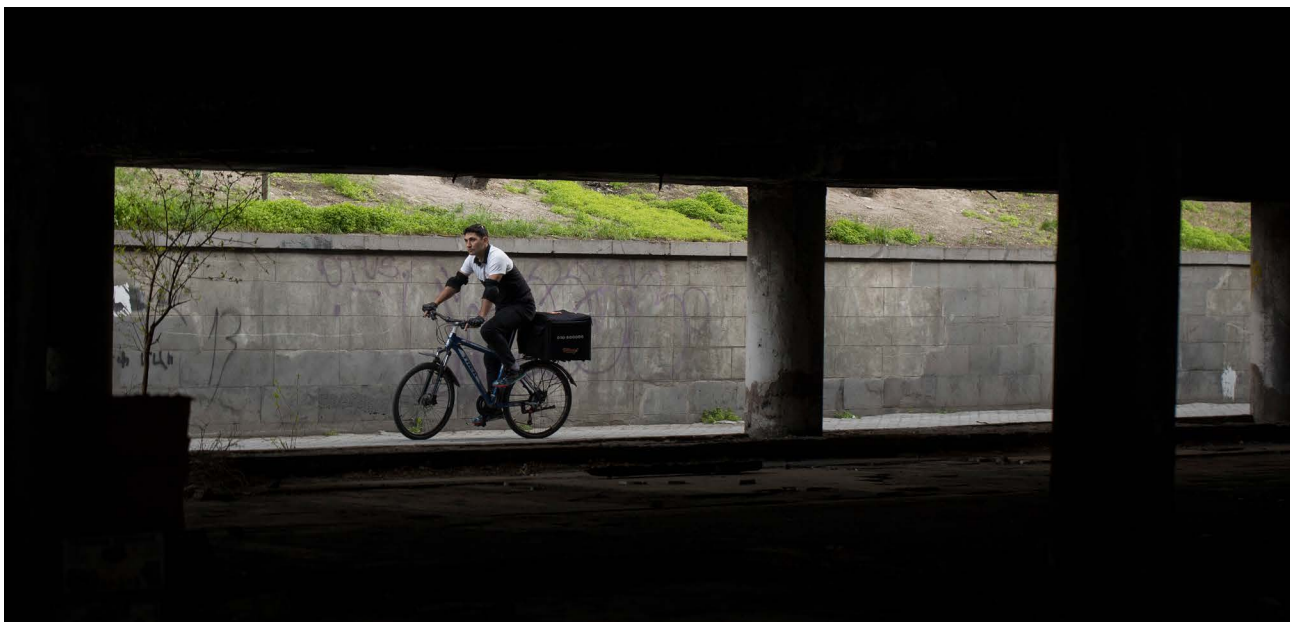
<sup>396</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>397</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimi-*

majority of discrimination cases, this protection is essential as a safeguard to ensure that those exposed to discrimination feel safe and secure and are able to seek justice. It is particularly salient in the employment sphere, where the victim is often directly challenging the entity responsible for their income, and risks job loss, demotion, blacklisting or other adverse actions that threaten their livelihood. This effect is magnified for workers with low incomes and those in precarious work arrangements, who often cannot afford even a brief break in employment. As discussed by several interviewees and in several chapters of this report, fears of reprisal can have a powerful, and often justified, dissuasive effect on potential claimants.<sup>398</sup>

In **India**, where there is no legal protection from victimisation, Chirayu Jain, a labour lawyer and trade union activist in Delhi, highlighted a number of cases in which employers have taken action in reprisal against workers seeking improved conditions:

*In one set of apartments [where residents were seeking] higher wages, an informal system of black-listing operated, where individual employers through the Resident Welfare Association (RWA) could deny access to domestic workers they did not find suitable. This meant the employer had an upper hand and would restrict the ability of workers to voice any violation of their rights for fear of being blacklisted from the entire apartment complex.<sup>399</sup>*



A platform delivery worker in Armenia. Credit: Solidarity Center / Narek Harutyunyan

Another example was provided by Vinay Sarathy, President of the United Food Delivery Platform Workers Union (UFDPU):

*In early 2022, workers with the platform Zomato resorted to a log-off strike against changes in delivery rates and incentives. The company called workers to a meeting and resolved some issues. However, 27 of the more active workers had their identities blocked. The union took up the matter with the Labour Minister, who asked the Labour Department to take some action. A conciliation procedure was initiated by the Additional Labour Commissioner, and the union managed to get the workers back on the platform. This was probably the first time in the country a platform had reinstated the worker after blocking his/her identity. The union felt this became possible only because of the Labour Minister intervening. However, the government has not supported any measures to regulate economic decisions, including salaries or rate card changes in platforms.<sup>400</sup>*

*nation Legislation*, New York and Geneva, 2023, p. 46.

<sup>398</sup> A fear of reprisals and retaliation from employers is mentioned in Chapter 3.3, 4.2.2, and 4.3.6 of this report.

<sup>399</sup> Equal Rights Trust interview with Chirayu Jain, a labour lawyer and trade union activist in Delhi.

<sup>400</sup> Equal Rights Trust interview with Vinay Sarathy, President of the United Food Delivery Platform Workers Union, India.

In **Brazil**, respondents articulated the fear of potential claimants in discrimination cases, in the absence of clear and comprehensive protection from victimisation. One trade union leader highlighted the plight of female workers who denounce harassment and discrimination, who particularly need “some kind of guarantee” that the worker will be protected from employer retaliation.<sup>401</sup>

In **South Africa**, interviewees explained the particular vulnerability of workers in precarious or informal work, where guarantees of victimisation in law are not effective in practice.<sup>402</sup> One interviewee explained that employers in the informal economy are often able to evict farm workers with impunity in the absence of any effective protection or legal representation. Other informal workers are often in similarly precarious and dependent situations, and so the consequences of reprisals from their employer can be particularly serious. Furthermore, the lack of legal protection for such workers often means they are unable to effectively challenge any reprisals, and so employers can often act with impunity.

As these testimonies underline, protection from victimisation – both in law and in practice – is essential if victims are to have the confidence to bring claims when they have experienced discrimination. As discussed in more detail below, anti-discrimination legal regimes are highly individualised, with enforcement relying heavily upon rights-holders to bring claims to court. As such, ensuring that those who have experienced discrimination have the confidence that they can challenge these acts through the legal system without reprisal is essential for the effective functioning of the system.

### 6.1.2.6 Accessibility

In addition to the challenges of complexity, cost and time, workers’ access to justice can be compromised by the inaccessibility of the judicial or enforcement process. As interviewees in **Tunisia** outlined, physical and linguistic barriers – among others – can prevent effective access to justice. Habib Baccouche, a Tunisian appeal lawyer with expertise on discrimination against persons with disabilities – himself a wheelchair user – spoke of the challenges posed by the physical inaccessibility of court buildings:

*I have faced discrimination at a personal level. For instance, to present the proceedings, as a lawyer, I face difficulties (...) I try to bypass them, because I can climb the stairs a bit with difficulty. I face discrimination when I go to the administration, there are certain places I cannot reach, I'm refused to do my job on the excuse that I cannot reach the workplace and so on. [...] I'm asked why I didn't file a complaint on my behalf as a lawyer, to make accommodations for those places. The issue is that the law provides for you to intervene for new buildings. When you see work in progress, you can intervene and ask them to stop because it does not follow the requirements. However, after the administration has opened (...) in my view, this complaint will not go anywhere.*<sup>403</sup>

Mariem Klouz, another Tunisian lawyer with an expertise on human trafficking law, spoke of the language barriers facing migrant workers when trying to access justice:

*Even if they [migrants] can access the justice system alone, they often don't know what to do or do not understand the words, the judge speaks Arabic, and uses legal terminology. S/he will easily not understand what is requested from them.*<sup>404</sup>

Access to justice requires not only that procedures are accessible in the legal and procedural sense. Groups exposed to discrimination – who frequently face physical, linguistic, spatial, and other barriers preventing their equal participation in different areas of life – must be ensured access to enforcement mechanisms,

<sup>401</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>402</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>403</sup> Equal Rights Trust interview with Habib Baccouche, appeal lawyer specialising in discrimination against persons with disabilities, Tunisia.

<sup>404</sup> Equal Rights Trust interview with Mariem Klouz, Appeal Lawyer, Tunisia; see also Equal Rights Trust interview with a senior officer of a non-governmental organisation working for the protection of migrants, Tunisia.

procedures and institutions. Failure to remove barriers which prevent access to justice is both a form of discrimination in itself and a significant impediment to the vindication of other rights claims.

### 6.1.3 Quality Justice

Effective access to justice requires those responsible for administering and enforcing the law to have the knowledge, competence, independence and means to do so correctly and effectively. Where members of the judiciary or other enforcement bodies lack understanding of anti-discrimination law, this can lead to narrow or incorrect interpretations. Where the judiciary is unwilling or unable to interpret the right to non-discrimination correctly, this can not only result in ineffective justice and remedy for individual victims, but also act as a disincentive for other rights-holders to make claims.

#### 6.1.3.1 Knowledge and Understanding among the Judiciary

In **Great Britain**, experts interviewed for this report spoke positively of the knowledge and expertise of the judiciary on equality and non-discrimination issues. One expert stated that “because we have had anti-discrimination laws for many years” members of the judiciary “are very competent in dealing with the questions that are brought before them.”<sup>405</sup> Another respondent – a former judge – stated that “we’ve moved light years in terms of judges understanding what the law is about,” noting that:

*It’s the story of my career that we’ve moved to a place where the professionalism of tribunal judges has changed utterly (...) When I started doing equality cases, my role was a didactic, teaching, one – telling them what the law was and what it was meant to achieve. So, I spent a tremendous amount of time going through its purposes, and explaining the obligations to draw inferences, and so on, and the social role that they performed in determining the outcome to difficult claims. I would say now that nearly everybody, and possibly everybody who becomes a judge, will have some experience of discrimination already (...) This means that we could be confident that they see the task in front of them as significant and worthwhile, and the claims are not to be scoffed at, they are to be taken very seriously. So, I think that is terrific.*<sup>406</sup>

The judge noted the value of “wonderful” judicial guidance, in the form of the Equal Treatment Bench Book, but stated that there is still inadequate judicial training: “I was [a judge] for twenty years (...) there was almost never any detailed training.” In **Brazil**, Professor Regina Stela Corrêa Vieira also emphasised the importance of judicial guidance:

*The National Council of Justice developed a protocol for judgment, with a gender perspective, and this has opened opportunities, mainly for judges. I have seen many magistrates and labour magistrates wanting to know the protocol, seeking to understand these theories that involve discrimination, so that they can apply the protocol (...) [The protocol] challenges these ideas of universality and neutrality to say that it is possible to have impartiality, but applying it to the gender perspective, the race perspective. In short, it is [necessary to have] understanding the social context of Brazil in labour relations as well.*<sup>407</sup>

Another Brazilian expert highlighted the practical challenge of ensuring adequate judicial training at all levels of the judiciary, given the scale of the challenge:

*I wonder how the common justice judge, in a labour court in the municipality of a city of 10,000 inhabitants, where the civil court performs marriages, arrests people, discusses house rentals. How does this work, in this small town? [The law on discrimination] is very specialized in its various ar-*

<sup>405</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>406</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>407</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

... eas. I can't see a judge who is so good that he would be able to do it in Brazil.<sup>408</sup>

A senior officer with the State Labour Department in **India** also highlighted the challenges of administering labour law protections at the local level, given the lack of training and education for those involved in administering and enforcing these laws.<sup>409</sup> In **Tunisia**, a representative of the National Authority against Human Trafficking explained how unclear or contradictory laws, coupled with a lack of clear guidance and training for members of the judiciary, can result in conflicting or inconsistent judgments:

*For example, in the Law Against Trafficking in Persons, the minimum sentence is 10 years [of imprisonment] with a fine of 5,000 Tunisian dinars (...) On the other hand, we see in the Law on Violence Against Women, the exploitation of minor girls can vary between 3 and 6 months [of imprisonment]. Do you see the difference? (...) So, two different judges who have two similar cases can give different judgments and each of them is right because the legal basis is there.<sup>410</sup>*

Saadia Mosbah, co-founder and President of Mnemty – an organisation fighting against racial discrimination – expressed concerns regarding judicial attitudes, noting that some jurists left following training on non-discrimination, “saying the topic was not that important.”<sup>411</sup> This reflects a concern which – while not referenced explicitly in the interviews for this report – has been identified in multiple jurisdictions: that members of the judiciary often have little or no direct experience of discrimination, being predominantly from groups which are not generally exposed to discrimination. In order for States to ensure effective access to justice and enforcement of the law, it is essential that measures are taken to ensure that the judiciary is representative of the population as a whole and to provide training and support for the judiciary, not only on anti-discrimination law but on the historical, political and social causes and consequences of discrimination.

### 6.1.3.2 Knowledge and Understanding among Lawyers

Experts in a number of jurisdictions also highlighted the importance of adequate knowledge and understanding of the law among lawyers, given their central role in enabling victims of discrimination to bring their claims successfully. In **Great Britain**, Professor Lizzie Barmes, an equality and employment law academic, stated that “[t]he role of lawyers is really important,” going on to give an example of research on positive action provisions introduced in the United Kingdom, which highlighted important areas of ignorance among practicing lawyers:

*When I was talking about lawyers, I was talking about my study about the impact of the positive action provisions. There were some shocks about how little the people we were talking to – including lawyers, including recruitment partners – the number that said they had never heard of positive action measures was a real shock. I was expecting (...) them to say, “I know all about the positive action provisions” (...) [but] there were lots of people saying they know nothing about the[m].<sup>412</sup>*

In **South Africa**, Darcy du Toit, Emeritus Professor at the University of the Western Cape, noted that levels of knowledge on the specifics of anti-discrimination law are highly varied:

*I think lawyers, by and large, are schooled to try to win cases, and so they will argue whatever they think will win the case (...) [but] others are incompetent or poorly prepared. The hapless employee goes to some attorney who is his or her brother or someone his cousin recommends who did their divorce = a very nice person who doesn't charge high fees.<sup>413</sup>*

<sup>408</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>409</sup> Equal Rights Trust interview with an expert on labour law and regulations, India.

<sup>410</sup> Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

<sup>411</sup> Equal Rights Trust interview with Saadia Mosbah, President and co-founder of Mnemty, Tunisia.

<sup>412</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>413</sup> Equal Rights Trust interview with Darcy du Toit, Emeritus Professor at the University of the Western Cape, South Africa.



He also highlighted a doctrine developed by the High Constitutional Court<sup>414</sup> to mitigate the impact of poor argumentation by lawyers, whereby the court will apply the law, irrespective of whether certain points of law are argued:

*I do quite a bit of consultancy work [reviewing] applications in which basically the CCMA or the Bargaining Council messed up quite badly. Very often, the crucial arguments were not even put, and the Commissioner was unaware of what the law was. Then there is a very important precedent (...) on the doctrine of legality, that the law is the law. [So] the given matter, even if it was not argued, and the parties proceeded on the mutual misunderstanding of what the law was, the High Court was obliged to apply the law.<sup>415</sup>*

As these expert testimonies reveal, the effective functioning of the enforcement system is predicated on legal professionals with the knowledge, understanding and capacity to interpret and apply the law. Given the complexity of anti-discrimination law and its specificities, States must ensure that the legal profession and the judiciary receive the training and education they need to use and apply the law if they are to meet their obligations to provide effective protection from discrimination.

### 6.1.4 Evidence and Proof

It is a well-established principle of international law that anti-discrimination laws must provide for the shift – or the transfer – of the burden of proof in discrimination cases from the claimant to the respondent, at the point where a prima facie case has been made.<sup>416</sup> As the Committee on Economic, Social and Cultural Rights has recognised: “[w]here the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the (...) respondent.”<sup>417</sup>

This principle is essential for the effective functioning of anti-discrimination law, because the evidence required to establish that a decision, policy, or practice was based on a ground of discrimination is frequently in the hands of the respondent rather than the claimant. Accordingly, the evidentiary requirement to demonstrate that discrimination has occurred can rarely be discharged without the transfer of the burden of proof. A corollary of the requirement for the transfer of the burden of proof is that discrimination is a civil or administrative matter, rather than a subject of criminal penalty, and that the civil standard of proof is applied.<sup>418</sup>

Where anti-discrimination legislation clearly and explicitly establishes discrimination as a civil matter and provides for the transfer of the burden of proof, the law can function as intended. In **Great Britain**, for example, none of the experts interviewed cited problems with evidence and proof as an obstacle preventing effective enforcement and implementation of the right to non-discrimination. Conversely, in States where the legal framework on equality and non-discrimination is characterised by gaps, inconsistencies and limitations in scope, the challenges to bringing enforcement action arise earlier in the enforcement process. Accordingly, none of the interviewees in **India** cited issues of evidence or proof as significant obstacles, focusing instead on the scope of protection and the justiciability and enforceability of the rights themselves.<sup>419</sup>

Where the law does not allow for the transfer of the burden of proof from complainant to respondent where a prima facie case of discrimination is made or where the judiciary or other enforcement bodies limit the range or types of evidence which can be provided in discrimination cases, the evidentiary threshold will be unachievable in most discrimination cases, rendering protections in the law ineffective in practice. In States

<sup>414</sup> *CUSA v Tao Ying Metal Industries and others (2009) (2) SA 204 (CC)*.

<sup>415</sup> Equal Rights Trust interview with Darcy du Toit, Emeritus Professor at the University of the Western Cape, South Africa.

<sup>416</sup> See Chapter 4.3.2 of this report.

<sup>417</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>418</sup> For discussion of why the criminal law is “both an inappropriate and an inadequate means to remedy (...) discrimination,” see United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023.

<sup>419</sup> See Chapter 4.3.1 of this report.

where the law prohibits discrimination on one or more grounds but does not provide for the transfer of the burden of proof, this poses an insurmountable obstacle for many individual claimants. In **Tunisia**, a significant number of those interviewed for this study spoke about the severe limitations on the proper operation of the Law on the Elimination of Racial Discrimination (Law 50 of 2018) as a result of the lack of provision for transfer of the burden of proof. One noted that:

*The main existing problem is the huge burden of proof, it creates a huge blockage. In general, at work either the colleagues do not want to testify, or it happens in an office between the boss and him [the victim], so there is no proof.<sup>420</sup>*

Other experts concurred, with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation highlighting the practical impossibility of accessing evidence that discrimination has occurred in many cases:

*The problem that the subjects of discrimination may encounter in the context of their work is that they cannot provide proof of this discrimination. Since we are talking about gestures made within the framework of a company, within the walls of the employer's office, he is facing his employer, there is an inequality of position and power. In the case of Lassaad and Sarra [two cases the lawyer had worked on and had described in detail], the employees who witnessed this discrimination did not want to testify in their favour. In Lassaad's case they testified against him outright (...) We use an expression in Arabic to say not that the fault does not exist, but that the fault could not be proven.<sup>421</sup>*

Respondents in **Colombia** and **Brazil** cited similar problems.<sup>422</sup> Professor Regina Stela Corrêa Vieira from Brazil explained;

*Today for a woman to prove wage discrimination – that she earns less because of her gender in comparison to a man – the requirements for her to be able to prove this are enormous. This makes it very difficult for a woman to prove that there is wage discrimination, for example. Harassment is the same thing (...) The inversion of the burden of proof is more complex and proof of harassment at work, even more so when it involves a superior and a worker or a worker at a lower level. Harassment in exchange for you not losing your job, 'you will go out with me' or 'you will do some kind of favour' or 'you will put up with some kind of joke' – this kind of proof is very difficult (...) I think it is perhaps one of the most difficult tests because, for example, in proving discriminatory advertising, it must be very clear that there was some kind of discrimination in order for that employer to be punished or for that worker to have some success in court (...) Proof of harassment, for example, is a very complex [where it] is hidden. For a worker, for example, to prove that her boss did some kind of blackmail, it is not up to her, so it is for that. It has been discussed, the application of protocols, the application of other means of proving or at least contextualizing discrimination (...) so that it is possible to incorporate these views or invert the burden of proof, but there is no specific norm that guarantees this.<sup>423</sup>*

As these statements from Colombia, Brazil and Tunisia articulate powerfully, where anti-discrimination laws and non-discrimination provisions do not provide for the transfer of the burden of proof from claimant to respondent, the enjoyment of the right to non-discrimination is severely impaired. In the majority of discrimination cases, rights-holders are simply unable to prove discrimination with the evidence which they have at hand; the transfer of the burden of proof is essential for individual remedy and thus underpins the effectiveness of the system as a whole.

<sup>420</sup> Equal Rights Trust interview with Saadia Mosbah, President and co-founder of Mnemty, Tunisia.

<sup>421</sup> Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia. See also Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

<sup>422</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia; and Equal Rights Trust interview with Renan Kalil, a labour prosecutor at the Labour Prosecutor's Office, Brazil.

<sup>423</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

### 6.1.5 Effective Remedy

Legal rights guarantees are effective only in so far as enforcement action results in both sanction for those responsible and remedy for those harmed. Sanctions should be effective, dissuasive and proportionate, creating an effective deterrent and thus stimulating preventative action by duty-bearers.

Effective remedy for rights-holders requires restoration to the situation which those affected would have been in had the discrimination itself not occurred; this necessitates recognition of the harm, compensation for both material and moral damage, and restitution and rehabilitation. In the workplace context, effective remedy includes – but is not limited to – compensation for damages including psychological harm; reinstatement; provision for resignation with compensation, adaptations to work environments, practices, policies or procedures; access to psychosocial support; support to re-enter the job market or change jobs; and other measures to recognise and redress the harm. As noted, international law requires States to ensure effective access to justice, including through the removal of financial barriers, with low-cost procedures and legal aid provision. In addition, however, an essential, minimum precondition for effective remedy is full reimbursement for court and other legal expenses for those bringing a claim of discrimination.

Beyond reparations for those individuals affected by discrimination, effective remedy requires measures at the institutional and societal levels to prevent repetition or address the social causes and consequences of discrimination. In particular, employers must be required to address systemic issues within the workplace, including making changes to working conditions and arrangements that constitute or enable discrimination or harassment, and adopting appropriate policies and procedures to prevent recurrence. This should include mechanisms to ensure employers adequately consult with workers on the design and implementation of both remedial and preventative measures.

Where sanctions in discrimination cases are not effective, proportionate or dissuasive – failing to create a deterrent effect – where individual claimants cannot secure effective reparation, or where the law does not provide for institutional and societal remedies, rights provided by law will be ineffective in practice, resulting in loss of faith among rights-holders and lack of compliance by duty-bearers, as well as a failure to remediate harms in specific cases.

#### 6.1.5.1 Sanction

A number of those interviewed for this report cited the ineffectiveness or inadequacy of sanctions as an impediment to the effectiveness of the law. Trade union leader Sérgio Luiz Leite in [Brazil](#) noted:

*[The law] has to be, sometimes, stronger in charging companies. If discrimination is proven, if sexual harassment, moral harassment, or any other type is proven. Well, what is the penalty? Brazil doesn't have [legal protection] against unjustified dismissal. So, any worker, man or woman; straight or homosexual; white or black; can be fired without just cause. (...) In the end, if you don't have legislation that is perhaps harder, more punitive, it may not be as effective as it should be.*<sup>424</sup>

In similar terms, Estefanni Barreto, a representative of the Central Workers Union (CUT), from [Colombia](#), noted that “sanctions in the State's anti-discrimination law are not effective or dissuasive and fail to fully compensate victims.”<sup>425</sup> She went on to note that it is necessary that any remedies act as a sanction on employers but also provide compensation for the harm suffered by the individual.

As a matter of principle, discrimination in the sphere of employment – where it does not involve violence or other criminal acts – should be subject to civil, rather than criminal, sanction. This is the case for a number of reasons, including the need to use a civil standard of proof and to allow the transfer of the burden of proof (as discussed above); the fact that criminal sanctions will be disproportionate in cases in which discrimination has occurred indirectly or unintentionally; and the fact that criminal law regimes generally fail to provide

<sup>424</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>425</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia.

adequate remedy for individual rights-holders.<sup>426</sup> As Arvind Narrain, President of the People's Union for Civil Liberties from **India**, noted on this latter point:

*Redress for violation of rights is available only under the Scheduled Castes and Scheduled Tribes Atrocities Act, for dalits and adavasis, and under the Anti Sexual Harassment Legislation for women. However, both the acts are under criminal law, and therefore offer no specific civil compensation for violation.*<sup>427</sup>

Nevertheless, Hatem Kotrane, a professor of law in **Tunisia**, cited the lack of criminal sanctions as an obstacle to the effectiveness of anti-discrimination law due to the lack of effective deterrent.<sup>428</sup> Another expert, Saadia Mosbah, President of Mnemty – an NGO working to eliminate racial discrimination in **Tunisia** – highlighted that failure by the courts to apply sanctions provided for in law as a factor limiting its effectiveness.<sup>429</sup>

As these various statements illustrate, in the absence of effective, proportionate and dissuasive sanctions, the effectiveness of the law will be fatally undermined. Sanction is essential both to engender compliance by duty-bearers and to ensure confidence and trust among rights-holders. Where the law does not provide for effective, proportionate sanctions, or where these sanctions are not applied in practice, individual claimants will not receive complete remedy, and the overall integrity of the system will be compromised.

Ensuring effective and dissuasive sanctions is particularly important in the context of the world of work, in which historic patterns of discrimination and marginalisation and intentional discriminatory policies and practices can play a central role in maintaining low wages and exploitative working conditions. Indeed, in some cases, discriminatory violence or harassment has been used to prevent workers from exercising rights or demanding equal treatment. In such cases, effective sanction – including criminal sanction for violent acts – is essential. More broadly, it is essential for the effective functioning of the law that sanctions should be sufficient that the costs of failure to prevent discrimination outweigh any potential financial benefit from maintaining discriminatory policies or practices.

### 6.1.5.2 Individual Reparation

Effective remedy for individuals requires full reparation for the harm suffered by those subjected to discrimination, including compensation for both the material and moral harms which they experienced, as well as restitution – measures to restore the victim to the situation they would have been in had the discrimination not occurred.

In some States, such as **India**, access to reparation and compensation may be limited by ground, because of the lack of a comprehensive framework providing protection from discrimination on all grounds. Legislation in India prohibits certain rights violations against members of scheduled castes and scheduled tribes and against women, but without providing for reparation for the victims, focusing instead on sanction. Moreover, “there is no equivalent legislation for protecting minority rights – in particular Muslim rights – in the country,”<sup>430</sup> meaning that there is no means for victims of discrimination on these other grounds to secure either sanction or remedy. The patchy and inconsistent framework of protection means that possibilities to secure remedy vary dependent on the region, the form of employment and the ground of discrimination. Arvind Narrain of the PUCL provided a specific example:

*We have a case in Rajasthan when a Muslim employee in the software company Infosys was charged with terrorism by the state, and the company dismissed him from work. Subsequently*

<sup>426</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 77-78.

<sup>427</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

<sup>428</sup> Equal Rights Trust interview with Hatem Kotrane, Emeritus Professor at the Faculty of Juridical, Political and Social Sciences, University of Tunis, Tunisia.

<sup>429</sup> Equal Rights Trust interview with Saadia Mosbah, President and co-founder of Mnemty, Tunisia.

<sup>430</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

he was held innocent by the court. He challenged his dismissal and was awarded compensation under the Rajasthan Shops and Establishment Act. However, such a compensation would not have been available to an informal employee, as labour regulations would not be equally applicable. The coverage of most provisions of labour legislation is available only to less than 10 per cent of the workforce in India in formal employment relations.<sup>431</sup>

Respondents in both **Brazil** and **South Africa** noted that the legal regimes in these countries provide for compensation, which is tied to the salary of the claimant, resulting in compensation which is often inadequate to remedy the harms experienced. In **South Africa**, for example, the law provides that the maximum compensation which can be awarded is twenty-four months' salary. As Tzvi Brivik, a labour law attorney, stated, this limit does not allow remedy for the full range of harms some individuals experience:

*We are saying that in addition to that, the worker should be entitled to recover what I've described as general damages. Because it's a contumelious injury in breach of your persona (...) Section 194 limits the compensation to a multiple of your salary. The problem with that is if you're a domestic worker or a farm labourer who is discriminated against, then 24 x 3000 is not much compensation for somebody who suffered sexual discrimination at the hands of her employer (...) Seventy thousand or one hundred thousand Rand for somebody victimised, embarrassed or forced into compromising acts is not much. If we could add to that, for example, 250,000 in general damages, the compensation is far more reasonable and acts as a deterrent.<sup>432</sup>*

Experts in **Brazil** cited the same problem in almost identical terms, noting also that these limitations undermine the effectiveness of the compensation regime as a form of sanction and deterrent, as well as a means of remedy for the victim:

*We have a big problem (...) because the labour legislation (...) limits the amount of moral damages to be paid. If I don't receive moral damages, then these damages are usually related, currently, to the value of the worker's salary. And there is a limit (...) How many times the salary for each type of damage? So, in my opinion, this is an invitation to repeat offences, because it is much more worthwhile to pay 10 minimum wage [instalments] to a cleaning lady who suffers harassment than to fire the manager, who is a harasser, for example. So, I think this is a very serious flaw, to limit it.<sup>433</sup>*

Effective and complete reparation for survivors of discrimination – in the form of compensation for both moral and material damage, together with measures of recognition, restitution and rehabilitation – is essential both for ensuring the right to effective remedy for individuals, and for maintaining confidence in the enforcement system. Unfortunately, as the interviewees for this report indicate, effective reparation is often not available, even in a State like South Africa with a well-established, comprehensive anti-discrimination law regime. In the absence of effective remedy for violations, the right to non-discrimination cannot be realised.

### 6.1.5.3 Institutional and Societal Remedies

Beyond providing an effective sanction for those responsible and effective remedy for those directly harmed, anti-discrimination laws must allow for institutional and societal remedies. These forms of remedy allow courts and other enforcement agencies to mandate measures designed to deter and prevent repetition and to address the structural and societal causes and drivers of discrimination. These forms of remedy are necessary if enforcement bodies are to play an effective role not only in remedying past harm but in preventing future discrimination. Unfortunately, however, few legal systems globally allow for a comprehensive and effective range of such remedies, focusing instead on sanction and remedy focused on the individual claimant or case.

<sup>431</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

<sup>432</sup> Equal Rights Trust interview with Tzi Brivik, an attorney with expertise on the platform economy, South Africa.

<sup>433</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

In **Great Britain**, a number of experts cited the inability of employment tribunals to make recommendations of general application as an important limitation of the legal framework. Melanie Field of the Equality and Human Rights Commission noted that changes to employment legislation introduced in the past decade reduced the powers of tribunals to provide societal remedies:

*The other [provision] I'd mention particularly as one that was there but is [no longer] there now is the ability of employment tribunals to make recommendations for the benefit of the wider workforce when they find unlawful discrimination. So that's a progressive, sort of, protective step, that could have improved employer practice, which unfortunately isn't in place.<sup>434</sup>*

Robin Allen KC specifically cited the fact that employment tribunals cannot order equal pay audits:

*There's a significant point in relation to remedies that needs to be addressed. The extent to which tribunals can really order equal pay audits is inadequate, and I think that equal pay cases in sex discrimination ought to allow for particularly equal pay audits as a primary remedy which could be sought by bodies acting collectively. I think that would be a very good addition.<sup>435</sup>*

Interviewees in **Brazil** highlighted the effectiveness of class-action suits in producing remedies at an institution-wide level, where individual remedies would have failed to prevent repetition:

*I see much more of an impact when they are class action suits. There are some paradigmatic cases of companies, for example: a large beer producer, for many years, was recognized as the company that harassed the most and had the most cases of humiliation of workers at work, in the work environment (...) The cases were so absurd that I heard several individual convictions and the Labour Prosecutor's Office went after it, collected evidence and got a collective conviction, a payment of damages and signed terms of adjustment of conduct with this company so that this kind of corporate practice would no longer happen. So, normally the most effective remedies involve this kind of widespread practice, and when either the Labour Prosecutor's Office or the Labour Inspection picks this kind of thing up and makes the macro negotiation (...) Normally the company itself, when convicted or when it signs a TAC, normally needs to incorporate anti-harassment training, anti-discrimination training, and so on to its staff, from the highest manager to the operational assembly line of the company. I think that these are the most effective cases in which we really see corporate change.<sup>436</sup>*

As this example from Brazil indicates, institutional and societal remedies are essential if enforcement action is to be effective not only in remediating discriminatory harms, but also in preventing future discrimination and addressing the wider societal causes and consequences of discrimination. It is a cause for concern, therefore, that examples of such remedies were raised in only a handful of the interviews conducted for this study, and even then mainly in response to collective, class-action complaints. If States are to meet their obligations and commitments to ensure the effective enjoyment of the right to non-discrimination, they must ensure that their legal frameworks permit institutional and societal remedies and mandate courts and other enforcement bodies to consider and award such remedies.

### 6.1.6 Individualised Model

Experts identified a diverse range of issues which compromise the effectiveness of anti-discrimination laws in respect of enforcement, access to justice and remedy. One of the underlying critiques which links many of these issues – whether the challenges relate to access, evidence or remedy – is the reliance of the enforcement system on individual rights-holders to bring legal action. Several interviewees explicitly criti-

<sup>434</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>435</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>436</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

cised this “individualised” model of anti-discrimination law and the dependency on individual rights claims as the primary means to secure the enforcement and implementation of the law.



Credit: Kenya Union Of Domestic Hotels Educational Institutions Hospitals & Allied Workers

In **Great Britain** and **South Africa** – the two States with the most comprehensive, well-developed and long-established anti-discrimination law frameworks – a number of interviewees critiqued the “individualised” model of enforcement. In South Africa, Amy Tekia, co-founder of IZWI Domestic Workers Alliance, noted that it is “ironic” that “the CCMA, as a mediation agency, is given the complete responsibility of enforcement of sectoral discrimination and the general labour rights of domestic workers.” She continued: “what happens when you are (...) dismissed unfairly is that instead of the employer getting a slap, you go to the CCMA and negotiate; instead of my right to have XYZ suddenly, you are now negotiating your rights.”<sup>437</sup>

Two experts in labour law in **Great Britain**, one an academic and the other a senior official with the Equality and Human Rights Commission, were forthright in their criticism of the limits of an individualised model of anti-discrimination law. One stated that the individualised model of rights enforcement “generally doesn’t [work]. I think that’s probably the bottom line,” continuing:

*There’s lots of discrimination that doesn’t get raised with the tribunal. There’s lots of discrimination that doesn’t get raised with the employer. There’s lots of discrimination where people don’t turn to the union or ACAS or anybody else. They just get on with it, and it has its impact, and it causes its destructiveness, and that’s the kind of discrimination that I think requires preventative action rather than waiting for every individual to take it (...) So, I do think that collective solutions are important (...) because if it’s all on an individual, the fear factor in some workplaces just stops people coming forward, and really important discrimination is not challenged.*<sup>438</sup>

She emphasised the personal toll of litigation on claimants, calling for a shift to a collective, preventative approach rather than one which relies so heavily on individuals to bring rights claims.<sup>439</sup> She explained that what is needed is “a way of collectivising it and finding processes that are understanding and supportive,

<sup>437</sup> Equal Rights Trust Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>438</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>439</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

that [enable people to] carry on in the workplace, and that the person who's perpetrating is the person that feels the consequences proportionately to the person who's raising the case."<sup>440</sup>

The other noted that the "individualised approach is a massive, massive, massive issue in a whole bunch of different ways." Speaking about the findings of a research study she had conducted on bullying and harassment in the workplace, she explained that:

*[The rights and enforcement model] pits individuals against what are innately collective entities – organisations – and just as importantly, in relation to complaints about what is a uniquely collective endeavour. So, it forces individuals to jump up and not only to take on an entity, but to suddenly be individualistic about work (...) when that simply doesn't fit well with their own self-understanding of what they're engaged in or what's happened, let alone the activity and the world of which they're part. So, one of the biggest things that one finds – and I would explain this partly because of this mismatch – is that vast numbers of people run into problems at work and do nothing about them. You end up with this model where allegedly there's a whole bunch of protections but, actually, they may not be accessed by those who are encountering the problems because – in my argument – the burden on the individual is way too much.*<sup>441</sup>

This same academic expert stated that it is important to "contextualise" the role and the influence of the judiciary and judgments, remembering that cases decided in courtrooms are the tip of an iceberg compared with the large number of cases which are never litigated.<sup>442</sup>

As these testimonies reveal, the individualised model of enforcement in anti-discrimination law is a major constraint on the effectiveness of the law, both in providing remedy for victims and in preventing discrimination.

Those exposed to discrimination are – almost invariably – in a weaker position than those who have discriminated against them. Individuals making claims against institutions almost always have fewer resources, meaning that they are ill-equipped to navigate procedures which are often costly, slow and complex. There are also innate power dynamics at play in many discrimination cases, and nowhere is this truer than in the relationship between worker and employer. Added to this, as discussed above, is the imbalance in respect of the evidence necessary to prove discrimination. While mechanisms – including legal aid, protections from victimisation, provision for collective complaints and the transfer of the burden of proof – have been developed to address some of these problems, the cumulative disadvantage facing claimants, coupled with the inherent power imbalance, both limits the success of claims and acts as a powerful deterrent, dissuading rights-holders from bringing claims.

Beyond the adverse impacts on individual claimants, however, the individualised model of enforcement gives rise to three other major constraints on the effectiveness of the law. First, as examined in the next chapter, a system based on individual rights claims requires rights-holders to know and understand their rights, recognise and articulate that the harms they have experienced constitute discrimination under the law, and have confidence in the enforcement system to provide them with remedy and protect them from victimisation. Many rights-holders may be unaware of their rights or lack an adequate understanding and so may be unable to identify instances of discrimination. Even when individuals are aware, mistrust of legal systems and lack of confidence in the possibility of achieving justice can have a significant dissuasive effect on individual complaints. Moreover, that lack of confidence is often well founded – without meaningful, systematic enforcement, workers rationally and correctly fear that retaliation and other negative consequences are likely to have a stronger and more immediate impact on their wellbeing.

<sup>440</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>441</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>442</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.



Second, the remedies and sanctions which are available and awarded in these claims are, frequently, individual in nature – compensation and restitution for the rights-holder, together with a fine for the duty-bearer. Individual reparations are often inadequate and do not outweigh the potential risks and losses that pursuing a claim against an individual’s employer can incur. Moreover, such remedies fail to engage with the societal impact of the harms caused by discrimination or the need for institutional remedies and sanctions to prevent repetition. Many respondents also identified this as an issue in relation to the sanctions imposed – sanctions in individual cases are perceived to be inadequate and insufficiently dissuasive to achieve tangible change in employer behaviour.

Third, the individualised model is – unavoidably – reactive and remedial in nature. Rights-holders bring claims where they have experienced harm and seek remedy for it. While providing effective remedy for rights violations is an essential element of any human rights law, it is only part of the solution. What such an approach fails to address are the root causes of the discriminatory conduct and how these are addressed. As discussed in Chapter 7, States have an obligation not merely to prohibit discrimination and to enforce remedy and sanction, but also to prevent and eliminate discrimination. In systems with a disproportionate focus on individual rights claims as the primary means of enforcement, States are unable to discharge this preventative duty.

### Promising Practice: A Shift to a Collective Model of Enforcement

Professor Alysia Blackham is an Associate Professor and Researcher at the University of Melbourne Law School with expertise in the enforcement and implementation of anti-discrimination legislation. Her 2022 book, *Reforming Age Discrimination Law: Beyond Individual Enforcement*, examines why there is so little enforcement action under anti-discrimination laws, with a particular focus on age discrimination.

Interviewed for this report, Professor Blackham affirmed the views expressed by experts in Great Britain and South Africa regarding the limitations of an individualised model of anti-discrimination law. Beyond the practical challenges and consequences of this model, she noted that, in principle, it is “unfair” to rely upon individuals to secure the necessary systemic change to address discrimination. Given that those experiencing discrimination are often the most marginalised and vulnerable workers, it is not only wrong but unrealistic to expect them to shoulder the financial, emotional and physical burden of challenging discriminatory practices which affect not only them as individuals but entire groups, communities and societies. To address this and the other challenges preventing the effective enforcement of the right to non-discrimination, Professor Blackham proposes the adoption of a fourfold approach to enforcement, which goes beyond ensuring effective, meaningful access to justice and remedy for individual victims, complementing it with collective action, properly empowered statutory agencies and positive duties on employers.

Professor Blackham emphasised in particular the need to establish concrete positive duties on employers to make equality considerations an inherent part of their workplace practices. She noted that while there are some examples of positive duties, none of those currently in place “create (...) an ideal positive duty that [not only] requires transparency and promotes dialogue around equality, but also requires employers to take action to address the equality problems that they face in the workplace.”

Professor Blackham highlighted a number of positive and promising examples, while noting that no State has yet established the ideal system of proactive obligations on employers. Alongside the work of the Equality and Human Rights Commission to promote adherence with the Public Sector Equality Duty in Great Britain, she highlighted equality legislation in Australia which

imposes a positive duty on both public and private employers to not only consider equality concerns but take direct action to address instances of inequality. While these measures are undoubtedly positive developments, the inadequate sanctions for non-compliance compromise their effectiveness.

Professor Blackham explained that to create effective duties and ensure compliance, there need to be statutory agencies to implement, monitor and enforce them. While individual workers, trade unions and even businesses themselves have a role to play, States must establish effective regimes, with statutory agencies which are properly empowered to secure compliance. At present, those statutory agencies which exist lack the powers, resources or funding to enforce the law effectively. As a result of these constraints, many such agencies have to prioritise their work rigorously, often adopting a reactive approach, based upon the complaints which they receive from individuals. While this is understandable, a shift to a proactive approach, focused on compliance with positive duties, is necessary to address the problems of an individualised, reactive and remedial model.

### SUMMARY: Access to Justice, Enforcement and Remedy

For the right to non-discrimination to be effective, individuals exposed to discrimination must be able to access justice and to seek and secure remedy for the harm they have experienced and sanction for those responsible for discrimination. This is essential both for the individuals concerned and for building confidence in, and compliance with, the law in society at large.

Ensuring effective **access to justice** demands a comprehensive set of institutional and legal measures. It requires the State to establish a system of judicial or other enforcement bodies which are independent, impartial, well-resourced and accessible; to ensure that rights are justiciable both in law and practice; to ensure that justice is genuinely available and accessible to those seeking remedy; and to ensure that the legal profession, the judiciary and others involved in enforcement are able to provide impartial, accountable and quality justice.

The **justiciability** of rights is an essential precondition for rights-holders to access justice. In States with weak, inconsistent and fragmented anti-discrimination laws, victims are unable to access justice because rights are ill-defined, too narrow in scope or unenforceable under law. In both India and Tunisia, respondents noted that those exposed to discrimination on certain grounds or in particular areas of life have no grounds in law to bring claims, rendering considerations about the availability, accessibility and quality of justice essentially irrelevant.

Where rights are justiciable in principle, we find that ineffective access to justice is a significant impediment to the elimination of discrimination. Where victims of discrimination cannot access justice, their cases receive no remedy, their rights lack force, rights-holders lose confidence and duty-bearers lack compulsion to comply. The research identifies a wide range of barriers which limit the **availability and accessibility of justice** – the complexity of the legal procedure; the time which the process takes, the cost for claimants; the inadequate resourcing of the enforcement system; the absence of effective and credible protection from victimisation; and the lack of physical or linguistic accessibility. The existence of these barriers represents a failure by the States in question to ensure access to justice and thus to take all appropriate measures to eliminate discrimination.

Effective access to justice requires not only that procedures and enforcement bodies are available and accessible, but that those responsible for administering and enforcing the law have the knowledge, competence, independence and means to do so correctly and effectively – this is essential to ensuring effective, **quality justice**. Experts interviewed for this report confirmed the essential role of a knowledgeable, informed and independent judiciary and legal profession which understands the particularities of anti-discrimination

law and is sensitised to the lived experiences of groups exposed to discrimination.

The effective enforcement of the right to non-discrimination requires the **adaptation of the rules regarding evidence and proof** in order to redress imbalances in access to evidence and the means to prove that discrimination has occurred. Accordingly, it is recognised at international law that discrimination should be subject to the civil – rather than the criminal – standard of proof, and that the burden of proof should transfer from claimant to respondent. Where laws meet these requirements in respect of the standard and burden of proof, the law can function as intended: in Great Britain, for example, none of those interviewed cited problems with evidence and proof as an obstacle to the effectiveness of right to non-discrimination. Conversely, in States like Tunisia and Colombia, where the law prohibits discrimination but does not provide for the transfer of the burden of proof, this is identified as an insurmountable obstacle for many victims.

The enforcement – indeed the effectiveness – of anti-discrimination laws also relies on the availability of **effective remedy**: sanctions for duty-bearers which are effective, dissuasive and proportionate; reparation for rights-holders in the form of recognition, compensation and restitution; and societal and institutional remedies. Where the system does not provide for effective sanction, reparation and remedy, rights provided by law are not only ineffective but intangible, driving perceptions that rights are merely rhetorical. The research finds significant differences between States with comprehensive anti-discrimination laws and those without in respect of **sanction**: interviewees from Brazil, Colombia, India and Tunisia all cited the inadequacy of sanctions as a factor in non-compliance, while none of the respondents from Great Britain or South Africa raised such concerns. Respondents from India also highlighted the absence of individual **reparation** – compensation and restitution for victims – as a factor limiting the effectiveness of the system. Interviewees from Brazil and South Africa, on the other hand, explained that inadequate levels of compensation serve to frustrate the enforcement of the law, by disincentivising claims.

Beyond sanction and remedy for those directly involved in litigation, anti-discrimination laws must provide for **institutional and societal remedies** – measures designed to deter and prevent repetition and to address the structural and societal causes and drivers of discrimination. Experts from both Brazil and Great Britain underlined the need for and effectiveness of such remedies, but the research also confirms that few legal systems allow for a comprehensive and effective range of such remedies.

Finally, while affirming the need for effective enforcement, remedy and sanction for individual victims of discrimination, experts from Great Britain and South Africa – the two States with the most advanced equality law systems among those reviewed – highlighted the shortcomings inherent in the **individualised model** of anti-discrimination law. This reflects a growing concern about the limitations of legal frameworks which rely in practice on individual rights-holders to bring enforcement action as the primary means to secure the implementation of the law. While victims must be able to seek and secure justice and remedy, relying upon such claims as the main mechanism to secure compliance means that progress in eliminating discrimination is – unavoidably – slow and sporadic. Collective approaches to non-discrimination will help to address many of these issues but must work in tandem with individual enforcement action to be truly effective.

## RECOMMENDATIONS

- ▶ States must ensure that the right to non-discrimination is justiciable in law and in practice, including through ensuring that the law prohibits all forms of discrimination on the basis of all grounds recognised at international law and that this law is enforceable against both public and private actors.
- ▶ States must ensure that those experiencing discrimination can access justice and remedy, taking all appropriate measures, including, but not limited to:
  - ▷ Ensuring that justice for survivors of discrimination is accessible and available;
  - ▷ Identifying and removing barriers which prevent equal access to justice, such as those associated with complexity, time, cost and physical or linguistic accessibility;
  - ▷ Ensuring that cost is not an impediment preventing access to justice by, inter alia, providing

- legal aid; ensuring the availability of free or low-cost legal representation; providing for the costs of legal action to be borne by the duty-bearer; and ensuring access to emergency social protections to maintain livelihood during legal proceedings;
- ▷ Providing effective and credible protection from victimisation; and
  - ▷ Ensuring that professionals involved in the enforcement of the law – including the legal and judicial professions – have the knowledge, understanding and independence to correctly apply the law and provide quality, equality-sensitive and accountable justice.
- ▶ States must ensure that legal rules related to evidence and proof in discrimination cases meet the requirements of international law and ensure effective access to justice and remedy for survivors of discrimination, through:
    - ▷ Ensuring that discrimination is subject to the civil, rather than the criminal, standard of proof;
    - ▷ Ensuring that there are no barriers to the admissibility of evidence that could establish a finding of discrimination; and
    - ▷ Ensuring that the law provides for the transfer of the burden of proof from the claimant to the respondent once a prima facie case of discrimination has been established.
  - ▶ States must ensure that the law provides for effective remedy in discrimination cases. This requires:
    - ▷ Applying sanctions for those found responsible for discrimination which are effective, dissuasive and proportionate;
    - ▷ Providing reparations victims of discrimination in the form of compensation, restitution and rehabilitation; and
    - ▷ Providing such institutional and societal remedies as are necessary and appropriate to correct, deter and prevent discrimination and to ensure non-repetition.
  - ▶ States must ensure that workers are able to organise and form trade unions and empower them to challenge discrimination and reduce the reliance on individual enforcement action against discriminatory conduct. This includes:
    - ▷ Providing legal protection for members of trade unions;
    - ▷ Permitting and empowering trade unions to promote equality and non-discrimination within the workplace;
    - ▷ Imposing equality and non-discrimination obligations upon trade unions; and
    - ▷ Empowering trade unions and other collective entities to bring challenges against discriminatory practices.

## 6.2 Awareness, Confidence and Compliance

Anti-discrimination laws will be effective in practice only if rights-holders, duty-bearers and those responsible for the enforcement and implementation of the law are aware of and understand their respective rights and obligations and if there is belief among all of these actors that the law will be enforced and implemented.

International law recognises a duty on States to raise awareness of the right to non-discrimination as part of States' obligations to address stigma, stereotype and prejudice and to promote non-discrimination. For example, Article 13 of the ICESCR – on the right to education – provides that education “shall strengthen the respect for human rights and fundamental freedoms (...) enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.” The Committee on Economic, Social and Cultural Rights has set out that: “[t]eaching on the principles of equality and non-discrimination should be integrated in (...) education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance

between different groups in society."<sup>443</sup> The ICERD, the CEDAW and the CRPD all establish explicit proactive obligations on States to address prejudice, stereotypes and stigma.<sup>444</sup>

In their interpretations of these provisions, the UN treaty bodies have elaborated on the content of these obligations, including on the duty to raise awareness of their rights and obligations among rights-holders and duty-bearers, respectively. The Committee on the Elimination of Discrimination against Women, for example, has stated that, as an aspect of its overarching obligation to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise,"<sup>445</sup> States should enlist "all media in public education programmes about the equality of women and men, and ensur[e] in particular that women are aware of their right to equality without discrimination [and] of the measures taken by the State party to implement the Convention."<sup>446</sup> The Committee on the Rights of Persons with Disabilities has underlined the importance of State obligations to raise awareness of, and foster respect for, the rights and dignity of persons with disabilities for the realisation of the right to non-discrimination, noting that "discrimination cannot be combated without awareness-raising among all sectors of government and society."<sup>447</sup>

While the majority of treaty provisions on awareness-raising focus on the need to counter negative attitudes at a societal level, the UN treaty bodies have also recognised that awareness-raising among rights-holders, duty-bearers and those responsible for the implementation and enforcement of the law is an essential element of securing equal and effective access to justice. Thus, for example, the Committee on the Elimination of Discrimination against Women has identified "outreach, education and the production of legal resources on justice mechanisms" as among the essential elements of "accessibility" – which is itself one of six components of access to justice.<sup>448</sup> Similarly, the Committee on the Rights of Persons with Disabilities has included "[m]easures to raise the awareness of all people about the rights of persons with disabilities under the Convention, the meaning of discrimination and the existing judicial remedies" as among the enforcement measures required for securing "[t]he effective enjoyment of the rights to equality and non-discrimination."<sup>449</sup> In 2020, a group of UN experts issued the "International Principles and Guidelines on Access to Justice for Persons with Disabilities," which include a requirement that States "[p]rovide persons with disabilities and their families with training and access to information on rights, remedies, claiming redress and the legal process."<sup>450</sup>

These statements by the UN human rights system reflect the fact that rights and duties are effective in practice only if those to whom they apply know, understand, accept and believe in the law and its enforcement. As noted by Dr Lali Naidoo, Director of ECARP in [South Africa](#), in the absence of this knowledge, understanding and acceptance, the effectiveness of laws is severely compromised:

*There are all these wonderful provisions, nice on paper, but the necessary conditions for those things to be implemented and for people to use them is not there; lack of awareness, understanding of rights; aversion to embracing a rights culture; government officials that don't necessarily understand their own legislation.*<sup>451</sup>

### 6.2.1 Awareness among Rights-Holders

In order for any system of legal rights to be effective in practice, rights-holders need to know and understand

<sup>443</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>444</sup> ICERD, Article 7; CEDAW, Article 5; CRPD, Articles 8 and 24.

<sup>445</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 36.

<sup>446</sup> *Ibid.*, para. 38 I.

<sup>447</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 39. See also A/HRC/43/27.

<sup>448</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14. These components are: justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems.

<sup>449</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, (2018), para. 31

<sup>450</sup> *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, (2019), Guideline 10.2.i

<sup>451</sup> Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa.

what their rights are and know how to bring claims when they consider these rights have been violated. As Antonio Roversi Júnior, a public defender from **Brazil**, noted simply: “a person will only access, will only seek to access his or her right to the extent that he or she is aware of it.”<sup>452</sup> Where rights-holders are not aware of their legal rights or how enforcement action can be brought, the system of legal protection will be ineffective. In the case of anti-discrimination law, if rights-holders do not understand discrimination, and so are unable to identify when they have experienced a violation, they will not be able to access or vindicate their rights.

It is important to note that ensuring awareness does not require individual rights-holders to become experts in the area of law in question. Rather, it requires them to have sufficient knowledge to identify when their rights may have been violated and to know how to access legal advice. Robin Allen KC, an employment and discrimination law barrister from **Great Britain**, explained:

*People need to determine whether they're uncomfortable in the workplace for some reason or another and need to have good advice as to which lawyers can analyse the problem and say if they think that there is direct or indirect discrimination in some way (...) I think expecting employees to understand fully the law on indirect discrimination, or the nuance of disability discrimination, or harassment, is a big call, actually. I would say that the knowledge level [of these concepts] isn't at all high (...) but I'm not sure I'd bother to worry too much about it because these issues arise in a fact-specific context and it's not always appropriate to teach employees about what their rights are by reference to a given set of facts which may never occur to them for some reason or another.*<sup>453</sup>

In **Great Britain**, where the first laws prohibiting discrimination were enacted in the 1960s and where the national equality body – the Equality and Human Rights Commission – has legal obligations to promote awareness and understanding of the right to non-discrimination,<sup>454</sup> lack of awareness among rights-holders was not cited by large numbers of interviewees as a principal barrier to enforcement. One expert stated that while “there are clearly areas where the law could be stronger (...) the Equality Act provides a good, detailed, comprehensive model, which is very clear for employers and employees about what their rights and responsibilities are.”<sup>455</sup> Another interviewee shared the view that “people are well-aware of discrimination – more in the UK because it has been around for many decades – and the various forms of discrimination.”<sup>456</sup>

However, even here, a number of respondents highlighted the challenges posed by lack of understanding of rights. As one expert on labour rights in the agricultural sector stated, while individual workers may have instinctive feelings that their rights or dignity have been violated, they are unlikely to “understand that with reference to the law.”<sup>457</sup> A number of other experts highlighted that lack of knowledge of rights and enforcement mechanisms and lack of faith in the system are particular problems for the most disadvantaged – those from groups exposed to discrimination and those working in sectors of the economy with high levels of informal employment – who are often most in need of protection.<sup>458</sup> Expert respondents from both the care sector<sup>459</sup> and the agricultural sector<sup>460</sup> – both areas with high levels of informal work – recognised particular challenges with lack of knowledge among workers. Despite the significant differences between

<sup>452</sup> Equal Rights Trust interview with Antonio Roversi Júnior, public defender and Substitute-Chief in the São Paulo Public Defender's Office, Brazil.

<sup>453</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>454</sup> Equality Act 2006, Section 9.

<sup>455</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>456</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>457</sup> Equal Rights Trust interview with a senior lecturer in Law at the University of Bristol, Great Britain.

<sup>458</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>459</sup> Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>460</sup> Equal Rights Trust interview with Kate Roberts, Head of Policy at Focus on Labour Exploitation, Great Britain.

these sectors, issues around lack of access to information in general and remoteness from management were cited as challenges. As a representative of the Equality and Human Rights Commission in Great Britain with expertise in the personal care sector noted, “awareness is very low in terms of tackling discrimination,” and new technologies are exacerbating the problems:

*[Some of these workers are] managed through an app, so they don't even have a manager – an app just tells them where they need to be, what time, and if they've got a problem, they'll ring a kind of call centre, rather than having a manager to do complaints. They're all running on very, very tight margins (...) it makes it so extremely difficult. One of our recommendations is around much better awareness of rights, entitlements, and employers thinking of ways they can do that. [To ensure that] they're given very clear information on what to do if they've got an issue, and how to make a complaint.<sup>461</sup>*

In **South Africa**, lack of awareness and understanding was cited by a number of interviewees as a barrier to the enjoyment of the right to non-discrimination. As Mr Tzvi Brivik, a labour lawyer with expertise in the platform economy, stated: workers “have a sense of right or wrong but they do not know how it fits into the law.”<sup>462</sup> Another attorney, Nikita Stander with the Stellenbosch Law Clinic, Stated that “I believe that people are aware of their right to non-discrimination, but I do not believe that they know how to enforce their right.”<sup>463</sup> These statements were corroborated by other respondents who noted that while workers may know about one enforcement institution – the Commission for Conciliation, Mediation and Arbitration (CCMA) – most would not be aware of other avenues of redress or enforcement, such as equality courts or the Human Rights Commission.<sup>464</sup> A further issue highlighted by Carlton Johnson, a senior Commissioner at the CCMA, is the difficulties faced by individuals seeking to file complaints:

*[T]hey feel that there's something unfair, but they don't know how to describe it, they don't know what the grounds are (...) So, they look at the form, and they indicate it is discrimination on an “arbitrary” ground. And I think the perception is because you say arbitrary; it gives you more scope to explain, instead of limiting you to race or gender or whatever the case may be. So, I think that's a misunderstanding or a wrong interpretation from our users (...) I also think with respect that the case administrators (...) who assist you with what and how to complete your form, I think also when they don't know what exactly discrimination is about, so they tick the box on arbitrary grounds. I think that is why you will see a lot of those cases, unfortunately then become unsuccessful in proving a case (...) because of the arbitrary ground, the onus is also shifting to you to prove as the referring party, which makes it quite difficult.<sup>465</sup>*

As in **Great Britain**, many respondents in **South Africa** highlighted the fact that it is the most marginalised workers – those in rural areas, those with limited education or living in poverty, and those working in sectors characterised by high levels of informal employment – who lack the knowledge required to access their rights. One interviewee, Nikita Stander, an attorney at Stellenbosch Law Clinic, noted:

*I do not believe that workers who face discrimination would always know their rights and how to enforce them. We have dealt with matters where, during consultation pertaining to the client's specific matter, issues of past discrimination were brought to our attention. These clients were definitely not aware of their rights or how to enforce them.<sup>466</sup>*

Another respondent who supports domestic workers highlighted the fact that informality can contribute to

<sup>461</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain.

<sup>462</sup> Equal Rights Trust interview with Tzi Brivik, an attorney with expertise on the platform economy, South Africa.

<sup>463</sup> Equal Rights Trust interview with Dr. Lali Naidoo, Director of the East Cape Agricultural Research Project, South Africa.

<sup>464</sup> Equal Rights Trust Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa; Equal Rights Trust interview with Omar Parker, a trade union leader, South Africa.

<sup>465</sup> Equal Rights Trust interview with Carlton Johnson, a Commissioner with the Commission for Conciliation, Mediation and Arbitration, South Africa.

<sup>466</sup> Equal Rights Trust interview with Nikita Stander, attorney at the Stellenbosch Law Clinic, South Africa.

a lack of awareness: “domestic workers do have some labour rights, but it is such an informal sector that the employers don’t know, and the workers don’t know.”<sup>467</sup> Informal workers then have to rely on third parties like trade unions and NGOs to inform them of their rights.<sup>468</sup> Even those who are aware of their rights do not necessarily understand them without assistance, as one respondent notes: “for a lay person to understand legislation and enforce their rights is difficult.”<sup>469</sup>

In **Colombia**, respondents also recognised that “people do not know well their right to non-discrimination”<sup>470</sup> and again highlighted disparities in access to information and levels of knowledge of rights and their enforcement as a factor impeding the effective implementation of the law. However, respondents here also went further, and Jhoniell Colina, a member of the Movimiento Nacional de Repartidores de Plataformas Digitales, stated that employers in the platform work sector do not comply with duties to provide information, in order to limit workers’ knowledge and so prevent claims being made.<sup>471</sup> Another expert, the President of the Union of Venezuelan and Returned Colombian Workers, in the same sector made a similar observation, noting the particular vulnerability of non-national workers in the platform economy:

*There are employers who hire foreigners because these people, due to their vulnerable condition (due to ignorance or necessity) accept unfair job offers, more hours, less pay, without social protection (...) On the part of migrant workers there is a great lack of knowledge about their rights, especially in social security issues because in Venezuela it works differently. There is a lack of knowledge about rights and how to enforce them.*<sup>472</sup>

Respondents in **Tunisia** highlighted rights-holders’ lack of awareness of their rights at even a relatively general level. Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation who specialises in discrimination cases, recounted a personal experience.

*Recently I was invited to deliver a training for a Christian minority (...) I had in front of me at least 20 people and all these people there, I realised they had no idea about Law number 50 [the Law on the Elimination of All Forms of Racial Discrimination, Law 50 of 2018]. They didn’t even know it existed.*<sup>473</sup>

In a similar vein, other respondents spoke of lack of knowledge among persons with disabilities as a barrier to their enjoyment of rights; while noting that their rights in law are more limited, two different interviewees state that lack of education and knowledge is a significant obstacle.<sup>474</sup> Hafidha Chekir, a professor of public law, identified lack of knowledge of the law as one of the principal barriers to the enjoyment of the equal enjoyment of labour rights:

*First the ignorance of the law and the institutions, then the legal costs. Although there are legal aid mechanisms, people do not know about them. I come back to the question of the lack of confidence in justice or the politicisation of justice which means that people do not go to court.*<sup>475</sup>

In **Brazil**, a different set of issues of awareness, knowledge and understanding were drawn out by those in-

<sup>467</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>468</sup> Equal Rights Trust interview with Anthony Hendricks, an official of the Food and Allied Workers Union, South Africa.

<sup>469</sup> Equal Rights Trust interview with Nikita Stander, attorney at the Stellenbosch Law Clinic, South Africa.

<sup>470</sup> Equal Rights Trust interview with Estefanni Barreto, a member of the Legal Department of the Central Workers Union, Colombia.

<sup>471</sup> Equal Rights Trust interview with Jhoniell Colina, a member of the Movimiento Nacional de Repartidores de Plataformas Digitales, Colombia.

<sup>472</sup> Equal Rights Trust interview with Leodis Porras, President of the Union of Venezuelan and Returned Colombian Workers, Colombia.

<sup>473</sup> Equal Rights Trust interview with Heyfa Abdelaziz, a lawyer at the Tunisian Court of Cassation, Tunisia.

<sup>474</sup> Equal Rights Trust interview with a representative of a Non-Governmental Organisation working with persons with disabilities, Tunisia. Equal Rights Trust interview with Habib Baccouche, appeal lawyer specialising in discrimination against persons with disabilities, Tunisia.

<sup>475</sup> Equal Rights Trust interview with Hafidha Chekir, Professor of Public Law at the University of Tunis, Tunisia.



interviewed. In a country with a less well-developed and well-established system of anti-discrimination law, workers' lack of understanding of discrimination as a concept and social acceptance of the need to eliminate discrimination was identified as a key barrier. The President of the Federation of Workers in the Chemical and Pharmaceutical Industries of the State of São Paulo stated:

*In certain sectors [where there are workers] with a slightly better level of education, with a better level of access to information, you generally have a more aware, more educated staff, people who even discuss this (...) daily with their colleagues inside the factories. But you also have sectors with a labour force which is less qualified and everything (...) These people lack information or education (...) These people have discriminatory views, a certain prejudice against some groups, sometimes not because of malice, sometimes due to lack of information and education.<sup>476</sup>*

Respondents also highlighted an urban-rural difference in levels of understanding of discrimination and acceptance of the need for equality. Professor Regina Stela Corrêa Vieira stated that in some more remote regions "there are female workers that reproduce several stereotypes and want to be treated this way. They think that it is very nice that the company treats them as the delicate ones in the company, and so on (...)"<sup>477</sup> Similarly, Delaíde Arantes, the National Coordinator of the Managing Committee of the Safe Work Program, noted the fundamental challenge of raising rights-holders' awareness of their rights in a society where inequality and relative poverty mean that many people's day-to-day focus is elsewhere:

*For me, what prevents a lot of labour legal actions is inequality. Brazil is one of the most unequal countries in the world (...) I refer to economic inequality and I also refer to social inequality (...) There is no way to make a woman aware of her individual right not to be a victim of gender prejudice if she is fighting to buy food, fighting to bring food for her children, fighting to survive.<sup>478</sup>*



Credit: Bangladesh Independent Garment Workers' Union Federation

These responses indicate that lack of awareness and knowledge of anti-discrimination law and the relevant enforcement mechanisms is a significant barrier to the effectiveness of the legal system. However, it is not

<sup>476</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>477</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>478</sup> Equal Rights Trust interview with Delaíde Arantes, Justice at the Superior Labor Court and National Coordinator of the Managing Committee of the Safe Work Program, Brazil.

the only problem in respect of awareness among rights-holders. In some instances, awareness of non-discrimination as a concept, misunderstanding as to the need for equality law or even the prevalence of stereotypes and prejudice undermine the legal system. Ultimately, however, if rights-holders do not know and understand their rights and how to enforce them, the effectiveness of the legal system is fatally undermined.

### 6.2.2 Confidence in the System

In addition to knowing and understanding their rights, it is essential that rights-holders have faith in the system of rights protection. As discussed above in the section on the “individualised model,” the effectiveness of the anti-discrimination law framework relies on individuals whose rights have been violated to bring their claims to court or another enforcement body. This, in turn, requires rights-holders to believe that enforcement action will be effective. As one trade union representative focused on the social care sector in Great Britain articulated, rights-holders will make complaints only if they have “some kind of confidence that something’s going to be done about it.”<sup>479</sup> The system will be undermined to the point of ineffectiveness where victims do not believe that their claims will be successful, lack trust in the system, or fear reprisals. And yet this is precisely what several respondents reported.

In **Colombia**, one respondent highlighted an “institutional mistrust” in the system of labour and non-discrimination rights protection as one of the most important factors impeding their effective enforcement.<sup>480</sup> A similar point was noted in **South Africa**,<sup>481</sup> where one interviewee explained that there is a “lack of faith that people have in government systems,” including enforcement mechanisms, which makes individuals unlikely to complain, as they “don’t believe it will lead anywhere.”<sup>482</sup>

A number of respondents here noted the role of power imbalances between workers and employers in limiting workers’ faith in the system. One noted that “[w]orkers (...) feel they don’t have any real power to stand up – even if the laws protect them.”<sup>483</sup> Charlene May, an attorney at the Women’s Legal Centre specialising in domestic work, elaborated:

*With domestic workers, we have found that the idea of standing up or challenging any issue – the unequal power relationship plays a big role – it takes a lot to have a domestic worker, to see a process through – and to be sitting there knowing that they are challenging that power figure with the idea that I need to continue working for these people. The domestic worker doesn’t want to stop working for the employer. She or he just wants whatever the behaviour is to stop.*<sup>484</sup>

Another interviewee responded to a question about levels of knowledge and awareness of rights by stating that lack of understanding is not a primary barrier, and focusing instead on broader imbalances of power:

*I think it’s sometimes too easy to suggest that marginalised sections of our society are ignorant of the law and that that’s the main problem. I think that’s often not the case, and it’s just the balance of power in our society that operate[s] against those workers.*<sup>485</sup>

Another attorney, Dr Jason Brickhill, spoke about the particular vulnerabilities of platform workers such as Uber drivers, who, as another interviewee confirmed, are “so scared to go forward because they’re scared of being victimised and then being taken off the platform, sitting with a vehicle”;<sup>486</sup> another interviewee high-

<sup>479</sup> Equal Rights Trust interview with a Senior Official at the Equality and Human Rights Commission, Great Britain.

<sup>480</sup> Equal Rights Trust interview with Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia; Equal Rights Trust interview with Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia.

<sup>481</sup> Equal Rights Trust interview with Charlene May, an attorney at the Women’s Legal Centre, South Africa.

<sup>482</sup> Equal Rights Trust interview with Charlene May, an attorney at the Women’s Legal Centre, South Africa.

<sup>483</sup> Equal Rights Trust Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>484</sup> Equal Rights Trust interview with Charlene May, an attorney at the Women’s Legal Centre, South Africa.

<sup>485</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>486</sup> Equal Rights Trust interview with Faiza Haupt, an activist for workers’ rights in the platform sector, South Africa.

lighted the same problem in the domestic care sector.<sup>487</sup> As set out in more detail below, international law requires that States provide protection from victimisation – retaliation against anyone making, participating in or providing evidence in relation to a claim of discrimination – and the Employment Equity Act in South Africa provides such protection.<sup>488</sup> However, as these statements make clear, for such protection to be effective in practice, workers need to know that these protections exist and believe that they will be enforced.

Many respondents highlighted situations in which specific groups, for various reasons, particularly lack confidence in the rights system. In **Tunisia**, those working with migrant workers in the domestic work sector highlighted lack of faith in the system to provide effective protection as a particular problem, stemming from the compound vulnerability of informal workers with irregular migration status. As one expert on the right to work for migrants in North Africa stated:

*The Labour Code protects everyone, however there are procedures that may leave a migrant worker less tempted to file a complaint. This is important for the effectiveness of the law. If you have an irregular migrant worker, if he files a complaint against an employer who has not paid him, if he manages to prove it, he will get the salary, the law will ensure that, but he may find himself in a procedure of refoulement since he is in an irregular situation. Suddenly in a situation of abuse and non-respect of the law, the vulnerability due to the irregularity can become a threat for migrant workers to enjoy their right.*<sup>489</sup>

Another Tunisian respondent, who works with a migrant rights NGO, said that migrant workers “discriminate against themselves” as a result of manipulation:

*They say “I work without contract” knowing that everything can be proved, the employer-employee relationship can be proved, but they do not want to continue [...]. The person who makes them come here is from their village, they know their family [...] the manipulation is stronger than the [legal] framework.*<sup>490</sup>

Other respondents suggested that these problems are also indicative of a deeper lack of belief in their status as rights-holders. A representative of the Tunisia National Authority against Human Trafficking explained that victims can sometimes not understand their experiences as discrimination: “they do not internalize, they are not even convinced they were victims of exploitation or of a right violation.” She went on:

*Once I asked a victim of trafficking, why did you agree to work this way? She said, “when I come here, we have to do it like that.” She agreed not to leave the house – sequestration – confiscation of her passport, she did not receive a salary, for her it felt normal.*<sup>491</sup>

Interviewees raised the same concerns with respect to persons with disabilities, with one stating that, in addition to the fact that “the Labour Code does not give specific protection” to persons with disabilities, and the costs associated with court proceedings, “there is also the question of self-esteem.” Another noted that lack of faith in the system and lack of self-esteem can prevent persons with disabilities from taking action in defence of their rights, stating that:

*Even those who are educated, there’s still a mentality of “let it go, don’t complain, you’re not getting anywhere.” Even when a person with a disability comes to me and wants to file a complaint or start a procedure, they themselves ask “can I really do this?” They have this vision but mostly they don’t*

<sup>487</sup> Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>488</sup> South Africa, Employment Equity Act, Act 55 of 1998, section 51.

<sup>489</sup> Equal Rights Trust interview with an advisor for an international organisation with expertise on the right to work and migrants in North Africa, Tunisia.

<sup>490</sup> Equal Rights Trust interview with a senior officer of a Non-Governmental Organisation working for the protection of migrants, Tunisia.

<sup>491</sup> Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

know their rights.<sup>492</sup>

A labour law and human rights academic in **Great Britain** spoke about workers in the social care sector where there is “a general lack of confidence in making complaints [a feeling that] they wouldn’t be taken seriously, that complaints wouldn’t be taken forward (...) particularly for those low-paid workers. A further issue regarding faith in the system was raised by respondents who cited the “horrendous” experience of bringing a claim under the State’s anti-discrimination legislation as a significant factor inhibiting public trust in the system. A labour law and human rights academic from University College London noted that “[t]here is no question that it’s unpleasant to bring a claim against your employer,”<sup>493</sup> while another stated: “For the tiny proportion of people who do litigate, the data about the experience they go through is horrendous (...) Even if (...) amazingly, you win, the word devastating comes up a lot (...)”<sup>494</sup>

Another expert concurred, highlighting how the “harrowing” process of making a claim before a court has had the effect of reducing the number of cases raised both with employers and with the courts:

*There’s lots of discrimination that doesn’t get raised with the tribunal. There’s lots of discrimination that doesn’t get raised with the employer. There’s lots of discrimination that they don’t turn to the union or ACAS or anybody else. They just get on with it (...) I’ve represented people in tribunals and with employers and individually as well as collectively. It is harrowing, distressing, really difficult to go through. I think the processes that exist – because they have to be thorough and robust, to get to the bottom of what’s gone on, and they have to be fair to all parties – do make the person feel as if they’re not believed, and that’s why we needed to look at.*<sup>495</sup>

As these statements indicate, lack of confidence in the justice system is a major impediment to the effectiveness of the right to non-discrimination. Individuals in precarious employment situations or those particularly exposed to discrimination are frequently unwilling to bring complaints, partly because the process is seen – often accurately – as long and traumatic, because complaints are perceived not to succeed because they do not believe complaints will achieve anything, or because of a high risk of reprisal or re-victimisation, generally at the hands of their employer. This suggests that workers lack confidence in the ability of the system not only to enforce rights but also to protect them. Given the centrality of individual complaints about the enforcement of anti-discrimination laws in most States, lack of confidence on the part of rights-holders – and failure of State actors to address these concerns – are significant barriers to effectiveness.

### 6.2.3 Awareness among Duty-Bearers

In addition to rights-holders’ knowing and understanding their rights and how to enforce them, those who bear duties under anti-discrimination laws must know and understand their obligations. Where duty-bearers are not aware of their legal obligations or the penalties for violation, they may unknowingly commit discrimination or allow discriminatory policies to persist. Equally, where employers do not understand discrimination, they may adopt indirectly discriminatory policies or practices, fail to make reasonable accommodation or otherwise discriminate, with only the possibility of legal action by a victim presenting a means to improve the implementation of the law.

Employers’ lack of knowledge or understanding of their non-discrimination obligations represents a failure by the State to discharge its obligations under international law. A necessary corollary of States’ obligations to eliminate discrimination and to ensure the enjoyment of the right to work without discrimination is a duty on the State to inform and educate employers of their legal duties and obligations. As one expert interviewed for this report noted: “it is not always the worker who must do something (...) the [State] must make

<sup>492</sup> Equal Rights Trust interview with Habib Baccouche, appeal lawyer specialising in discrimination against persons with disabilities, Tunisia; Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>493</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>494</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>495</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

an effort to educate the employers about their responsibilities.<sup>496</sup>

In **South Africa**, our research concluded that many employers lack knowledge of their obligations, or simply choose to ignore their duties. As human rights attorney Dr Jason Brickhill stated:

*I think a lot of employers are ignorant of their legal obligations. [For example,] commercial farmers. They're either ignorant or they know the law, but they routinely choose to ignore it. It's similar with employers of domestic workers and so on. I think many of them have probably heard that there's now a Minimum Wage requirement, for example. Somewhere they've probably heard that on the radio or seen it, but they don't implement it. So, this issue cuts across our whole society.<sup>497</sup>*

As this interviewee alluded to, where levels of knowledge and understanding vary between sectors or types of work, this can have discriminatory impacts in itself, with groups who are disproportionately represented in these sectors being denied their rights because of ignorance or non-implementation of the law. As Amy Tekie, co-founder of IZWI Domestic Workers Alliance, highlighted, lack of knowledge on the part of certain employers can lead to directly discriminatory outcomes:

*In cases of health and HIV status, we have a lot of cases where the privacy (of domestic workers) is violated. This is where the employer does not want the domestic worker to work there anymore because they are afraid the health of the domestic worker will impact their family. Or domestic workers do not want to reveal their health status to the employer, which might lead to them quitting or losing their job because of the refusal.<sup>498</sup>*

In **Great Britain**, where a number of respondents agreed that employers generally know and recognise that they have non-discrimination obligations under law, interviewees highlighted the challenges in ensuring that employers not only acknowledge these obligations but also understand discrimination sufficiently to ensure that policies and practices do not have discriminatory impacts. As Dr. Virginia Mantouvalou noted, while “employers are always aware that discrimination is prohibited (...) when experts are able to identify discrimination, employers may not.”<sup>499</sup> Professor Lizzie Barmes, an academic specialising in equality and employment law, stated that common misconceptions or misinterpretations of the law can have significant adverse impacts on employers’ policies and practices.<sup>500</sup>

Conversely, in **Tunisia**, Amina Boukamcha of the Tunisia National Authority against Human Trafficking highlighted the widespread lack of awareness of rights and obligations among not only rights-holders, but duty-bearers and those responsible for the implementation and enforcement of the law:

*A shortcoming is awareness with a capital A. Awareness not only for the general public, but especially for the professional at several levels, whether it is the professionals who provide services or the professionals of the criminal law – the police, the judges. In the end if a person is discriminated against, regardless of the discrimination, if he goes to a police station or a specialized police unit, if the person in charge does not understand what discrimination is, does not know how to detect discrimination or even is not convinced that there is discrimination, even though it is discrimination, he cannot deal with the matter properly.<sup>501</sup>*

The same respondent noted that lack of knowledge among duty-bearers allows the perpetuation of preju-

<sup>496</sup> Equal Rights Trust Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>497</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>498</sup> Equal Rights Trust Equal Rights Trust interview with Amy Tekie, co-founder of the IZWI Domestic Workers Alliance, South Africa.

<sup>499</sup> Equal Rights Trust interview with a labour law and human rights academic at University College London, Great Britain.

<sup>500</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>501</sup> Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

dices and stereotypes which in turn drive discriminatory actions. As he noted: “sometimes discrimination exists in an intentional way (...) [the person in charge] works that way given his frame of reference – he got used to this kind of functioning but in the end it is a discriminatory attitude.”<sup>502</sup>

In **Brazil**, Professor Regina Stela Corrêa Vieira, of the Federal University of Pernambuco, discussed the role of the State in increasing knowledge and understanding among duty-bearers and the ways in which the policies, priorities and approaches of those in positions of political power influence understanding of what is permissible among duty-bearers. She explained that the level of understanding that employers had often correlated with the attitudes of current governments and politicians. When public officials are “more concerned about reinforcing the roles of a traditional family [and] women in the home,” this attitude is reflected by employers.<sup>503</sup> More broadly, she talked about a culture of non-enforcement and ultimately non-compliance with legislation, which undermines the effectiveness of the whole labour rights framework, including the right to non-discrimination.<sup>504</sup>

### 6.2.4 Compliance with the Law

The effective functioning of the anti-discrimination law framework requires not only that duty-bearers know and understand their obligations, but also that they feel compelled to comply with the law. It was noted by several respondents that there is a culture of non-compliance among employers that stems from a lack of enforcement and confidence in enforcement mechanisms. As one respondent from Brazil indicated, while there may well be protection for workers on paper, lack of compliance means that the reality is very different.<sup>505</sup> As Jhoniell Colina, a representative of the Movimiento Nacional de Repartidores de Plataformas Digitales in **Colombia**, explained:

*In the legal framework, the norm has been created for protection from discrimination, but in Colombia it is not complied with due to cultural issues. It is a matter of non-compliance, not a legal vacuum. Lack of political will is the main barrier.*<sup>506</sup>

In **Great Britain**, respondents noted that in the agricultural sector – which has a high proportion of migrant workers and high levels of informality – employers ignore their legal obligations because of perceptions that the dedicated enforcement agency – the Gangmasters and Labour Abuse Authority – lacks the resources to undertake effective action.<sup>507</sup> The respondents presented this as the result of a deliberate political choice to focus on extreme cases of workplace mistreatment like modern slavery at the expense of workplace discrimination.<sup>508</sup> Accordingly, there is not simply a culture of non-compliance among employers but a lack of political will to ensure compliance.

In **Tunisia**, respondents noted that problems of non-compliance go beyond lack of political will and the impact on private-sector employers but extends to public-sector employers. Rached Massoud, President and co-founder of Ettalaki – an NGO working on religious freedom and the rights of religious minorities – explained that public-sector employees fear not only losing their jobs but reprisals from the State if they bring claims of discrimination.<sup>509</sup>

<sup>502</sup> Equal Rights Trust interview with Amina Boukamcha, Social Protection Advisor and Interim Secretary General at the Tunisia National Authority against Human Trafficking.

<sup>503</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>504</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>505</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>506</sup> Equal Rights Trust interview with Jhoniell Colina, a member of the Movimiento Nacional de Repartidores de Plataformas Digitales, Colombia.

<sup>507</sup> Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>508</sup> Equal Rights Trust interview with representatives of Unite the Union, Great Britain.

<sup>509</sup> Equal Rights Trust interview with Rachad Massoud, President and co-founder of Ettalaki, Tunisia.

Conversely, in **Brazil**, a trade union leader noted that there is a tendency among employers to deny the existence of discrimination, despite the existence of significant disparities in respect of salaries and seniority:

*You talk to the businessman [and he says:] "No, in my company there is no discrimination." Then you go to the data [and it shows that] women earn 40% less than men, they have less opportunity to occupy management positions or to earn higher salaries. If you [look at racial disparities], this difference increases (...) This goes for gender; it goes for race, and of course the issue of homophobia. It doesn't always appear very clearly inside the factories – the boss talking, looking at the person and treating them differently – but we know that it exists.<sup>510</sup>*

In both Great Britain and South Africa, respondents noted that internal mechanisms for handling and responding to discrimination complaints are – or are perceived to be – inadequate or ineffective. As one expert in **Great Britain** noted, "the vast number of people apparently do try to do something, but they do things like talk to their manager – huge numbers just get nowhere."<sup>511</sup> In **South Africa**, Lebogang Mulaisi, policy analyst for the Congress of South African Trade Unions (COSATU), raised very similar concerns:

*There are certain things we can do in order to make the CCMA work better, but it also translates back to what happens in the workplace. It's the outcomes of workplace disputes that are resulting in cases going to the CCMA and, ultimately, the labour court. We need to talk about how the workplace disciplinary process unfolds because it is incredibly unfair in the way that it happens (...) The manner in which they handle disciplinary matters is not good. It's toxic. It's not fit for purpose, and it's creating a ripple effect. [For example,] here is a lady who just wants an informal process, an acknowledgement of what has happened and an apology, and she would've just moved on. That's not happened. She's been suspended and probably will be dismissed (...) now we're going to the CCMA because the employer is going to fight, and that's how these processes unfold. So, the manner in which we handle disciplinary processes in the workplace can sometimes feel as though it's the root cause of the problem.<sup>512</sup>*

The culture of non-compliance that exists in many workplaces is the result of several factors identified elsewhere in this report, as well as broader social, economic and political dynamics. The lack of effective enforcement action in cases of discrimination discourages both victims from raising complaints and employers from taking effective action to address, identify and prevent discrimination. In turn, non-enforcement flows from a lack of awareness among rights-holders and duty-bearers as to the law on non-discrimination and the right to work, coupled with lack of confidence in the outcome of any complaints among rights-holders. Taken together, the barriers which prevent claimants from accessing justice and the failure of systems to provide effective, dissuasive sanctions, even where cases are successfully litigated, all contribute to a climate of impunity among employers. Ultimately, in a system which relies heavily on individual claims as the primary means of enforcement, the fact that many victims cannot or do not – for whatever reason – challenge the discrimination they experience means that the effective sanction for discriminatory conduct is low. The problem is compounded in situations where businesses believe – in some cases accurately – that judgments will not be enforced. All of these factors contribute to fewer successful instances of enforcement, which in turn disincentivises compliance. This creates a feedback loop of non-compliance and a lack of confidence in the system as each reinforces the other.

Beyond these challenges, however, it is important to recognise the importance of cost for employers. Taking comprehensive, systemic and effective action to prevent discrimination imposes a cost on business. Moreover, identifying and eliminating discriminatory practices which result in lower costs – such as gender pay gaps, mandatory retirement ages, or failures to accommodate persons with disabilities – has an immediate

<sup>510</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>511</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>512</sup> Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

impact on businesses' profit margins. In this context, there is a business incentive to permit and indeed perpetuate discriminatory practices, unless the costs of non-compliance are greater. Accordingly, unless employers believe that discriminatory practices will be subject to enforcement action, and that the sanctions for discrimination will outweigh the benefits of maintaining discriminatory practices, the incentives for compliance will be low.

### **SUMMARY: Awareness, Confidence and Compliance**

Awareness, knowledge and understanding of rights and obligations are essential to the effective functioning of the law, as is confidence that the law will function as intended, with justice and remedy for the rights-holder and sanction for the duty-bearer.

Where **rights-holders** are not aware of their rights or how to enforce them, the effectiveness of the anti-discrimination law framework is compromised. This is true both in respect of the individual who cannot access justice and in respect of the wider system, as enforcement relies on individual rights claims. Lack of awareness is a problem in all countries under review. In systems with more long-established and comprehensive anti-discrimination laws, awareness is seen as less of a problem in general, but levels of knowledge and understanding of their rights among the most marginalised are considered to be particularly low. This reflects a wider pattern in all countries that it is often those most marginalised, either because of their marginalised position in society or because of their employment status – often those most in need of protection – who lack knowledge most acutely.

Where rights-holders lack confidence that their claims will lead to enforcement action, or that they will be protected from reprisals if they bring claims, this undermines the system of protection. In many of the countries under review, "institutional mistrust" or "lack of faith" were cited as significant obstacles to individual enforcement action. Concerns around reprisals were also raised, particularly in countries without explicit prohibition of victimisation in their laws. In the countries under review, experts indicate that those in informal or precarious employment are more likely to lack confidence in the system to protect them and are thus less likely to make claims.

Where **duty-bearers** are not aware of their obligations, or do not feel compelled to comply with the law, the anti-discrimination law framework will be ineffective. Lack of compliance with the law is identified as a more significant barrier to the effective functioning of the law in States with less well-established anti-discrimination and labour rights protection regimes. In South Africa and Great Britain, for example, criticisms of non-compliance were focused on the informal economy, though these issues were nevertheless raised as a major factor in the continued prevalence of discrimination.

In all respects, the role of the State is central. States have international law obligations to ensure the effectiveness of the right to non-discrimination and to ensure that rights-holders can access justice and remedy. Lack of knowledge or understanding among rights-holders or duty-bearers represents a failure by the State to discharge these obligations. Nevertheless, the research found that in many countries under review, rather than raising awareness and encouraging compliance, political leaders undermine the anti-discrimination law regime through their words and actions.

### **RECOMMENDATIONS**

- ▶ States should mandate, establish, fund and implement public awareness and sensitisation campaigns to educate both rights-holders and duty-bearers about the right to non-discrimination, the means and mechanisms of enforcement and the remedies and sanctions available.
- ▶ States should ensure that their anti-discrimination law regime provides effective protection from victimisation, including, for example, through establishing dissuasive fines and sanctions and safeguards against loss of income, and should ensure that public awareness campaigns explain the protections in place for those bringing or participating in discrimination claims.
- ▶ States should take all appropriate measures to create confidence in anti-discrimination law, includ-



ing through conducting public education campaigns; publicising enforcement action and the sanctions imposed; and requiring societal remedies such as public apologies.

- ▶ States should take all appropriate measures to incentivise compliance with the law, including through supporting and enabling effective enforcement action; ensuring that sanctions are effective, dissuasive and proportionate; and promoting compliance through education, sensitisation and incentivisation programmes.

# 7. Prevention of Discrimination

## 7.1 Proactive, Preventative Measures

States do not fully discharge their international human rights law obligations to ensure the enjoyment of the right to non-discrimination by merely enacting and enforcing anti-discrimination legislation, no matter how comprehensive or effective such laws are. International human rights law imposes a general obligation on States to adopt “all appropriate measures” to not only prohibit discrimination but prevent and eliminate it. As the Office of the UN High Commissioner for Human Rights has set out in guidance for States:

*Each of the core United Nations human rights treaties requires States to take the steps necessary to give effect to the rights that they protect, including the right to non-discrimination. States parties to both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, for example, commit to “pursue by all appropriate means and without delay a policy of eliminating” discrimination. Thus, alongside the removal of discriminatory laws and policies, and the establishment and enforcement of a protective legal framework, international law requires the adoption of proactive measures for the implementation of the rights to equality and non-discrimination. Implementation measures form part of a comprehensive programme of action, which includes positive action, designed to eliminate discrimination, and achieve equality in practice.<sup>513</sup>*

There is a clear international consensus that an effective and comprehensive anti-discrimination law framework entails **proactive duties to prevent and eliminate discrimination**. Two specific types of duty are well established. Article 9 of the CRPD establishes a duty to ensure **accessibility** to the environment, transportation, services, facilities, and information and communications for persons with disabilities. This, in turn, has led to growing recognition of a wider obligation to ensure equality of access for persons exposed to discrimination on other grounds.

Separately, a growing number of States are making use of **statutory equality duties**<sup>514</sup> – a “legal framework through which consideration of the rights to equality and non-discrimination is integrated into decision-making processes.”<sup>515</sup> These equality duties are seen as one essential means by which States fulfil their obligations not only to refrain from and prohibit discrimination, but to prevent and eliminate it, and indeed to advance progress towards equality.

As the passage above underlines, through the ratification of human rights treaties, States have undertaken not only to refrain from and prohibit discrimination, but to prevent and eliminate it, and to do so by “all appropriate means” and without delay. Accordingly, States’ obligations in this area are open-ended – the duty is to identify and adopt such measures as are necessary to prevent and eliminate discrimination and to address

<sup>513</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 115. See also International Covenant on Civil and Political Rights, art. 2; ICESCR, art. 2; ICERD, art. 2; CEDAW, art. 2; CRPD, art. 4; and Convention on the Rights of the Child, art. 2.

<sup>514</sup> For further information, see, for example: Crowley, *Making Europe More Equal*; and Equinet, “Compendium of good practices on equality mainstreaming: the use of equality duties and equality impact assessments” (Brussels, 2021).

<sup>515</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 66.

its causes and its consequences. Adopting accessibility measures and statutory equality duties are two clear legal obligations, but they are not States' only duties.

In addition to articulating proactive, preventative duties, the UN human rights treaty bodies have recommended a number of specific **measures of implementation** which States should adopt. This list includes: (i) the adoption of proactive measures to combat prejudice, stigma and stereotype; (ii) the development and implementation of equality policies and strategies; (iii) the adoption, integration and use of equality impact assessment as an integral part of public decision-making processes; (iv) the collection, analysis and publication of data; (v) the adoption of processes to ensure the participation of groups exposed to discrimination in the development and implementation of equality policies, strategies and programmes.<sup>516</sup> It should be noted that this list is non-exhaustive – States' obligations are to take all appropriate means, and this entails a duty to identify problems or challenges and develop suitable responses.

In addition to adopting and implementing strategies, policies and programmes at the State level, an essential element of States' obligations to prevent and eliminate discrimination is to legislate for **duties on private actors**, including employers. As with measures of implementation at the State level, international law does not provide an explicit, exhaustive list of the duties which States should impose upon private actors, with "all appropriate means" providing the framework for action. Nevertheless, international standards have been, and continue to be, developed on the duties which should be imposed upon employers, pursuant to the overall obligation to take all appropriate measures to eliminate discrimination. Such measures should include duties to undertake equality impact assessment conducted in consultation and collaboration with groups exposed to discrimination, workers and unions, to identify and eliminate discrimination at any point in the business operation; the adoption of equality and non-discrimination policies and guidance; training and education for employees and managers; and the integration of discrimination risk assessment in occupational safety and health management procedures.<sup>517</sup> Once again, however, it should be noted that this is a non-exhaustive list of relevant duties. The international law obligation on States is to take "all appropriate means" to eliminate discrimination – this is an open-ended duty to design, develop and implement measures which are effective in eliminating discrimination.

### 7.1.1 Proactive and Preventative Measures by the State

As noted, any system of anti-discrimination law will be inadequate and ineffective if there is no requirement on the State to take proactive measures to prevent discrimination and promote equal participation in employment. Laws without these obligations, even if they provide comprehensive protection from discrimination, will not be able to eliminate discrimination in the workplace or in other areas of life.

Nevertheless, even in States with the most well-established, well-developed and comprehensive anti-discrimination law regimes, proactive duties are more the exception than the norm, and those duties which do exist are limited in scope and enforceability. Equally, in States with less comprehensive legal frameworks, proactive obligations are generally not envisaged or required. This was borne out in the research, with interviewees from **Brazil**, **Colombia**, **India** and **Tunisia** making no concrete references to proactive duties.

Conversely, a number of experts from **Great Britain** and **South Africa** critiqued the limitations of the provisions in their respective laws in this area. Respondents from **Great Britain** discussed the Public Sector Equality Duty and equality impact assessments. The Public Sector Equality Duty (PSED), provided for in Section 149 of the Equality Act 2010, requires anyone exercising a public function to have "due regard," when making decisions, to the need to eliminate discrimination, promote equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. Equality impact assessment is a tool used by decision-makers to identify potential discriminatory impacts – or the potential to advance equality of opportunity – arising in connection with a decision, policy or practice and to take appropriate action. As such, equality impact assessment is a mechanism through which States can ensure – and

<sup>516</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. 115 and 116. See also, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 36-41; ICERD, art. 2 (1) (c); International CEDAW, art. 2; and CRPD, art. 4 (1) (b).

<sup>517</sup> See, for example, ILO, Violence and Harassment Convention, 2019 (No. 190), section 9.

demonstrate – compliance with their PSED obligations. Both the PSED and equality impact assessments are proactive measures with significant potential. A senior officer with UNISON, the country's largest trade union – noted:

*There's entrenched discrimination and inequality that needs more than we've got to put it right. (...) Equality impact assessment is a really good tool. We've done a guide<sup>518</sup> on it which we developed during Covid, because all those changes that were happening around Covid – about people working from home; who went on furlough; who got offered enhancements and who didn't; pregnant women being treated as if it was a favour to protect their health and safety, when it's a legal requirement (...) those kind of things.<sup>519</sup>*

As the Guide produced by UNISON explains, “[t]he PSED is an instrument that requires public sector organisations to consider the impact on equality when they are planning to change, cut or introduce services, right from the start. Similarly, when public sector employers propose changes to pay, conditions and working hours or are planning redundancies, they have to consider the impact on equality. This means thinking about the impact on workers delivering services, people receiving services, and the wider community”<sup>520</sup>.

An expert in labour rights in the health and social care sector in Great Britain outlined the way in which the PSED and the use of equality impact assessment have driven improved labour practices in this sector, while also acknowledging its shortcomings:

*There are some NHS (National Health Service) Trusts that have – because they are conscious that ethnic minorities are disproportionately represented in their outsourced staff – have now in-sourced those workers (...) There are some examples of in-sourcing because they perceive that as addressing the disproportionate make-up of the staff who are out-sourced. [In these Trusts, the] leadership has taken a really strong role in trying to change the culture around discrimination (...) The public sector equality duty – yes, it does bite, but it's a kind of it's a process duty (...) They've got to “have regard” to these things. They've got to demonstrate they've thought about them and have policies in place to address them and mitigate it. I think the government, the regulators that we spoke to, they were aware that the care sector in particular, is quite challenging with regard to minimum wage, and payment of that, mainly around things like travel time. So, I think it is (...) very lightly regulated.<sup>521</sup>*

Another preventative practice being implemented across a variety of jurisdictions, including the UK, is the adoption of regulations requiring transparency regarding compensation to address pay disparities. Many such policies currently focus exclusively on the gender pay gap. Regulations that require businesses to disclose information address information asymmetries. They provide individual workers with information they otherwise might not have regarding their pay relative to colleagues, and allow government officials, unions and civil society advocates to identify patterns within individual businesses and across industries.

In Great Britain, employers with 250 or more employees are required to disclose their median and mean gender pay gaps across hourly and bonus pay,<sup>522</sup> and that information is publicised on a searchable database.<sup>523</sup> The programme, however, is very limited in its effectiveness for a number of reasons: it applies only to very large employers, the data is so general that it can be difficult to draw clear conclusions, it contains no measures to provide workers within a business with more detailed information, and there are no robust

<sup>518</sup> UNISON UK, Securing Equality: A guide to using the Public Sector Equality Duty to fight local cuts (2017) <https://www.unison.org.uk/content/uploads/2017/09/24577.pdf>.

<sup>519</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>520</sup> UNISON UK, Securing Equality: A guide to using the Public Sector Equality Duty to fight local cuts at 3 (2017) <https://www.unison.org.uk/content/uploads/2017/09/24577.pdf>.

<sup>521</sup> Equal Rights Trust interview with a senior official at the Equality and Human Rights Commission, Great Britain.

<sup>522</sup> UK Equality Act 2010 (Specific Duties and Public Authorities) Regulations, 2017.

<sup>523</sup> See, Gender Pay Gap Service, accessed December 20, 2023, <https://gender-pay-gap.service.gov.uk/>.

mechanisms to ensure companies address pay gaps.<sup>524</sup> The regulation also does not address hiring practices, although the UK government also launched a pilot scheme in 2022 in which participating companies agreed to list a salary range on job adverts and to refrain from asking job applicants to disclose a salary history.<sup>525</sup>

This stands in contrast to other jurisdictions that create clearer obligations with more robust enforcement. For example, the EU Directive on Pay Transparency<sup>526</sup> requires employers to disclose salary ranges in hiring and prohibits inquiries about a candidate's pay history. Employers with at least 100 employees are required to disclose information on gender pay gaps, and those with an unjustified gap of at least 5 per cent are required to conduct a pay assessment in collaboration with workers' representatives.<sup>527</sup> The Directive also contains some minimum standards on enforcement<sup>528</sup>, including ensuring that employer have the burden of proof, as well as sufficient compensation and other sanctions. While the limitation to large companies hampers the effectiveness of the mandate – for example, the European Trade Union Confederation proposed that it apply to employers with over ten employees<sup>529</sup> – it still contains important improvements on past attempts at transparency requirements.



Credit: Cambodian Center for Human Rights

The Directive further mandates that workers or trade unions can request information from their employer regarding information on their individual pay level and the average pay levels disaggregated by gender down for categories of workers performing the same work or work of equal value to theirs.<sup>530</sup> Currently, Great Britain does not robustly prevent employers from disciplining workers for discussing their salaries, which the

<sup>524</sup> See, Thomson Reuters Foundation, et. al., "Gender Pay Gap Reporting: A Comparative Analysis," <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>.

<sup>525</sup> Government launches pay transparency pilot to break down barriers for women, accessed December 20, 2023, <https://www.gov.uk/government/news/government-launches-pay-transparency-pilot-to-break-down-barriers-for-women>.

<sup>526</sup> Eur-Lex, "Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023L0970>.

<sup>527</sup> *Ibid.* at Article 10.

<sup>528</sup> *Ibid.* at Chapter III.

<sup>529</sup> ETUC, "Model Proposal for a Directive on strengthening the principle of equal pay between women and men through pay transparency," <https://www.etuc.org/sites/default/files/press-release/file/2020-11/Model%20Proposal%20for%20a%20Directive%20on%20strengthening%20the%20principle%20of%20equal%20pay%20between%20women%20and%20men%20through%20pay%20transparency.pdf>.

<sup>530</sup> EU Directive at Article 7.

Trade Union Congress has identified as a critical barrier to organising for equal pay.<sup>531</sup>

Equality assessments, pay transparency measures and other proactive duties can provide an important framework in which discriminatory labour practices can be addressed. Requiring employers, whether public or private, to take into account equality and non-discrimination issues in all their decisions can be successful in addressing unequal practices that would otherwise not be considered at all. However, both the PSED and other proactive measures provided in the UK Equality Act are considered to be underutilised and limited, in particular because of the limited provision for enforcement and the lack of political will among those responsible for implementation. One interviewee explained:

*The preventative stuff – I guess what you're talking about is things like the PSED. I've seen so many of these different initiatives. I knew the predictions – the analysis – about why [gender pay gap reporting] was unlikely to work (...) Sure enough, a few years later, the predictions were borne out. (...) [With the] PSED, also the devil's very much in the detail (...) and massively in political will. In the UK story, having one government pass it and then another government implement it, for whom it was convenient to have it on the statute book but to have it with limited effect [is a problem].<sup>532</sup>*

Another expert concurred, discussing the limitations of legislation requiring businesses to report on the gender pay gap:

*There are some positive bits like the gender pay gap reporting, but (...) again: it's only gender, and there's other forms of pay gaps that we've exposed, and that need to be reported on. [In addition], reporting on it, what's that? We've got to have an action plan to put it right. And sometimes it's not about pay systems: it's about lack of childcare, or it's about part time working, or it's about discrimination, or it's about lack of access to training, or whatever it is. All of those things need to be considered alongside the cold, hard facts of the gender pay reporting, and the other forms of pay gap reporting. So, it's all a start, but it doesn't have the full picture.<sup>533</sup>*

Similar issues were identified in **South Africa**, where interviewees also highlighted lack of political will and failures of enforcement and implementation as a key obstacle, with Henk Smith, a human rights and public interest litigation attorney, noting that the sections of the Employment Equity Act dealing with positive, proactive obligations have not yet been brought into force:

*The chapter on positive obligations of the state requires [it] to address and report on discrimination in the various sectors – mining, farming, [and so on] and to implement joint and separate anti-discrimination plans and programmes. That Chapter has not been put into effect yet. So, whereas certain employer[s] must address [this], the state departments are not required to report on what they are doing to address equality and non-discrimination in all aspects, not only employment.<sup>534</sup>*

These good practices show the potential that proactive duties can have in addressing inequalities within employment. As our expert respondents explained, when properly implemented, proactive duties can require businesses to identify and prevent discrimination, remove barriers to access and ensure that equality considerations are mainstreamed. This, in turn, enables the law to become an effective preventative – rather than merely remedial – instrument. While the experts we spoke to identified a number of promising good practices, the overwhelming sense from the interviews in States with proactive measures in place was of concern about the limited scope and enforceability of these measures, which are all too frequently seen as exceptional and voluntary, rather than essential and obligatory. Whether as a result of a lack of political

<sup>531</sup> TUC, "One in five workers are banned from discussing their pay, TUC poll finds," <https://www.tuc.org.uk/news/one-five-workers-are-banned-discussing-their-pay-tuc-poll-finds>.

<sup>532</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>533</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>534</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.

will, an overly narrow scope or a limited enforcement framework, proactive and preventative mechanisms which are not implemented will not achieve their aims and will leave States still falling short of their obligations. Nevertheless, the predominant pattern identified through the research is that proactive, preventative measures are the exception, rather than the norm, with most countries having no such mechanisms, while those which do exist are narrow in scope.

### Promising Practice: A Shift to a Compliance-Based Model

As discussed above, while anti-discrimination laws must provide a means for individuals to challenge violations against them and to secure remedy and sanction, individual enforcement action is not an effective means to ensure the enforcement of the right to non-discrimination. As explained at various points in this report, the reactive, individualised model of enforcement in many anti-discrimination law regimes means that discriminatory practices go unchallenged.

We interviewed Dr Vincenzo Tudisco of University of Trento, who has recently completed a study on the extent to which sanctions and remedies in European countries are effective, proportionate and dissuasive. As part of this project, Dr Tudisco and his research partners analysed the enforcement frameworks in anti-discrimination law, consumer protection law and data protection law and compared the strengths and weaknesses of each framework.

Dr Tudisco began by clarifying that the research confirmed that a victim-centred approach is fundamental to anti-discrimination law and must be preserved. However, Dr Tudisco explained that even in victim-centred systems, individuals are, in practice, rarely awarded a sufficient compensation. Furthermore, this emphasis on individual victims comes at the expense of broader society-wide remedies.

Dr Tudisco explained that in data protection and consumer protection enforcement mechanisms, individual compensation is intended and independent authorities supervise and enforce compliance with the law and impose fines for breaches. There is no need for individuals to be harmed or to bring a claim themselves in order for enforcement action to be taken. Furthermore, the sanctions that these regimes impose constitute serious and expensive fines that are significantly more dissuasive than any sanctions which exist under anti-discrimination law.

If this compliance-based approach were to be applied to non-discrimination, an independent authority would be able to audit employers to ensure that none of their policies or practices are discriminatory and impose fines if they are. This approach would be proactive and preventative, in that it would not rely on any harm to have occurred. If the same levels of fines which are used in data protection law were imposed for breaches of non-discrimination law, this could also have a considerable dissuasive effect – unlike the sanctions in most anti-discrimination law regimes. Unfortunately, to date, there has not been application of data and consumer protection laws to anti-discrimination cases to effectively utilise this mechanism.

However, Dr. Tudisco was keen to stress the strengths of the victim-centred approach in anti-discrimination laws. He explained that data protection and consumer protection laws do not, in general, provide for any individual compensation. It remains imperative that individuals be able to access justice and obtain remedy suitable for the harm they have suffered. Accordingly, any move towards a compliance-based model would need to be in addition to the existing victim-centred approach, complementing and building upon the existing framework, rather than replacing it.

#### 7.1.2 Preventative Duties for Employers

Discrimination in the workplace cannot be eliminated if employers do not take measures to prevent it. As a

senior official at Unite the Union in **Great Britain** noted, to some extent a comprehensive anti-discrimination law framework, properly enforced, with effective sanctions, will stimulate preventative action by employers seeking to avoid litigation:

*So, at the moment I think it's possible to interpret the law as requiring those things [proactive and preventative measures], because if you don't want to be accused (...) if you want not to have vicarious liability under the law, then it's important that the employer can show they've taken positive steps to make sure that everybody that's employed by them knows what would be unlawful and what would be discrimination, and what's appropriate action in the workplace, and so on.<sup>535</sup>*

However, as noted in the chapter on enforcement and access to justice, this approach to anti-discrimination law relies on individual rights-holders to know their rights and have the will, determination and resources to make claims where discrimination has occurred. Even then, in the majority of cases which are successful, the immediate outcome will be remedial and responsive – compensating an individual for harm which has already occurred – rather than preventative. As such, where there is no requirement in law on employers to take proactive, preventative measures – including training and guidance, policies and procedures – the elimination of discrimination in the workplace will be an incredibly slow process. Moreover, without enacting and enforcing legal requirements on employers to take these measures, States will be failing in their duties to take “all appropriate measures.”

Globally, the law in this area remains severely underdeveloped. As noted above, relatively few States include positive duties in their anti-discrimination law regimes; in those States which do – such as the United Kingdom – such duties are often focused on public authorities rather than private actors. Yet there are a wide variety of creative options which States could adopt within the “all appropriate measures” framework. This could include: measures on transparency in hiring, pay, promotion and other indicators, and requirements to make interventions to address disparities; requirements to identify and address factors which make discriminatory practices more likely; and requirements to partner with unions and civil society organisations to identify and address barriers preventing equal participation.

Unfortunately, however, even in comprehensive anti-discrimination law systems, it is rare to find effective, enforceable preventative and proactive duties on private actors. As one expert in **Great Britain** noted:

*The positive case for equality needs to be made. And that's where I think the enforcement bodies – the Equality and Human Rights Commission – used to have very clear objectives for doing that, and they were removed by the government. I think that was wrong, because they had a requirement to make the case, and that was all about the positive framework.<sup>536</sup>*

Two different experts interviewed in **Great Britain** – Robin Allen KC and Melanie Field, a senior official of the Equality and Human Rights Commission – spoke about the potentially transformative impact of extending duties currently applicable in the public sector to the private sector:

*Some campaigners have argued for something similar to the Public Sector Equality Duty to apply also in the private sector – obviously that already applies to public sector bodies [in their capacity as] employers as well as in the delivery of public functions. It is intended to focus the mind of the employer on how they can both eliminate discrimination and promote equality of opportunity – so both that preventative side and progressive side.<sup>537</sup>*

Another expert also spoke about the impact of the Public Sector Equality Duty on employment policy and practice among public-sector employers in the health sector, illustrating the potential effect of extending

<sup>535</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>536</sup> Equal Rights Trust interview with a senior official at Unite the Union, Great Britain.

<sup>537</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain; Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.



the duty to other employers:

*They are required to carry out equality impacts assessments where they're bringing in a change in the workforce. There's not a legal requirement for them to have particular policies in place, I don't think. But a lot of employers do that anyway as a matter of good practice (...) That's a manifestation of that positive duty. And where employers do it, it is actually a really useful thing.*<sup>538</sup>

Another expert also spoke about the potential of using public-sector procurement to "leverage" preventative and proactive measures in the private sector:

*Local government or departments or non-departmental public bodies have a huge leverage over the economy in terms of purchasing goods, facilities or services, which in turn are provided by employees in external organisations. That leverage can be incredibly beneficial – has at times been very beneficial – through public procurement programs, insisting on good equality and diversity practice. That trickles down, it doesn't just stop at the local authority, it goes through the supply chain. So, if it's well constructed, a public authority which purchases through public procurement – goods, facilities and services – may well [be able to impose] an obligation on the supplier to have an equal opportunities policy, and they may also impose obligations on suppliers to the supplier – it will reach further.*<sup>539</sup>

In relation to this, Professor Lizzie Barmes, an equality and labour law academic, spoke specifically of the missed opportunity of recently enacted gender pay gap legislation, which creates reporting obligations but is not seen as being as effective as it could be in stimulating proactive responses by business:

*I think the gender pay gap reporting provisions were (...) a bit of a fudge. I think the preferred approach from a policy perspective would have been to require equal pay audits, which is really a way of driving employers to take a proactive approach to addressing unlawful pay discrimination rather than the societal issue of the gender pay gap, where, arguably, some of the causal factors are outside employers' control.*<sup>540</sup>

Adriane Reis de Araújo, a labour prosecutor in Brazil – where no gender pay gap reporting obligations exist – and a National Coordinator of COORDIGUALDADE – a Brazilian organisation focused on eliminating discrimination at work, also spoke of the need for duties to disclose pay information, in order to identify pay inequalities and stimulate action to correct it:

*One of them, I think, concerns the salary issue. So, to have more clarity in the salary values that are practised within the company, because many times the inspection is faced with situations of totally unfair, unjustified salary discrimination that the company practices, because it practices until it is alerted by the inspection. If we had a technological mechanism to speed this up, we would certainly reduce the impoverishment, especially of women.*<sup>541</sup>

Some of these experts have also highlighted the role that trade unions and collective action can play in encouraging employers to adopt preventative measures. One interviewee from Great Britain explained that the duty to inform and consult trade unions enshrined within labour law can help to encourage employers to conduct equality impact assessments and hold them to account.<sup>542</sup>

<sup>538</sup> Equal Rights Trust interview with a senior official at Unison, Great Britain.

<sup>539</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>540</sup> Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

<sup>541</sup> Equal Rights Trust interview with Adriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work, Brazil.

<sup>542</sup> Equal Rights Trust interview with a senior official at Unison, Great Britain.

## Promising Practice: The Fair Employment and Treatment Order

One important example of a well-established and effective proactive duty on employers is the Fair Employment and Treatment Order 1998 (the Order) in Northern Ireland. This built on the previous 1989 legislation which introduced much of the innovative features of the Northern Ireland model of employment equality law. The Order makes discrimination on the grounds of religious belief and political opinion unlawful in employment and other areas. In addition to this prohibition, the Order imposes several positive duties on employers. These include registering with the Equality Commission for Northern Ireland (the Commission); monitoring the number of individuals of relevant religious groups in their employment; reviewing recruitment, training and promotion practices every three years to ensure different groups enjoy fair participation in employment; and, where disproportionalities are identified, undertaking affirmative action measures to identify and remove the barriers preventing equal participation. Other important provisions include the possibility of bringing claims to the Fair Employment Tribunal and providing for the Equality Commission's mandate and powers.

Professor Christopher McCrudden, professor of human rights and equality law at Queen's University Belfast and one of the architects of this regime, explained the history of the Order and its impact on addressing inequality in the workplace. He explained that the Order was passed as one of a number of measures designed to address the long-standing, violent conflict – known as “The Troubles” – between those who supported the unification of Northern Ireland with the Republic of Ireland and those who supported remaining part of the United Kingdom. Developing a legal regime to ensure equality of opportunity on the basis of religion and political opinion in the area of employment was considered to be central to addressing one of the drivers of conflict, and so to developing the foundations for peace. As Professor McCrudden explained, this meant that there was, eventually, very significant political will to address the problem through strong legislation. A result of this political will to achieve systemic change was that those in power were prepared to listen to and accept the recommendations of experts, based on comparative research, resulting in the strong and effective regulatory framework established in the Order.

Professor McCrudden was keen to emphasise the simple fact that the regime established by the Order “has worked”: it has made a material difference to the representation and experiences of the two religious-political communities (Catholics/Nationalists and Protestants/Unionists) in the workplace. While discrimination does still exist, in comparison with the situation that existed before the 1989 and 1998 legislation were passed, the representation of different religions and political opinions in the workforce has drastically improved.

Importantly, Professor McCrudden explained that the success of the Order was due to its perspective on non-discrimination. Rather than only being concerned with identifying and addressing cases of discrimination, the monitoring and positive action duties in the Order shifted the focus to equality of opportunity and compliance on the part of the employer. Any employers failing to monitor their workforce appropriately or take measures to identify any discrepancies are in breach of the Order and can be sanctioned. While it is still possible for individuals to bring complaints, these complaints are not the principal driver for enforcement action. In turn, this has promoted a change in the labour market where employers are both more aware of discrimination concerns and the need to promote equal opportunities.

Another important feature of the regime is that while it requires employers to take positive, affirmative action, it does not permit or require the use of quotas. Professor McCrudden suggested that this “softer” approach leads to employers identifying and addressing the specific barriers that dissuade individuals from protected groups applying for jobs, rather than simply fulfilling quotas for their own sake.

Professor McCrudden explained that the reason the Order has been so successful is that it establishes an extensive, serious legal regulatory structure. The Order is fully justiciable, and the enforcement bodies that it established actively enforce the obligations contained within it. These bodies can and do impose significant sanctions against employers in breach of the Order. Professor McCrudden highlighted the ability to exclude employers from government contracts as a particularly powerful mechanism given how often private companies worked with the government. The fact that enforcement bodies are able and willing to impose these sanctions promotes compliance.

Data on labour market participation in Northern Ireland clearly demonstrates that the regime established by the Fair Employment and Treatment Order has been successful. Levels of employment both across the economy and within individual sectors and businesses are much closer to parity between the two communities.

However, it is important to note that the Order prohibits discrimination only on the grounds of religious belief and political opinion and that the positive duties it imposes are limited to promoting equal participation in the area of employment. Professor McCrudden noted that the positive duties which have been so successful were not implemented for other grounds or in other areas of life. The result is that inequalities between other groups – and between the religious and political communities in areas such as housing – persist.

Nevertheless, the Fair Employment and Treatment Order is a clear example of a successful approach which has had the effect of not only strengthening the prohibition of discrimination, or improving remedy and sanction, but actually substantially reducing discrimination and advancing equality of participation. While limited to two grounds of discrimination, the regime offers a promising model which could be adapted and used in respect of other grounds.

### 7.1.3 Education and Sensitisation Measures

Alongside positive duties to identify and prevent discrimination and its causes, States should take a wide array of other measures – “all appropriate means” – to eliminate discrimination. This includes measures focused on raising awareness among both rights-holders and duty-bearers, which can have the effect of both informing and empowering those needing access to justice and remedy and the effect of stimulating preventative action from duty-bearers. As discussed in 4.2, a lack of awareness among rights-holders and duty-bearers was routinely identified as an issue among respondents, and it is clear that States have more to do to increase awareness, knowledge and understanding.

Carlton Johnson, a Commissioner of the CCMA in [South Africa](#), highlighted practical measures of education, sensitisation and awareness-raising which the Commission undertakes as an example of good practice with real impacts, albeit on a limited scale:

*[We] have a very active programme in terms of what we call “dispute prevention,” where we do go out to various stakeholders, and we’ve got relationships with trade unions, employers – the bigger ones and the small organisations like your farmer in farming operations. [We] get farm workers into a workshop on a Saturday, and you take them through the legislation. So, at various levels, I must say that the CCMA is doing a lot. [They do this] over weekends so that when you are not able to get domestic workers or farm workers or any vulnerable worker into a workshop during the week because they are working, they do a lot of that outreach work over weekends. (...) It covers different aspects of law but in particular unfair discrimination and making sure that the communities out there know their rights in terms of discrimination law – equal pay for equal work, for example, and the law on medical testing, for example. So, we do cover that extensively. But the biggest challenge is that if you do this work on a one-on-one basis, once every week, you are not reaching the masses.*

*And so, what we need to talk about as a society together, I believe, with universities and organisations such as CCMA and the Department of Labour, is how do we get that message across to higher volumes of people simultaneously?<sup>543</sup>*

Another respondent explained that there are legal requirements on businesses in South Africa to display information about labour rights and working conditions, and that these obligations have recently been extended to include information on the right to non-discrimination.<sup>544</sup>

One expert on the agricultural sector in **Great Britain** also spoke about the impact which public awareness-raising programmes can have, including in sectors with high degrees of informality.<sup>545</sup> They specifically mention the “Just Good Work” app, which provides information and advice for workers in various sectors and of various nationalities. The same expert also spoke about the importance of engaging other actors in a value chain, beyond the direct employers, because of the influence which those with purchasing power can have on practice elsewhere in the sector:

*It is important to consider the whole supply chain. Supermarkets have enormous influence on the supply chain. [They] need to promote a message about decent work and ethical standards. Supermarkets have invested in the Just Good Work app, but they could do more. What is crucial is a consistent message. A consistent message is a powerful message. Supermarkets should have a voice in the discussions on worker rights and employment rights.<sup>546</sup>*

These respondents make clear that educating both rights-holders and duty-bearers is an essential step to eliminating discrimination. When they are aware of their rights, individuals are empowered to identify and challenge instances of discrimination. Similarly, when employers are educated on their obligations, they not only know how to effectively comply with the law but are also more aware of the consequences of non-compliance. The respondents here explain that what is needed are far-reaching education and sensitisation measures that go beyond targeting individual employers and employees to develop a society that is more rights-conscious generally.

#### 7.1.4 Outreach and Engagement Measures

Another form of proactive measures which States may adopt under the rubric of “all appropriate measures” are those which involve outreach and engagement with business in order to encourage and incentivise the adoption of equality and non-discrimination policies and practices, particularly when pursued in tripartite dialogue with workers and unions.

In **Brazil**, Adriane Reis de Araújo, a representative of the Labour Prosecution Office, set out the four-step approach which the Office encourages companies to adopt in order to identify and eliminate discrimination:

*One of them is precisely the sense of gender, race or the vulnerability factor, where you will identify how many people are in that group, how much they are paid, (...) what functions they occupy (...) and what is the possibility of promotion (...) Then a portrait is created of the company. The company is encouraged to draw up a specific affirmative action that can be either a reserve of vacancies or training or support. But this action has to be clear, it has to be clear. What is the action? Who will benefit and what is the period of this action? What is the goal to be reached? Objective indicators that, at the end of a certain period, a specific period, they will be evaluated to verify if there was, effectively, a fact of that affirmative action, if there was no impact, (it) must be reviewed and if there was an impact it can be expanded to another group. For this to happen (...) it is essential that*

<sup>543</sup> Equal Rights Trust interview with Carlton Johnson, a Commissioner with the Commission for Conciliation, Mediation and Arbitration, South Africa.

<sup>544</sup> Equal Rights Trust interview with Tzi Brivik, an attorney with expertise on the platform economy, South Africa.

<sup>545</sup> Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

<sup>546</sup> Equal Rights Trust interview with representatives of the Gangmasters and Labour Abuse Authority, Great Britain.

*the company trains all the male and female workers on these issues and also opens a channel for complaints. [This channel should be] confidential, known to all, have diversity in its composition, have protection from reprisals for the people (...) and preferably clear mechanisms for sanctioning the aggressors, so that it is very clear. So, with these four steps, we understand that we can considerably reduce this situation of discrimination, violence, and harassment.*<sup>547</sup>

Another respondent from **Brazil** – Sérgio Luiz Leite, Vice-President of a trade union – spoke about how engagement by the union and the Ministry of Labour with businesses following cases of discrimination has led to the adoption of measures designed to prevent repetition. They note that when a company has a particularly strong brand, they may take decisive actions to protect their image.<sup>548</sup>

Respondents from both **Colombia** and **Brazil** spoke of programmes of public data sharing and public recognition which incentivise businesses to identify and eliminate discriminatory practices and their consequences. In **Colombia**, for example, the Equipares Labour Equity Seal is a certification programme focused on gender equality in the workplace. Established in 2013 and managed by Ministry of Labour and the Presidential Council for Women's Equality, with support from the United Nations Development Programme, Equipares incentivises businesses to work to close gender gaps through the implementation of equality measures, affirmative action and gender mainstreaming. Participating companies are assessed against a range of indicators and awarded a seal at different levels, depending on their performance. As of 2023, sixty-seven organisations – together employing approximately 140,000 workers – participate in the programme.<sup>549</sup> The programme has had positive impacts but remains voluntary and relatively small scale (the workforce in Colombia is 26 million people).<sup>550</sup> One expert viewed the award with optimism but also thought it needed to be made mandatory.<sup>551</sup>

An expert from **Brazil** – Vice-President of an online food delivery platform – spoke of a similar scheme focused on racial equality in the workplace:

*The racial equity pact is made up of a coalition of companies from different countries. This pact proposes a racial equity index that aims to measure how racially representative companies are in comparison to the environment in which they operate. (...) One of the things that is most special about the pact is that from the beginning it has sought to approach the racial issue from an intersectional, gender and race perspective. The focus is on racial imbalance, because that is where there is the greatest imbalance in companies today. What we see is that companies are taking actions to prevent stereotyping, such as actions aimed at increasing representation in leadership positions and in the workforce. In the company, we voluntarily joined, in 2021, the pact for racial equity which is very interesting because it works on the issue of improving measurement. We are going to have better metrics instead of just counting the number of black people in the company.*

## Promising Practice: Equipares Labour Equity Seal

The Equipares Labour Equity Seal is a voluntary award scheme which focuses on advancing gender equality within the workplace in Colombia. Established in 2013 and managed by the Ministry

<sup>547</sup> Equal Rights Trust interview with Andriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work.

<sup>548</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>549</sup> United Nations Development Programme, *Equipares Labour Equity Seal*, available at: <https://www.undp.org/es/colombia/proyectos/sello-equidad-laboral-equipares> (accessed January 2023).

<sup>550</sup> World Bank, *Labor force, total – Colombia*, <https://data.worldbank.org/indicator/SL.TLF.TOTL.IN?locations=CO> (accessed January 2023).

<sup>551</sup> Equal Rights Trust interview with Diana Paola Salcedo, ILO national officer for the Implementation of the Peace Process, Colombia.

of Labor and the Presidential Council for Women's Equality, Equipares is intended to incentivise businesses to work to close gender gaps through the implementation of equality measures, affirmative action and gender mainstreaming.

Participating companies are assessed against a range of indicators, such as fair pay and protections from sexual harassment, and awarded a seal at different levels, depending on their performance. There are three levels to the award: bronze, silver and gold. Companies must also create internal monitoring mechanisms and commission an external audit of their progress. As of 2023, sixty-seven organisations – together employing approximately 140,000 workers – participate in the programme.<sup>552</sup>

We interviewed Linda Correa Martinez of the Chamber of Commerce in Bogota on the Equipares Seal and the extent to which it has helped to address gender discrimination and inequality within the workplace. Ms Martinez was positive about the impact of the scheme. Not only does it encourage companies to proactively address instances of discrimination, but it also supports the mainstreaming of equality considerations into business practice. Speaking about the Chamber of Commerce, she said that “it has made people aware of these issues” and changed the culture of the organisation.

Ms Martinez also made the point that companies which successfully implement affirmative action and other equality mainstreaming measures in order to meet the requirements for the award begin to develop a workforce that understands gender equality issues. In turn, this understanding spreads throughout the labour market, creating a positive example and fostering good practice beyond the participating businesses. Ms Martinez noted that gender inclusion has, in recent years, become a focal point in wider society, and this not only boosts the profile of the Equipares scheme but also makes employers more likely to join the scheme and take proactive steps to address discrimination.

Ms Martinez also discussed the extent to which companies engaged with the award and their reasons for doing so. She explained that while some companies do understand the need to address gender inequality, some pursue the award for publicity purposes, simply wanting to present themselves as progressive. These businesses adopt those measures which are strictly necessary to obtain the award but go no further. Ms Martinez explained that the key difference between these companies and those which go beyond the bare minimum is whether those in senior positions advocated for the changes and so whether new measures are initiated “from the top down.”

While the Equipares seal does bring benefits, the number of participating companies remains small, for a variety of reasons. Notably, the complexity and the cost of implementing the necessary measures are seen as barriers to participation for many businesses. Ms Martinez explained that it took the Chamber of Commerce three years to achieve the silver award, and it is currently employing twenty-five individuals to work on achieving the gold standard. As this indicates, while the award does not impose a requirement in respect of resources or staffing, achieving the highest standard requires significant commitment and investment from businesses. While this is attainable by bigger and better-funded companies, smaller businesses are unable to make the necessary changes and so are discouraged from engaging in the awards process.

As this indicates, while the Equipares scheme has undoubtedly been successful in addressing gender discrimination, inclusion and equality in participating businesses, the small number of participants and the voluntary nature of the scheme limit its scale, sustainability and impact.

<sup>552</sup> United Nations Development Programme, *Equipares Labour Equity Seal*, available at: <https://www.undp.org/es/colombia/projects/sello-equidad-laboral-equipares> (accessed January 2023).

While voluntary schemes pursued by employers can make an important contribution to addressing discrimination, States cannot rely upon such schemes to fill the gaps in their legislation or address employer misconduct. Voluntary schemes are no substitute for the comprehensive and effective prohibition of discrimination, and the implementation and enforcement of positive duties to identify and eliminate discrimination and promote equality of participation. By their nature, voluntary schemes are subject to change or discontinuation; such schemes may also be limited in scope, focused on addressing inequalities for certain groups or in certain areas of employment, while failing to address other patterns of discrimination; they may be a distraction, also giving an impression of change while leaving the fundamental structure of power in the workplace unchanged. These schemes cannot be considered a replacement for accountability mechanisms.

### SUMMARY: Proactive and Preventative Measures

States do not discharge their international human rights law obligations to ensure the enjoyment of the right to non-discrimination by merely enacting and enforcing anti-discrimination legislation, no matter how comprehensive or effective such laws are. International human rights law imposes a general obligation on States to adopt “all appropriate measures” to not only prohibit discrimination but prevent and eliminate it.

The requirement to take “all appropriate measures” is open-ended – States have discretion as to the form of the measure they take but have an obligation to take any measures necessary to eliminate discrimination. This requires – at a minimum – measures to ensure accessibility; proactive and preventative measures by State actors; and duties on private actors to undertake preventative measures. In addition, States should institute awareness-raising, sensitisation, outreach and engagement activities, among others, designed to prevent discrimination. The research finds that even in States with the most well-established, well-developed and comprehensive anti-discrimination law regimes, proactive duties are more the exception than the norm, and those duties which do exist are limited in scope and enforceability.

The research finds that the practice of imposing **proactive and preventative legal duties on State actors** is limited to States with comprehensive anti-discrimination law frameworks: interviewees from Brazil, Colombia, India and Tunisia made no concrete references to proactive duties. In Great Britain, the Equality Act establishes a Public Sector Equality Duty – an obligation on decision-makers to consider the discriminatory and equality impacts of policies and practices. While experts agreed about the transformative potential of the duty and other proactive obligations in the law, there was general agreement that they are underutilised and limited, in particular because of the limited provision for enforcement and the lack of political will among those responsible for implementation.

If practice in respect of proactive, preventive duties on State actors is limited, the imposition of such **duties on private actors** is even more rare. None of the experts interviewed for this study cited concrete examples of such duties, though a number spoke about the potential of such measures and proposed different approaches and measures which could have transformative impact.

While practice in respect of binding preventive duties is extremely limited, experts from a range of countries highlighted good practice in respect of **public education and sensitisation** among both duty-bearers and rights-holders. Experts from Brazil and Colombia also highlighted the impact of **outreach and engagement** measures, such as the Equipares scheme in Colombia – a certification scheme focused on gender equality in the workplace under which participating companies are assessed against a range of gender equality indicators and awarded a seal at different levels, depending on their performance. However, it is notable that the initiatives in these areas are limited in scope and that they are almost all voluntary measures taken by businesses rather than actions taken to meet a legal obligation. While such good practices should always be encouraged, in the absence of an enforceable duty, these measures will often be limited in scope and temporary in nature, limiting their impact.

### RECOMMENDATIONS

- ▶ States should establish clear and explicit proactive duties on public decision-makers to identify

and prevent discrimination; promote and advance equality; and integrate equality considerations into decision-making. Such duties should be integrated into public decision-making processes and should be enforceable, with effective sanction for non-compliance.

- ▶ States should establish proactive duties on employers and other private actors to prevent discrimination. Private actors should be subjected to a general duty to take all appropriate measures to prevent and eliminate discrimination, with a requirement to identify and develop mechanisms which are appropriate and effective, in consultation with groups exposed to discrimination and trade unions. Preventative duties on employers should include – but not be limited to – obligations to integrate equality impact assessment into all decision-making processes regarding employment and work; requirements to adopt clear policies to prevent and address discrimination and promote equality; and mandatory ongoing training of all workers and managers on the rights to equality and non-discrimination
- ▶ States should both establish and lead, and encourage and support, other proactive measures by private actors designed to eliminate discrimination or promote equality. In order to ensure that such measures are comprehensive, effective, sustainable and enforceable, States should ensure that such programmes are mandated by law.

## 7.2 Positive Action

Since the adoption of the earliest international human rights conventions, it has been recognised that eliminating discriminatory practices alone will not eradicate the consequences of past discrimination or current structural inequalities. Providing comprehensive and effective protection from discrimination is a necessary – but not a sufficient – condition for the creation of equal societies. In addition to prohibiting discrimination, States must take a range of positive measures to overcome past and present disadvantage and accelerate progress towards equality. As Dr Jason Brickhill, a human rights attorney from [South Africa](#), related powerfully:

*[W]ithout significant redistribution of resources at a structural level in society, mere legal guarantees of equal treatment and even reasonable compliance with [these] guarantees (...) is not going to build a more equal society. I think we need major redistributive policies in relation to land and cash in particular. Social grants are one form of that, the universal basic income grant is one form of cash redistribution at a structural level [but] it's only the tip of the iceberg (...) Similarly, with land reform, urban and rural. Until that happens, everything else that we were talking about, having guarantees of equal protection for domestic workers and farm workers, bringing them in line with the minimum wage, won't be enough on its own. And we know that. We know that.*<sup>553</sup>

Accordingly, international human rights law recognises an obligation to adopt and implement positive action measures<sup>554</sup> – also referred to variously as “affirmative action”<sup>555</sup> and “temporary special measures.”<sup>556</sup> Positive action involves targeted, preferential measures designed to overcome inequality. As the Committee on the Rights of Persons with Disabilities has explained, it involves “adopting or maintaining certain advan-

<sup>553</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>554</sup> ICERD, arts. 1 (4) and 2 (2); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 11 and 14; CEDAW, art. 4 (1); Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24; CRPD, arts. 5 (4) and 27 (1) (h); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 16; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9; Human Rights Committee, general comment No. 18 (1989), para. 10; and Human Rights Committee, general comment No. 28 (2000), para. 3.

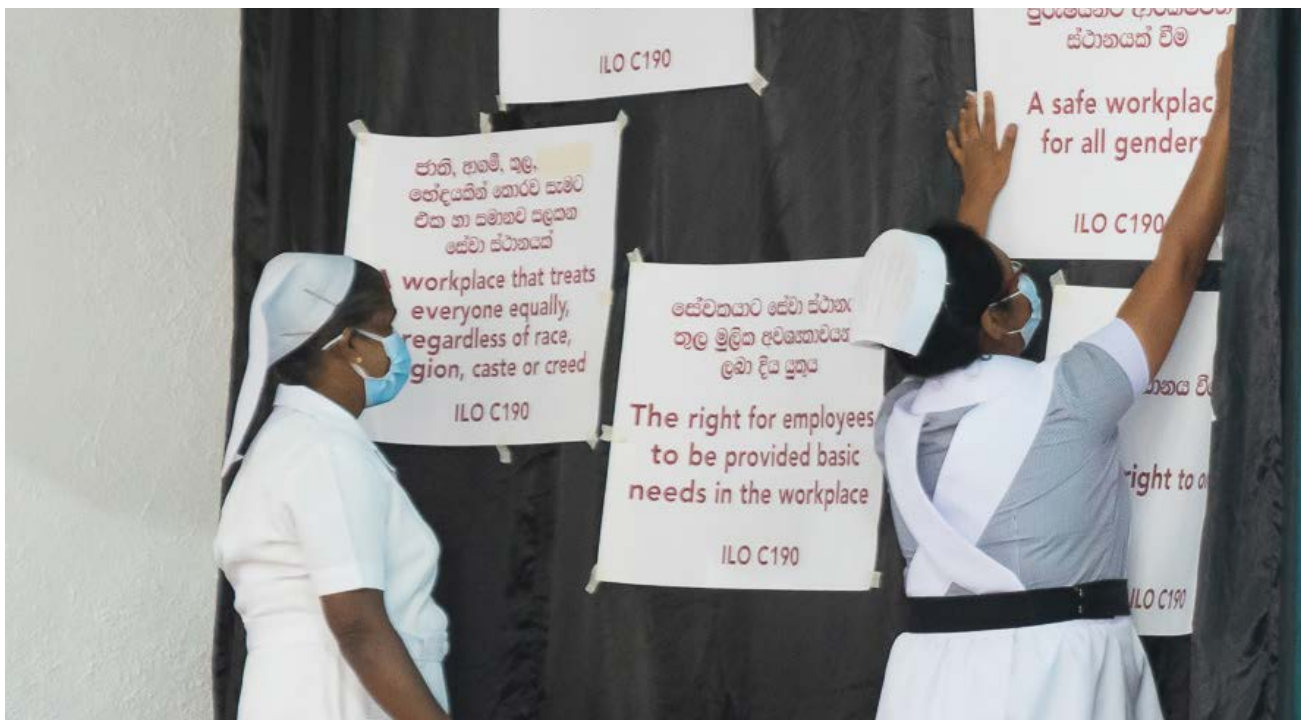
<sup>555</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10.

<sup>556</sup> CEDAW, art. 4 (1). The Committee on the Elimination of Discrimination against Women has noted that: “The term ‘special’, though being in conformity with human rights discourse, also needs to be carefully explained. Its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or ‘special’ measures in order to participate or compete in society. However, the real meaning of ‘special’ in the formulation of article 4, paragraph 1, is that the measures are designed to serve a specific goal.” Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 21.



tages in favour of an underrepresented or marginalized group.”<sup>557</sup> In order to comply with international human rights law, States must both require and permit positive action measures in situations of substantive inequality.<sup>558</sup>

Beyond the legal obligation to adopt positive action measures in situations of substantive inequality, international law permits significant discretion to States to develop and implement positive action measures which meet the needs of, and are appropriate for, the national context. As the UN Human Rights Office has noted, positive action “includes any measures taken for the purpose of advancing equality for a group exposed to discrimination (...) [and] the treaty bodies have repeatedly emphasized the wide range of measures that could fall within the scope of special measures.”<sup>559</sup> The form and nature of specific positive action measures should be responsive and appropriate to the needs of groups experiencing inequality and disadvantage. In the employment context, examples of positive action measures can include quotas and reservations for underrepresented groups; adjustments to scoring schemes for hiring or promotions to account for inequalities in access to education and prior employment; targeted programmes of training and support, including mentoring schemes, fellowships and placements; and targeted programmes of outreach and recruitment.



Union members in Sri Lanka participate in a workshop. Credit: Sean Stephen / Solidarity Center.

As positive action entails preferential treatment based on a protected characteristic,<sup>560</sup> there is a need, as

<sup>557</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>558</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 56. See also ICERD, arts. 1 (4) and 2 (2); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 11 and 14; CEDAW, art. 4 (1); Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24; CRPD, arts. 5 (4) and 27 (1) (h); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 16; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9; Human Rights Committee, general comment No. 18 (1989), para. 10; and Human Rights Committee, general comment No. 28 (2000), para. 3.

<sup>559</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 66.

<sup>560</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10 (“such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population”); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28: “specific measures ... entail adopting or maintaining certain advantages in favour of an underrepresented or marginalized group” in order to

the Committee on the Elimination of Racial Discrimination has put it, to “distinguish ‘special measures’ from unjustifiable preferences.”<sup>561</sup> The Committee has noted that in order to be legitimate, positive action measures should be: (a) appropriate to the situation, (b) legitimate, (c) necessary in a democratic society, (d) respectful of the principles of fairness and proportionality and (e) temporary.<sup>562</sup>

Where there is no legal requirement on the State to adopt positive action programmes or measures; where positive action programmes are not established despite legal requirements; or where positive action programmes exist but are ineffective in practice, then the effectiveness of anti-discrimination law in addressing substantive inequalities will be significantly limited. Similarly, in the sphere of employment, where there is no legal requirement on public- or private-sector employers to establish positive action programmes or where public- or private-sector employers do not establish effective positive action programmes despite legal requirements to do so, progress in redressing and correcting inequalities within the workplace will be slow.

In practice, despite the consensus at the international level that States must develop, adopt and implement positive action measures in situations of substantive inequality between groups sharing a protected characteristic, national legal approaches vary significantly: some countries require the adoption of positive action measures; some permit this, but do not require it; yet other countries prohibit positive action measures, incorrectly defining such measures as discriminatory. Moreover, even in States where the legal framework on positive action is relative strong, there are frequently significant weaknesses in implementation. The States under review for this report reflect a diverse range of legislative approaches to positive action.

The law in **Great Britain** permits positive action but does not impose a requirement on employers to institute positive action programmes; the relevant provisions are also limited in their scope. Nevertheless, Melanie Field, a senior official with the Equality and Human Rights Commission, was keen to emphasise the impact of those measures which are taken:

*I think the provisions are as extensive as they could be in terms of permitting positive action in the context of the [European Union] law framework that applied to Britain at the time that the [Equality] Act was passed. So, the Act broadened the scope of positive action that could be taken to include recruitment or promotion where people were of equal merit to give preference to somebody from an underrepresented group. So, I think the legal framework is quite strong there. I think there's a question, now that we're not in the [European Union], whether there would be an appetite to go further. I think there are risks around doing that in terms of how well those provisions are used. My sense is that the sort of general positive action provisions, about encouragement of people to apply, and putting people on a level playing field, you know, encouragement and training, are reasonably well used. My sense is that they're talked about less than they were maybe five or ten years ago. I think the equal merit provision has been misused, and I think employers are quite cautious about using it in case they get it wrong.*<sup>563</sup>

Another expert, an equality and non-discrimination barrister, Robin Allen KC, concurred with the view that awareness and use of the provisions permitting positive action remains limited in **Great Britain** but expressed optimism nevertheless:

*What is very slowly beginning to happen is greater confidence in positive action measures. Not enough, but there is a certainly a greater belief that things can be done to promote positive action. I would like to see much more use of that in order to show how positive action measures – not just tie breaks, but particular programs for encouragement and training and so on – so there can be greater [understanding of] what works, what doesn't work. I was involved in setting up one, for in-*

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achieve equality.

<sup>561</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 16-18.

<sup>562</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para 16.

<sup>563</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

stance, for the recruitment of judges by developing a training program which targeted in particular minorities who were underrepresented in the judiciary.<sup>564</sup>

Experts in **Brazil** discussed the importance of the public appetite for affirmative action only after noting that legal requirements for employers to ensure that a certain proportion of their workforce is made up of persons with disabilities are not properly applied:

*I think that our great affirmative action case in labour law is [in respect of persons with disabilities] (...) It is a very complex law and not properly applied. We have it, but even the big companies – which should have the greatest commitment to the quota law nowadays – can very easily get rid of this obligation with the flimsiest justifications possible. [They say that] “there is no worker with this kind of qualification with a disability that we can hire,” and they take it up in the labour courts. There is a serious problem in enforcing a requirement like this (...) I think that there is much more of a market demand, incredible as it may seem. I think that large companies, or multinational companies have demanded gender quotas. I think that civil society has demanded female leaders. I think it is more [about] social shame than a legislative requirement.<sup>565</sup>*

Another interviewee discussed the well-established quota requirements for Afro-Brazilians and other marginalised groups, noting that these measures continue to be required because of the significant and lasting inequalities resulting from the most severe forms of racial discrimination in the past.<sup>566</sup>

However, Sérgio Luiz Leite, a trade union leader from **Brazil**, spoke about the lack of public understanding about the full range of positive action measures envisaged within different laws, calling for harmonisation as well as public education. This expert noted:

*I can think, for example, of affirmative action itself that is in the CLT (...), but for the most part, people are not even aware of it, because it is lost within the women's chapter (...). I can say [the same thing] about affirmative actions in relation to black people that are in the statute of racial equality (...) The most well-known affirmative action is the one for people with disabilities, because it is older, more than 30 years old. It is a very objective and clear legal requirement (...) but (...) we've even had questions about the legality of affirmative action for companies.<sup>567</sup>*

As in **Brazil**, interviewees in **South Africa** explained that positive action provisions are mandated by the law but are not applied effectively in practice.<sup>568</sup>

In common with respondents in both **Great Britain** and **Brazil, South African** experts also discussed the need to build public awareness of – and support for – positive action programmes in order to underpin their legitimacy in the public mind and so improve their effectiveness.

*[M]ost of our employment equity litigation (...) has been driven by conservative social forces (...) [There are cases] challenging affirmative action measures or employment equity plans and so on. So, we've tended to see that the Constitution is on the back foot – on the defensive – [with activists] having to defend affirmative action measures or defend other equality measures against these sorts of challenges (...) I think those particular conservative groupings have a different reading of*

<sup>564</sup> Equal Rights Trust interview with Robin Allen KC, a barrister specialising in human rights and non-discrimination law, Great Britain.

<sup>565</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>566</sup> Equal Rights Trust interview with Sérgio Luiz Leite, President of the Federation of Workers in the Chemical and Pharmaceutical Industries and Vice-President of the Trade Union Confederation, Brazil.

<sup>567</sup> Equal Rights Trust interview with Andriane Reis de Araújo, a regional labour prosecutor and National Coordinator of the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work, Brazil.

<sup>568</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.

*the Constitution or they're out of touch with the constitutional vision or values (...) I think there's been a gap there where not enough action has been taken by the most vulnerable and marginalised groups in society to (...) challenge the absence of affirmative action measures.<sup>569</sup>*

However, it is in **India** – a State with one of the weakest anti-discrimination law frameworks of all those considered in this report – that experts spoke of positive action measures being effective and impactful, with some identifying these measures as the most successful and effective elements of an otherwise limited and inconsistent framework. The Constitution of India provides for reservations – student positions in universities and staff positions in the civil service which are “reserved” for members of the “scheduled castes” and “scheduled tribes.” As one expert noted, this is “the only measure that gives some degree of effectiveness despite the many shortcomings in its enforcement.”<sup>570</sup> Nevertheless, even here, other experts highlighted the reservation programme’s failure to overcome the social inequalities affecting the most marginalised Dalit caste.<sup>571</sup>

In **Tunisia**, one expert discussed the positive action measures in Law 83 of 2005 – the law governing the rights of persons with disabilities – which provide that a percentage of the staff positions in any business above a certain size be reserved for persons with disabilities. This expert outlined the relatively detailed regime provided for in the Law but noted that non-compliance and limited enforcement mean that the provisions have not been as effective as hoped:

*[In Law number 83] there was a quota which required public and private companies in Tunisia which employ more than 100 people to reserve 1% place for a disabled person. (...) This quota has doubled with the Law of 2016 to 2%. (...) It also now applies with a workforce of 50 people in the company. For vocational training there is also a quota for ordinary professional centres in Tunisia for an occupation of 3% minimum on the whole national level. (...) There are other [measures in] Law 85, such as the assumption [by the State] of employer's social security expenses for disabled persons – this can be partial or total depending on the degree of disability. (...) The Law also offers alternatives (...) for companies which cannot hire disabled persons for several reasons, but which are subject to the 2% requirement by law. There are four alternatives: remote work; subcontracting; issuing calls for tenders to work with micro-enterprises managed by disabled people; and support for associations of disabled people through buying what is produced by these associations. There is also a part which concerns in the event of non-application of the law, the penalties. If the company does not apply the percentages or [adopt one] of the alternatives, it is the labour inspectorate that ensures compliance (...) [However], all this is not well applied. In 2013 the organisation for the defence of persons with disabilities did a study on the application of the law. It found that in the private sector the proportion of persons with disabilities in the workforce did not exceed 0.3%. In the public sector – although there had been several campaigns and calls for employment in the decade 2000-2010 – the rate was 0.9% so not even 1%.<sup>572</sup>*

In **Colombia**, one interviewee spoke about a programme established to provide financial support to women managing their own businesses and enterprises in rural areas, noting that despite its promise, lack of public awareness limited its effectiveness:

*Really, what we find is that the lack of institutional articulation makes any proposal to formulate a policy towards closing gender gaps more difficult. In any case, we managed to support the creation of the Women's Fund with the previous government and from there we generated some initiatives that could benefit women, especially rural businesswomen. That Fund today has funds but does not have projects to finance, so that is where you begin to see these large gaps because women have*

<sup>569</sup> Equal Rights Trust interview with Dr Jason Brickhill, an attorney with a specialisation in human rights law, public interest litigation and the domestic work sector, South Africa.

<sup>570</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

<sup>571</sup> Equal Rights Trust interview with a member of a Civil Rights Organisation working on land rights issues, India.

<sup>572</sup> Equal Rights Trust interview with a representative of a Non-Governmental Organisation working with persons with disabilities, Tunisia.

*projects but do not know how to finance their projects They do not know how to apply the formulation of projects, they do not have technical knowledge of the requirements for public financing.*<sup>573</sup>

## SUMMARY: Positive Action

Providing comprehensive and effective protection from discrimination is a necessary – but not a sufficient – condition for the creation of equal societies. In addition to prohibiting discrimination, States must take a range of positive measures to overcome past and present disadvantage and accelerate progress towards equality.

In practice, despite the consensus at the international level that States must develop, adopt and implement positive action measures in situations of substantive inequality between groups sharing a protected characteristic, national legal approaches vary significantly: some countries require the adoption of positive action measures; some permit this, but do not require it; yet other countries prohibit positive action measures, incorrectly defining such measures as discriminatory. A diversity of approaches was found among the six States under review for this study, with some countries requiring and mandating positive action measures and others simply permitting such measures.

Experts from a range of countries – Great Britain, Brazil and South Africa – noted the potential and impact of positive action measures but also highlighted that frequently, measures required by law are not properly applied in practice and often fail to target those groups who are most marginalised, as was identified in India. These experts also emphasised the importance of public awareness of and support for positive action measures if they are to be effective in practice. This was an issue identified in several jurisdictions. A lack of awareness around the purpose and benefits of positive action, and how to implement it effectively, undermines the political will for such measures – and also their effectiveness. However, it is in India – a State with one of the weakest anti-discrimination law frameworks of all those examined in this research – that experts spoke of positive action measures being effective and impactful, with some identifying these measures as the most successful and effective elements of an otherwise limited and inconsistent framework.

## RECOMMENDATIONS

- ▶ States must ensure that anti-discrimination legislation explicitly both permits and requires the adoption of positive action measures by both public and private actors. Positive action includes any measure developed for the purpose of advancing or achieving equality and redressing disadvantage. Such measures should be time-limited, subject to regular review and proportionate to their purpose of advancing or achieving equality.
- ▶ States must institute positive action programmes in all areas of life, targeting any group exposed to discrimination where substantive inequalities are identified. While States have discretion as to the form and nature of positive action measures, they must have the objective of advancing equality and must be effective in doing so.
- ▶ States should require and enable employers and other private actors to adopt and implement positive action measures in cases of substantive inequality. Such measures may include – but not be limited to – quotas and reservations for underrepresented groups; adjustments to scoring schemes for hiring or promotions to account for inequalities in access to education and prior employment; targeted programmes of training and support, including mentoring schemes, fellowships and placements; and targeted programmes of outreach and recruitment.
- ▶ States should ensure that any and all positive action programmes – whether instituted by public or private actors – are properly resourced, implemented and enforced and that the public understands and has confidence in the measures taken.

<sup>573</sup> Equal Rights Trust interview with a former member of the Colombian Farmers Society and an expert on the agricultural sector, Colombia.

## 7.3 Equality Bodies

As noted above, international legal standards on equality and non-discrimination require States to establish a system of judicial or other enforcement bodies which are independent, impartial, well-resourced and accessible.<sup>574</sup> In addition to the duty to establish enforcement bodies, however, “[r]ecent decades have witnessed an increasing global trend for the creation of independent, specialized equality bodies (...), public authorities established to support the enforcement and implementation of anti-discrimination law.”<sup>575</sup>

While none of the UN human rights instruments – with the exception of the CRPD<sup>576</sup> – establishes an explicit obligation on States to establish independent equality bodies, in recent years all of the UN human rights treaty bodies have recommended this step.<sup>577</sup> As the Office of the UN High Commissioner for Human Rights has noted in its guidance for States, the need for these bodies “emanates directly” from States’ obligations to respect, protect and fulfil the rights to equality and non-discrimination. These bodies fulfil a range of functions:

*Through the discharge of their equality mandate, national equality bodies play an essential role in working to identify and eliminate discriminatory practices and are often responsible for coordinating the delivery of implementation measures, in accordance with States’ broader equality and non-discrimination obligations. In some jurisdictions, equality bodies also possess a direct enforcement function, receiving and deciding upon individual complaints of discrimination.*<sup>578</sup>

Where States do not have a national equality body, or where these institutions lack the mandate, funding or resources to fulfil their role in promoting non-discrimination or equality, then these functions may not be discharged correctly, and States may not be in compliance with their international obligations. Equally, where such bodies exist but are not meaningfully independent or lack the powers to fulfil their role, the ability of the State to discharge its duties under international law – and therefore to effectively prohibit and prevent discrimination in the workplace and other spheres – will be compromised.

As in other areas investigated in this report, State practice in respect of the establishment and operation of equality bodies varies significantly between the six States under review. At one end of the spectrum, in **Colombia**, a representative of the Movimiento Nacional de Repartidores de Plataformas Digitales stated simply: “I am not aware that there is a national organization in Colombia to promote equality and [combat] discrimination.”<sup>579</sup> Similarly, **India** has no independent equality body, and its national human rights institution is considered to be ineffective. As Arvind Narrain, President of the People’s Union for Civil Liberties, noted:

<sup>574</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14 (a). See also International Covenant on Civil and Political Rights, art. 2 (3) (b); ICERD, art. 6; CEDAW art. 2 (c); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (h); Human Rights Committee, general comment No. 31 (2004), para. 15; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>575</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 101.

<sup>576</sup> CRPD, Article 33(2).

<sup>577</sup> See, for example, Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1 and Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 28. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have made recommendations to individual States to establish independent equality bodies. For instance, in its recent concluding observations, the Committee on Economic, Social and Cultural Rights has recommended the establishment of “institutional mechanisms” to combat discrimination against Roma, and the designation of a body in Belgium “responsible for addressing complaints of language discrimination.” In its concluding observations on Tunisia, the Human Rights Committee called for the establishment of a “national commission to combat racial discrimination”; while in its concluding observations on Greece, the Committee recommended the adoption of an “independent monitoring and reporting system” to ensure the right to non-discrimination for persons with disabilities. See, respectively, E/C.12/UKR/CO/7, para. 15 (b); E/C.12/BEL/CO/5, para. 19; CCPR/C/TUN/CO/6, para. 18 (b); and CCPR/C/GRC/CO/2, para. 10.

<sup>578</sup> United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, p. 101.

<sup>579</sup> Equal Rights Trust interview with Jhoniell Colina, a member of the Movimiento Nacional de Repartidores de Plataformas Digitales, Colombia.

*There is no Equality Commission in India. The closest equivalent would be the National Human Rights Commission (NHRC). The NHRC has the powers of a civil court, and therefore can give compensation. In effect however, it has functioned mostly as a consultative body, at times advising the State Human Rights Commissions. The State Commissions follow the political dispensation in the state. In effect therefore, discrimination regulation becomes a State subject, with no uniformity in state obligations.<sup>580</sup>*

At the other end of the spectrum, **Great Britain** has had independent equality bodies – first ground-specific and, since 2006, a single comprehensive body – for decades. Melanie Field, a senior official at the Equality and Human Rights Commission, highlighted some of its powers and the impact which it is able to achieve:

*We in the Commission have strategic enforcement powers. We're not funded to support every person who's discriminated against – we are constrained in cases that we can support, so we would tend to support cases where there has been a particularly egregious breach of rights; where there's a systemic issue; or where we're wanting to establish case law on a particular issue. (...) We [also] have an inquiry power that we have adopted in various workplace equality situations which enables us to research, compel evidence and delve into [issues] (...) We'll start with some sort of evidence that there's an unequal outcome (...) and then try and dive into that. We've done [investigations] on women in the financial services (...), low paid ethnic minority workers in health and social care (...) various inquiries where we've looked at different sectors and (...) come up with recommendations for the sector. Those can have quite good traction. What's important is that there's then the kind of follow through to make sure that those recommendations are implemented, and then that you're able to evaluate the impact.<sup>581</sup>*

A trade union official focused on the health and social care sector emphasised the impact of the Commission's inquiries. They highlighted that trade unions can play an important role in combatting discrimination by working with these equality bodies:

*[The Commission did] an inquiry into discrimination in the social care sector during the pandemic (...) We submitted evidence, and a lot of other organisations did that as well. (...) They then make recommendations to the Government on any changes to policies or any other changes that they think need to be made. It's not a kind of statutory or mandatory process – the Government can ignore those recommendations – and it does at times. So, it's not the kind of process where basically that organisation is able to instruct government to behave in a particular way in order to achieve an outcome that would promote non-discrimination. The government has a lot of leeway. But it is an organisation that, I think, makes a positive contribution because they're able to shine light on these things.<sup>582</sup>*

However, other experts criticised the fact that the Commission's reach and effectiveness has been compromised by underfunding and political interference.<sup>583</sup> A senior official of Unite the Union spoke of what is perceived to be diminishing impact:

*I had the great experience in the early days of working with the Equal Opportunities Commission [a Commission focused on combatting discrimination against women], where they had proper union representation alongside employers and other specialists. [We collaborated on] all our big campaigns around equality and pensions, part-time workers rights – looking at how the legislation was operating in practice. Although of course there's differences in everybody's approach, we were all against discrimination and trying to find ways of solving it. And so, we had a lot of roundtables,*

<sup>580</sup> Equal Rights Trust interview with Arvind Narrain, President of the People's Union for Civil Liberties, India.

<sup>581</sup> Equal Rights Trust interview with Melanie Field, former Executive Director of the Equality and Human Rights Commission, Great Britain.

<sup>582</sup> Equal Rights Trust interview with a Senior Official at Unison, Great Britain.

<sup>583</sup> See, for example, Equal Rights Trust interview with Professor Lizzie Barmes, an academic specialising in equality and employment law, Great Britain.

*joint campaigning, a very strong lobby to change discrimination. The Equality and Human Rights Commission, bringing it all together, has lost the sharp focus on different areas of discrimination. [There is] really good work, trying to expose things like class discrimination, intersectionality, and so on. [However], they kind of lost the ability to be the voice of black workers, the voice of disabled workers, and so on, which the previous commissions were. Also funding cuts, and people put in who are opposed to trade union representation (...) so we no longer have any stakeholder engagement – it used to be that we would recommend everybody turned to these commissions for specialist support and advice, and we would work together, and they referred to us, our members, who were raising legal cases from them with them that we ought to be representing. That doesn't happen anymore. I think that's a huge failure, and it used to be so much better.<sup>584</sup>*

While a number of those interviewed in **Great Britain** remarked on the perceived weakening of the Equality and Human Rights Commission, those we spoke to in **South Africa** highlighted the absence of a dedicated, expert and independent body to address discrimination in the workplace. Rather, the Human Rights Commission “shies away from taking responsibility where workplace and related discrimination take place because it defers to the CCMA and formal provisions of the Equality Act and Employment Equity Act.”<sup>585</sup> This results in a failure to address “transsectoral approaches to discrimination” and the “plight of farm workers and mine workers.”<sup>586</sup>

### Promising Practice: The Equality Council in Moldova

The Equality Council in Moldova is an autonomous independent public authority established in 2013 under the country's comprehensive anti-discrimination law. The Council is composed of five Council members appointed by the Parliament of Moldova for a five-year term and 33 staff persons. Its aims and objectives are to prevent and protect against discrimination and promote equal opportunities and diversity.

Broadly, the Equality Council has two primary roles: first, it has enforcement powers, with Council members able to examine complaints and initiate investigations; second, it has a range of powers to proactively address discrimination and inequality, including the ability to examine current and draft laws, promote the implementation of legislation and raise awareness of discrimination and inequality.

We spoke with Evghenii Alexandrovici Goloșceapov, a member of the Equality Council, to understand the role and impact of the organisation. Mr Goloșceapov explained that there are several aspects of the Equality Council's enforcement powers that make it – in his view – particularly effective at both enforcing the right to non-discrimination and promoting equality. The first of these is the accessibility of the Council's procedures. Complaints can be made via post, e-mail or through an online form. For persons who are unable to use these methods, there is the option of going to the Council in person and submitting a complaint directly. The forms which the Council uses are designed to not require legal knowledge or legal advice on the part of the applicant, and there is also no cost for submitting a complaint, which makes the Council a simple and accessible enforcement mechanism.

Secondly, Mr Goloșceapov highlighted the range of potential remedies that the Equality Council can issue. The primary remedies that are available are prescriptions and recommendations.

<sup>584</sup> Equal Rights Trust interview with a Senior Official at Unite the Union, Great Britain.

<sup>585</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.

<sup>586</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to land, South Africa.



Prescriptions remedy individual instances of discrimination and can include requirements to reinstate someone's job or reword a job advertisement. Recommendations are more preventative in nature in that they are directed towards the employer and seek to prevent discrimination from occurring again. Importantly, Mr Goloşceapov made clear that the Equality Council had significant freedom in the type of measures it can call for, and this often allowed it to make progressive, wide-ranging recommendations, ranging from requirements that employers implement training programmes to instructions to issue apologies. Notably, however, the Council is unable to provide compensation to victims directly. Instead, individuals must seek compensation through the normal court systems, even if they have already succeeded in a complaint in front of the Equality Council.

Finally, Mr Goloşceapov noted that it is possible for the Equality Council to initiate investigations and complaint proceedings *ex officio* – by the Council's own initiative and without an individual bringing a complaint. This allows the Council to effectively address systemic discrimination and enables it to take a proactive approach. While this power is not regularly used (only three cases were initiated *ex officio* in 2022), it does reduce the Council's reliance on individual complaints and allows the Council members to identify, investigate and address patterns of discrimination and discriminatory practices.

Alongside its enforcement powers, the Equality Council can also pursue preventative and proactive policies that seek to address the root causes of discrimination. Mr Goloşceapov highlighted, for example, the Council's review of the textbooks used in schools. The Council undertook a review and recommended changes to remove prejudicial, stereotypical and stigmatising language and presentations, and to increase the representation of different protected groups, including women, persons with disabilities, ethnic and racial minorities, and LGBTQI+ persons. A second example of a proactive measure which the Council has pursued is in relation to sexist advertising. Following a number of individual complaints and investigations, the Council invited businesses to submit draft adverts for review. A written opinion is provided on whether or not the advert is discriminatory, and recommendations are made to remove sexist language and depictions. Specifically in relation to employment, the Equality Council's positive measures have been equally positive. Mr Goloşceapov explained that following a series of cases initiated *ex officio* concerning discriminatory hiring processes, the Equality Council provided training to staff of specialised web-portals that publish job advertisements, and published comprehensive guidance on non-discrimination in hiring policies. Following their decisions and training, they saw a dramatic reduction in discriminatory job advertisements.

As the example of the Equality Council in Moldova demonstrates, independent, dedicated equality bodies play a vital role in combatting discrimination and promoting equality through a combination of enforcement and proactive implementation measures.

Another respondent was keen to emphasise: "We can create institutions as much as we like. They won't solve the problem. We need to fix the gaps where they are, and the gaps are at the workplace."<sup>587</sup> It is clear that the first step to creating effective equality bodies is to ensure the law is comprehensive and fully effective. Similarly, the mandate and powers of these equality bodies must be just as comprehensive. If this is not done, then the work of any equality body that is established will be significantly undermined. However, even when there are such laws, respondents still make clear that without sufficient resources, political support and appropriate stakeholder participation, they are unable to effectively fulfil their mandates.

<sup>587</sup> Equal Rights Trust interview with Lebogang Mulaisi, a policy analyst for the Congress of South African Trade Unions, South Africa.

## Other bodies

In addition to establishing bodies which meet the requirements for specialised and independent equality bodies, a number of States have established institutions which can discharge some of the relevant functions in respect of discrimination in the area of work and employment. These bodies may include national human rights institutions, ombudsmen or public defenders' offices or specialised bodies in the employment sphere, such as labour inspectorates. While States will not discharge their obligations to establish independent equality bodies by establishing these other bodies or extending their mandates and functions to include issues of equality and non-discrimination, such bodies can nevertheless play important roles in raising awareness, providing a means to secure access to justice and supporting the implementation of rights.

In **Brazil**, the Office of the Public Defender plays an important role in both enforcement and implementation of the right to non-discrimination. However, as a number of experts noted, its ability to fulfil its mandate is compromised by underfunding, political backlash and structural problems: "we have the emptying of the labour inspectorate, persecution of a number of inspectors and prosecutors who try to file class actions to guarantee rights (...) the fact is that it is difficult even to make it reach everyone who is entitled to it."<sup>588</sup> Indeed, a representative of the institution informed our researchers that:

*The Office of the Public Defender has in itself, as an institution, education in rights. So, in this more vulnerable population, the Public Defender's Office of the Union has a series of projects that seek to make this population aware of their rights so that from then on, this population that was being questioned can access their rights, and go to court on the issues themselves (...) [However] we, in the Office of the Union Public Defender, have a limitation, due to the personnel, the same structure, because, even though it is the duty of the Union Public Defender to act in the labour courts, currently, with the current structure of the institution, notably with the current human resources, we do not act in the labour courts (...) So the Brazilian state finds itself with this constitutional deficit, because it does not structure the Public Defender's Office in such a way that we can exercise this assistance, be it (...) judicial [or] in the scope of education in rights and, principally, in the scope of prevention. With the current structure, we are unable to act on this account. What we have are working groups, not from the most diverse areas, with discrimination against minorities. So, we have working groups on women's issues, working groups on LGBT issues, working groups on racial issues, but they are working groups that act in these specific areas. And these working groups are not created by the justice system. The Office of the Public Defender is not composed of people who are interested in the composition of these groups, but specifically in the work environment, because of this structural deficit, the Office of the Public Defender has not acted.<sup>589</sup>*

Another expert spoke about the lack of investment in another important institution – the labour inspection system – and even described the "destabilization [and] deconstruction of the inspection system."<sup>590</sup>

In **South Africa**, as discussed further above, the Commission for Conciliation, Mediation and Arbitration (CCMA) plays an essential role in providing simple, quick and affordable access to justice and remedy for persons experiencing discrimination and other rights violations in the area of work and employment. However, as a CCMA Commissioner underlined, the effectiveness of this institution requires adequate funding to ensure the effective and expedient handling of complaints.<sup>591</sup> Other respondents were more direct in their criticism, citing an important case which the Commission "should have dealt with (...) immediately" but did not because of "capacity and resource constraints."<sup>592</sup>

<sup>588</sup> Equal Rights Trust interview with Regina Stela Corrêa Vieira, a Professor at the Law School of the Federal University of Pernambuco and at the University of West of Santa Catarina, Brazil.

<sup>589</sup> Equal Rights Trust interview with Antonio Roversi Júnior, public defender and Substitute-Chief in the São Paulo Public Defender's Office, Brazil.

<sup>590</sup> Equal Rights Trust interview with Ney Strozake, a lawyer and member of the National Coordination of Human Rights of Brazil's Landless Workers Movement, Brazil.

<sup>591</sup> Equal Rights Trust interview with Carlton Johnson, a Commissioner with the Commission for Conciliation, Mediation and Arbitration, South Africa.

<sup>592</sup> Equal Rights Trust interview with Henk Smith, a human rights attorney specialising in public interest litigation and access to

In **Tunisia**, labour inspectorates play important roles in overseeing the enforcement and implementation of labour rights, including non-discrimination. As one expert noted, though, adequate funding is an essential condition for the success of these institutions:

*For me, the Labour Inspectorate is not part of the problem, they are part of the solution, they have made things happen for child labour, they have listed dangerous jobs, they carry out joint missions. They are part of the solution, but they must be given the means to achieve the ambitions of their aspiration for the realization of rights. It is an asset because they have experience.*<sup>593</sup>

## SUMMARY: Equality Bodies

In addition to the duty to establish enforcement bodies as a means to ensure access to justice, remedy and sanction in discrimination cases, in recent years, all of the UN human rights treaty bodies have called on States to establish independent, specialised equality bodies to support the enforcement and implementation of anti-discrimination law.

As in other areas investigated in this study, State practice in respect of the establishment and operation of equality bodies varies significantly between the six States under review. At one end of the spectrum, Colombia and India do not have specialised independent equality bodies. At the other end, Great Britain has a well-established and comprehensive body – the Equality and Human Rights Commission – the successor to three ground-specific commissions. While experts in Great Britain are critical of the limitations on the Commission – as a result of reduced funding and diminishing political support – there is a clear consensus about the important role that a properly funded and empowered independent equality body can play in the effective implementation of the anti-discrimination law framework.

Respondents from a number of countries – including Brazil, Tunisia and South Africa – spoke about specific bodies or institutions with responsibility for the implementation of the labour law framework in their jurisdiction. While establishing such bodies or extending their mandates and functions to include issues of equality and non-discrimination does not discharge the obligation to establish specialised equality bodies, these institutions can nevertheless play important roles in raising awareness, supporting access to justice and supporting the implementation of rights. Those interviewed highlighted the important role foreseen for these bodies but also raised concerns about the limitations of underfunding and lack of political support.

## RECOMMENDATION

- ▶ States should establish dedicated, specialised independent equality bodies. All appropriate measures must be taken to ensure that such bodies are effective and accountable. They must be afforded the resources and given the functions and powers necessary to fully and effectively discharge the full breadth of their mandate to promote equality and prevent discrimination.

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land, South Africa.

<sup>593</sup> Equal Rights Trust interview with an advisor for an international organisation with expertise on the right to work and migrants in North Africa, Tunisia.

# 8. Conclusions and Recommendations

The research for this report confirms that, despite their repeated commitments to the elimination of discrimination in the workplace, States are failing to deliver on the promise of equality in the world of work.

This is true both in States with comprehensive anti-discrimination laws and those without, though the barriers and obstacles preventing the enjoyment of the right to non-discrimination are – inevitably – more numerous and more difficult to navigate in States with weaker legal frameworks. Nevertheless, even in States with the most well-established and comprehensive systems of protection, gaps in protection, failure to ensure genuine access to justice and failures of enforcement render protections illusory for far too many workers. Ultimately, even in the most comprehensive and most effectively enforced systems, the approach is reactive and remedial rather than proactive and preventative.

In Chapter 3, drawing on the evidence provided by those we spoke to, we outlined four prerequisites for the enjoyment of the right to non-discrimination in the workplace – what we referred to as the preconditions for protection and prevention: **(1)** that work must be **subject to the protection of the law**; **(2)** that the **law must provide comprehensive protection from all forms of discrimination**; **(3)** that **laws prohibiting discrimination need to be effective in practice**; and **(4)** that **laws must permit, mandate and require positive, proactive measures to prevent discrimination and promote equality**. In Chapters 4, 5, 6 and 7, we identified dozens of specific barriers and obstacles which those whom we interviewed told us contribute to one or more of these preconditions not being met.

Our conclusions and recommendations reflect these general and specific findings. Our overarching recommendations centre on the need for States to establish these four preconditions. These are then followed with targeted recommendations – as set out throughout the report itself – on the measures which States must take to address or remove the specific barriers identified through the research.

## **RECOMMENDATION 1: Effect a transition to the formal economy, ensuring at a minimum that the right to non-discrimination applies on an equal basis to workers in the informal sector**

As set out in detail in Chapter 4, the relationship between discrimination and informal work is complex, multi-layered and mutually reinforcing. Discrimination, its consequences and its legacies, in areas such as education and housing, drive members of marginalised groups into informal employment, while working in the informal economy is a major factor in the prevalence of discrimination in the workplace. Those working informally experience discrimination both when compared to those working in the formal sector – because of differentials in pay, conditions and decent-work guarantees which disproportionately impact women, ethnic and religious minorities and other groups who are overrepresented in informal work – and within the informal economy itself, with certain groups forced to work in roles which are less well paid, for example, because of prejudice, stereotype and discrimination by those in positions of responsibility. Ultimately, the absence of a legal and regulatory framework gives rise to an environment in which discrimination can and does occur with impunity.

The research demonstrates that the right to non-discrimination in the workplace cannot be effectively guaranteed in the informal economy. States must take measures to both bring about a transition to the formal economy and ensure that those working in the informal economy enjoy effective protection from

discrimination.

- ▶ States should both increase the protection of workers in the informal economy and formalise informal work, in line with the ILO's Transition from the Informal to the Formal Economy Recommendation.
- ▶ States must expand legal coverage to include informal workers and ensure that they are subject to comprehensive and effective legal protection on the same basis as those in the formal economy.
  - ▷ States must take measures to promote and realise the fundamental principles and rights at work for those in the informal economy, including the right to non-discrimination and all rights guaranteed in the fundamental ILO conventions and under international human rights law.
  - ▷ Where necessary, laws must be revised to reflect and respond to the current and new forms of employment to ensure that no workers are left unprotected.
  - ▷ All informal workers should be granted social security, minimum-wage protection, maternity protection and other decent working conditions and public services on an equal basis and in line with those available to formal workers.
- ▶ States must take effective measures to address the structural inequalities that force individuals into the informal economy. This includes, but is not limited to:
  - ▷ Adopting welfare and social security policies that enable participation in the formal economy, including affordable and accessible childcare and other care services, education, and training opportunities.
- ▶ States must empower workers to form trade unions and other collective groups and ensure they are able to freely challenge discriminatory and unfair labour practices, including through taking measures to promote and realise the right of freedom of association, creating an enabling environment for workers to exercise their right to organise.

States must also adopt and effectively implement comprehensive anti-discrimination laws, consistent with the requirements of the United Nations *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, in order, inter alia, to provide effective protection from discrimination for all workers, in both the informal and formal sectors.

## **RECOMMENDATION 2: Enact and enforce comprehensive anti-discrimination legislation**

Throughout this report, the limited scope of anti-discrimination laws and provisions has been cited repeatedly as a barrier which has foundational significance in preventing the enjoyment of the right to non-discrimination. For those experiencing discrimination on a ground which is not recognised, experiencing a form of discrimination which is not defined or explicitly prohibited, or experiencing discrimination in an area of work or employment which falls beyond the scope of the law, the lack of protection in the law itself is the defining barrier to the enjoyment of the right to non-discrimination.

If they are to provide effective protection from all forms of discrimination, States must enact dedicated, comprehensive anti-discrimination legislation. While it is possible for States to enact specific anti-discrimination laws for different groups or to legislate to prohibit discrimination in specific areas of life – including work and employment – there is little evidence that even an extensive set of such specific laws can provide the consistent, effective and comprehensive protection which is required. Indeed, among the six countries examined in this study, only the two States which have dedicated, comprehensive anti-discrimination laws provide effective protection from all forms of discrimination, on all grounds in all areas of life.

Beyond the fact that comprehensive laws are the only effective means to provide protection from all forms of discrimination, the research in Chapter 6 confirms that these laws are more effective in practice than specific anti-discrimination laws or isolated non-discrimination provisions. In those States examined in this

report which lack comprehensive anti-discrimination legislation, experts regularly identified that the fragmented and inconsistent legal framework undermines implementation and enforcement. In relation to the availability and accessibility of justice, respondents noted that the absence of harmonised and comprehensive legislation complicates enforcement action, discouraging or preventing individuals from securing remedy and redress. None of the States without these laws have adapted rules of evidence and proof in the ways required by international law. A fragmented legal framework was also identified by respondents as a barrier to the knowledge and understanding of the right to non-discrimination by rights-holders, duty-bearers and the legal profession.

The research confirms, fundamentally, that the adoption of dedicated, comprehensive anti-discrimination laws in line with international legal standards are an essential prerequisite for the effective enjoyment of the right to non-discrimination.

- ▶ States must repeal laws which discriminate, directly or indirectly, on any, or any combination of, grounds recognised at international law. This includes, but is not limited to, laws which criminalise activities connected to particular grounds – including laws which criminalise same-sex sexual activity and those which criminalise the profession of religious beliefs – and laws which prohibit women, older persons and other groups exposed to discrimination from undertaking certain forms of work.
- ▶ States must adopt and effectively implement comprehensive anti-discrimination laws, consistent with the requirements of the United Nations *Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*.
- ▶ States' anti-discrimination legislation should prohibit discrimination arising on the basis of all – and any combination of – the grounds recognised at international law. Accordingly, States must ensure that their anti-discrimination laws:
  - ▷ Prohibit discrimination on the basis of age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion, including human rights defender status, trade union membership or political affiliation; pregnancy; property; race; refugee or asylum status; religion or belief; sex and gender; sex characteristics; sexual orientation; social origin; social situation; or any other status.
  - ▷ Permit the possibility of recognising additional grounds of discrimination, through the inclusion of an “other status” or similar provision.
  - ▷ Prohibit discrimination arising on the basis of perception and discrimination on the basis of association.
  - ▷ Prohibit multiple and intersectional discrimination – discrimination occurring on the basis of a combination of two or more grounds.
- ▶ States' anti-discrimination legislation should prohibit all forms of discrimination. Accordingly, States must ensure that their anti-discrimination laws explicitly define and prohibit direct and indirect discrimination, harassment, failure to make reasonable accommodation, segregation and victimisation, using the definitions accepted at international law:
  - ▷ Direct discrimination occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.
  - ▷ Indirect discrimination occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.
  - ▷ Ground-based harassment occurs when unwanted conduct related to any ground of dis-

crimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

- ▷ Reasonable accommodation means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.
  - ▷ Segregation occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.
  - ▷ Victimisation occurs when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or proceedings aimed at enforcing equality provisions.
- ▶ States' anti-discrimination legislation must prohibit discrimination in all areas of life regulated by law, including, but not limited to, all areas of work and employment, at all stages of the employment relationship, in all forms of work and in all aspects of work.
  - ▶ States' anti-discrimination legislation must ensure that discrimination can be justified against clear criteria, established in comprehensive anti-discrimination legislation. These criteria should include the existence of a legitimate aim and confirmation that the means of achieving such an aim are appropriate, necessary and proportionate. A legitimate aim may never be justified by reference to discriminatory stereotypes. Certain forms of prohibited conduct (including harassment, sexual harassment and victimisation) cannot – by definition – be justified. Direct discrimination may be justified only exceptionally, on the basis of strictly defined criteria.

### **RECOMMENDATION 3: Ensure effective access to justice, remedy and sanction for victims of discrimination**

The adoption of comprehensive anti-discrimination laws is a necessary condition for ensuring the enjoyment of the right to non-discrimination, but it is not sufficient. Unless rights-holders can access justice, remedy and sanction in the event of a violation, rights provided by law will be illusory. Effective enforcement is a prerequisite for the enjoyment of the right to non-discrimination.

As demonstrated throughout Chapter 6, rights-holders in all six States under review face an array of obstacles when seeking justice and remedy for discrimination, though these challenges are invariably harder in States without comprehensive anti-discrimination laws. The complexity, cost and length of legal proceedings, the inaccessibility or underresourcing of enforcement mechanisms and the lack of knowledge, understanding and capacity within the legal profession all pose challenges – sometimes insurmountable barriers – to individual rights-holders. Where States' legal frameworks impose a criminal standard of proof or fail to provide for the transfer of the burden of proof to the respondent in discrimination cases, the evidentiary challenges faced by rights-holders are impossible to overcome in all but a minority of cases. Our research also found that, even where rights-holders are able to overcome the various obstacles limiting or preventing access to justice, the remedies and sanctions available and provided by the courts are frequently inadequate.

The research identifies a range of specific measures which States must take to ensure that rights-holders can access justice, remedy and sanction and thus ensure the effective enforcement of the right to non-discrimination:

- ▶ States must ensure that the right to non-discrimination is justiciable in law and in practice, including through ensuring that the law prohibits all forms of discrimination on the basis of all grounds recognised at international law, and that this law is enforceable against both public and private actors.

- ▶ States must ensure that those experiencing discrimination can access justice and remedy, taking all appropriate measures, including, but not limited to:
  - ▷ Ensuring that justice for survivors of discrimination is accessible and available.
  - ▷ Identifying and removing barriers which prevent equal access to justice, such as those associated with complexity, time, cost and physical or linguistic accessibility.
  - ▷ Ensuring that cost is not an impediment preventing access to justice by, inter alia, providing legal aid; ensuring the availability of free or low-cost legal representation; providing for the costs of legal action to be borne by the duty-bearer; and ensuring access to emergency social protections to maintain livelihood during legal proceedings.
  - ▷ Providing effective and credible protection from victimisation.
  - ▷ Ensuring that professionals involved in the enforcement of the law – including the legal and judicial professions – have the knowledge, understanding and independence to correctly apply the law and provide quality, equality-sensitive and accountable justice.
- ▶ States must ensure that legal rules related to evidence and proof in discrimination cases meet the requirements of international law and ensure effective access to justice and remedy for survivors of discrimination, through:
  - ▷ Ensuring that discrimination is subject to the civil, rather than the criminal, standard of proof.
  - ▷ Ensuring that there are no barriers to the admissibility of evidence that could establish a finding of discrimination.
  - ▷ Ensuring that the law provides for the transfer of the burden of proof from the claimant to the respondent once a prima facie case of discrimination has been established.
- ▶ States must ensure that the law provides for effective remedy in discrimination cases. This requires:
  - ▷ Applying sanctions for those found responsible for discrimination which are effective, dissuasive and proportionate.
  - ▷ Providing reparations victims of discrimination in the form of compensation, restitution and rehabilitation.
  - ▷ Providing such institutional and societal remedies as are necessary and appropriate to correct, deter and prevent discrimination and to ensure non-repetition.
- ▶ States must ensure that workers are able to organise and form trade unions and empower them to challenge discrimination and reduce the reliance on individual enforcement action against discriminatory conduct. This includes:
  - ▷ Providing legal protection for members of trade unions.
  - ▷ Permitting and empowering trade unions to promote equality and non-discrimination within the workplace.
  - ▷ Imposing equality and non-discrimination obligations upon trade unions.
  - ▷ Empowering trade unions and other collective entities to bring challenges against discriminatory practices.

If rights-holders are to challenge the discrimination which they experience – and to face down the legal, financial, practical and procedural challenges which this entails – they must both know and understand their rights and how to enforce them. Beyond this, they must have confidence that when they bring legal action, the law will both provide them with recognition, restitution and compensation and protect them from retaliation. The research in Chapter 6.2 finds that in countries with less well-established, well-developed and comprehensive anti-discrimination law frameworks, both rights-holders and duty-bearers lack knowledge and understanding. Alarming, the research also finds that in all six countries under review, rights-holders and duty-bearers lack confidence in the system, resulting in limited numbers of claims brought to court and



fostering a culture of non-compliance by duty-bearers.

The research underlines the absolute necessity of ensuring that rights-holders, duty-bearers and those involved in the enforcement system know, understand and have confidence in the anti-discrimination law regime.

- ▶ States should mandate, establish, fund and implement public awareness and sensitisation campaigns to educate both rights-holders and duty-bearers about the right to non-discrimination, the means and mechanisms of enforcement and the remedies and sanctions available.
- ▶ States should ensure that their anti-discrimination law regime provides effective protection from victimisation – including, for example, through establishing dissuasive fines and sanctions and safeguards against loss of income – and should ensure that public awareness campaigns explain the protections in place for those bringing or participating in discrimination claims.
- ▶ States should take all appropriate measures to create confidence in anti-discrimination law, including through conducting public education campaigns; publicising enforcement action and the sanctions imposed; and requiring societal remedies such as public apologies.
- ▶ States should take all appropriate measures to incentivise compliance with the law, including through supporting and enabling effective enforcement action; ensuring that sanctions are effective, dissuasive and proportionate; and promoting compliance through education, sensitisation and incentivisation programmes.

#### **RECOMMENDATION 4: Establish and implement proactive measures to prevent and eliminate discrimination and promote equality of participation**

The adoption and enforcement of comprehensive anti-discrimination laws is a necessity if rights-holders are to secure remedy and duty-bearers are to face sanction for acts of discrimination. However, if the law is to do more than remedy discrimination after the fact – if it is to prevent and ultimately eliminate discrimination – individual enforcement will never be adequate.

If States are to meet their international legal obligations to “take all appropriate measures” to eliminate discrimination and ensure the equal enjoyment of the right to non-discrimination, they must establish and implement a system of proactive, preventative and positive action measures. The research identifies that even in States with well-developed and well-established anti-discrimination law frameworks, such measures are the exception rather than the rule. While a range of good practices are identified, experts raised serious concerns about the scale, scope and sustainability of these schemes, which are all too often perceived not as legal obligations but permissive, voluntary commitments.

If States are to move beyond prohibiting discrimination and enforcing violations of the right, they must adopt a full complement of proactive and positive measures to both prevent discrimination and promote equality of participation.

- ▶ States should establish clear and explicit proactive duties on public decision-makers to identify and prevent discrimination; promote and advance equality; and integrate equality considerations into decision-making. Such duties should be integrated into public decision-making processes and should be enforceable, with effective sanction for non-compliance.
- ▶ States should establish proactive duties on employers and other private actors to prevent discrimination. Private actors should be subjected to a general duty to take all appropriate measures to prevent and eliminate discrimination, with a requirement to identify and develop mechanisms which are appropriate and effective, in consultation with groups exposed to discrimination and trade unions. Preventative duties on employers should include – but not be limited to – obligations to integrate equality impact assessment into all decision-making processes regarding employment and work; requirements to adopt clear policies to prevent and address discrimination and promote

equality; and mandatory ongoing training of all workers and managers on the rights to equality and non-discrimination

- ▶ States should both establish and lead, and encourage and support, other proactive measures by private actors designed to eliminate discrimination or promote equality. In order to ensure that such measures are comprehensive, effective, sustainable and enforceable, States should ensure that such programmes are mandated by law.
- ▶ States must ensure that anti-discrimination legislation explicitly both permits and requires the adoption of positive action measures by both public and private actors. Positive action includes any measure developed for the purpose of advancing or achieving equality and redressing disadvantage. Such measures should be time-limited, subject to regular review and proportionate to their purpose of advancing or achieving equality.
- ▶ States must institute positive action programmes in all areas of life, targeting any group exposed to discrimination where substantive inequalities are identified. While States have discretion as to the form and nature of positive action measures, such measures must have the objective of advancing equality and must be effective in doing so.
- ▶ States should require and enable employers and other private actors to adopt and implement positive action measures in cases of substantive inequality. Such measures may include – but not be limited to – quotas and reservations for underrepresented groups; adjustments to scoring schemes for hiring or promotions to account for inequalities in access to education and prior employment; targeted programmes of training and support, including mentoring schemes, fellowships and placements; and targeted programmes of outreach and recruitment.
- ▶ States should ensure that any and all positive action programmes – whether instituted by public or private actors – are properly resourced, implemented and enforced and that the public understands and has confidence in the measures taken.
- ▶ States should establish dedicated, specialised independent equality bodies. All appropriate measures must be taken to ensure that such bodies are effective and accountable. They must be afforded the resources and given the functions and powers necessary to fully and effectively discharge the full breadth of their mandate to promote equality and prevent discrimination.



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