

Ending Job Discrimination

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Introduction

Women and ethnic minorities still find it harder to get a good job than other workers in OECD countries, and are more likely to be paid less, despite impressive improvements in recent years. One reason for this continuing problem is discrimination – unequal treatment of equally productive individuals because of gender or race.

Virtually all OECD countries have enacted anti-discrimination laws in recent decades, mainly to improve equity and social cohesion. However, anti-discrimination legislation can also be seen as a way to make the economy more efficient. By outlawing barriers to employment for under-represented groups, these policies are likely to raise labour supply and thus help counteract the effect of population ageing.

The OECD's *Revised Jobs Strategy* suggests that specific strategies to bring under-represented groups into the workforce, along with family-friendly policies or tax incentives can help bring them back into paid work. But helping people to find a job is not enough; major efforts are also needed to ensure that all individuals have access to the same job opportunities. Discrimination diminishes the potential impact of such policies, but anti-discrimination legislation can help make them more effective.

Enforcing anti-discrimination legislation in most OECD countries, however, relies essentially on victims' willingness to claim their rights. Thus, public awareness of legal rules and their expected consequences (notably, victims' costs and the benefits of lodging complaints) is a crucial element of an effective strategy to establish a culture of equal treatment. But legal rules are likely to have more impact if they do not rely exclusively on individual complaints for enforcement. In this respect, specific anti-discrimination agencies (so-called equality bodies) may play a key role. This *Policy Brief* looks at what anti-discrimination policies have achieved and what more governments can do to create a level playing field for all potential members of the workforce. ■

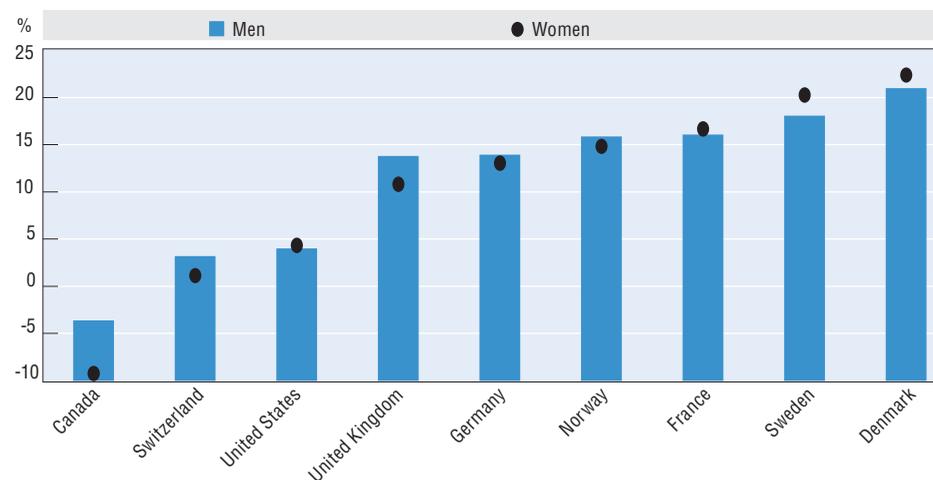
Is discrimination widespread?

Sex and race have affected people’s job prospects in most OECD countries in the past and these differences persist, although the size, nature and trend of these gaps vary across countries. On average, 20% fewer women than men have a job in OECD countries. Smaller gaps tend to be found in the Nordic countries, while in Turkey, Mexico, Greece, Korea and Italy, more than 30% fewer women are in employment. Women are also paid on average 17% less than men in OECD countries.

It is more difficult to measure the extent of employment and wage disparities as regards race or ethnic origin because statistics on race are illegal in many countries, particularly in Continental Europe. Where they are available, these statistics show that labour market gaps between minority and non-minority race groups are as large as between men and women. Second-generation immigrants – that is the native-born with foreign-born parents – appear to have on average 10% fewer chances to have a job than their native-born counterparts with no immigration background (Figure 1). This figure can be seen as the lowest estimate of employment disparities by ethnic origin since in a number of countries, descendants of immigrants account for only a small proportion of ethnic or racial minorities. And evidence shows that in traditional immigration countries, such as Canada, the United Kingdom or the United States, longer-established racial minorities tend to fare even worse than second-generation immigrants.

A number of elements contribute to gender and ethnic differences in labour market outcomes. Educational attainment, or more generally, human capital, is a good candidate. However, gender gaps in education have been closing rapidly in the past half century and, nowadays; women are as qualified as men, if not more qualified, in many OECD countries. By contrast, differences in human capital between ethnic minorities and the rest of the population tend to be more persistent, and can partly explain differences in employment

Figure 1.
CHILDREN OF IMMIGRANTS FARE WORSE IN THE LABOUR MARKET THAN THE NATIVE-BORN
 Employment rate gaps between the second-generation and native-born with no migration background, early 2000s



Note: Persons aged 20 to 29 years and not in education.
 Source: International Migration Outlook, OECD, 2007, Paris.

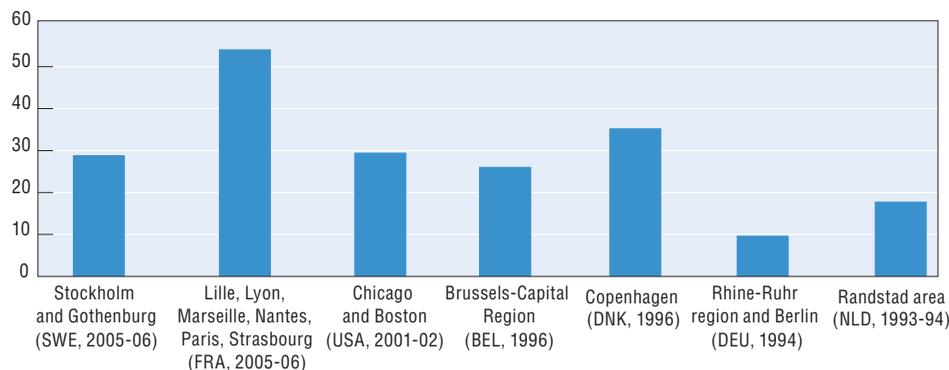
outcomes. Other individual characteristics, often difficult to observe – such as personal traits, expectations and motivation – may also play an important role in explaining gender and ethnic differences in labour market success. And in the case of race and ethnicity, where people live is often the key. However, even taking into account many of these potential explanatory factors, at least one quarter of the gender or ethnic gap remains unexplained and discrimination in the labour market may account for part of it. ■

How much of the gender and ethnic labour gap is due to discrimination?

One way to detect and measure discrimination is to use field experiments, particularly “correspondence tests”, in which fictitious written applications are sent in response to real job advertisements and discrimination is measured by comparing invitations to interviews among different groups. As regards ethnic or racial minorities, virtually all available experiments point in the same direction: discrimination in the hiring process is far from uncommon. Typically, with strictly equivalent diplomas, qualifications, work experiences, areas of residence, etc., ethnic minorities receive about 30 percentage points less call-backs for interview than the rest of the population when sending résumés in response to job advertisements (Figure 2). This roughly implies that they need to search between 40% and 50% longer to find a job, which makes them much more vulnerable to the risk of long-term unemployment.

Field experiments are costly to implement, however. Therefore, they are undertaken in small geographical areas and focus on narrow ranges of occupations and, in the case of gender discrimination, they are less conclusive. Indeed, a number of occupations are still “gender specific” (be they male- or female-dominated). Thus, field experiments typically find discrimination against women in some occupations or activities and no discrimination or even reverse discrimination favouring men in others,

Figure 2.
RACIAL OR ETHNIC DISCRIMINATION IN THE HIRING PROCESS IS FAR FROM BEING UNCOMMON
 Results of correspondence testing studies of discrimination by ethnic origin, percentage points¹



Interpretation: In the Stockholm and Gothenburg areas, with strictly equivalent resumes, ethnic minorities receive almost 30 percentage points less call-backs than the rest of the Swedish population when sending a resume in response to a job ad.

1. Difference in the number of call-backs as a percentage of jobs applied for with at least one observed call-back (jobs for which no call-back is registered are excluded from the sample). Figures reported refer to different economic activities and occupations, and thus, they cannot be compared across geographical areas.

Source: OECD Employment Outlook, 2008, Paris.

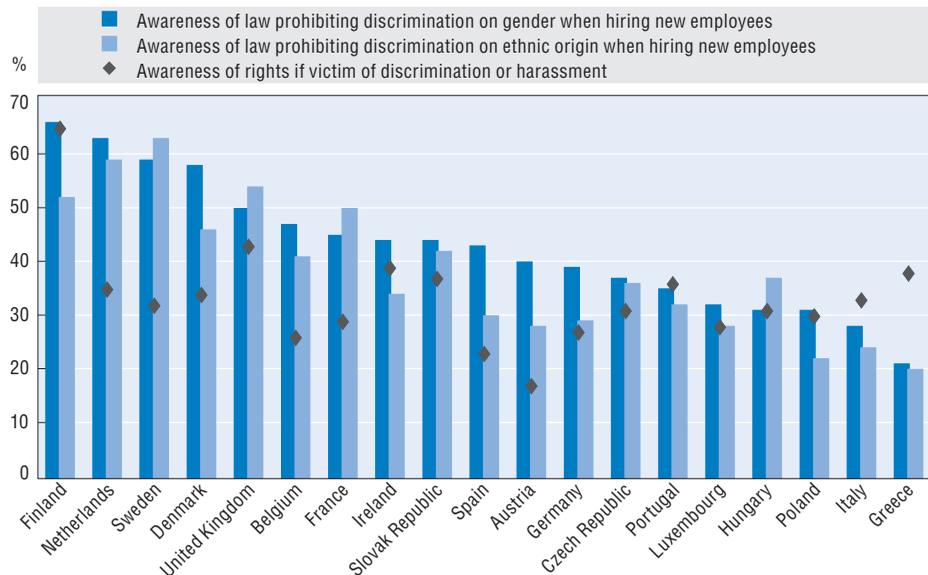
but the aggregate implications of these results are difficult to draw. More comprehensive, but also less direct, approaches relying on predictions from economic theory are therefore required. The latter often reveal that gender discrimination tends to be pervasive. To give an example, OECD estimations suggest that at least 8% of the gender employment gap can be attributed to discrimination on average in OECD countries. ■

How do anti-discrimination laws work?

Successful anti-discrimination legislation requires effective enforcement, which is often difficult to achieve. The main reason for employers not to practice discrimination is the likely cost to them if they are found guilty of breaking anti-discrimination laws. But, in most countries, discrimination can be investigated and proved only if the individuals who have suffered discrimination are willing to take legal action.

In this situation, the first requirement for the anti-discrimination system to work is that workers know that they have a legal right to equal treatment, so as to enforce their rights. But the evidence suggests that public opinion is often ill-informed about such rights. For instance, in European Union countries, on average, less than half of the population knows that discriminating on the basis of gender or ethnic origin when hiring new employees is unlawful (Figure 3). And public knowledge about the general rights of people who have suffered discrimination is even more limited: on average, only one third of European Union citizens claim to know their rights

Figure 3.
MANY PEOPLE DO NOT KNOW THAT DISCRIMINATION IS UNLAWFUL



Note: The bars correspond to the share of persons answering “Yes” to the question (QA12) “Please tell me whether, in your opinion, in your country there is a law which prohibits the following types of discrimination when hiring new employees”. The question refers to discrimination on the basis of gender or ethnic origin, respectively. The symbol corresponds to the share of persons answering “Yes” to the question (QA14) “Do you know your rights if you are the victim of discrimination or harassment?”. Source: European Commission (2007), *Discrimination in the European Union, Special Eurobarometer 263/Wave 65.4*.

should they be a victim of discrimination. Running campaigns to inform individuals of their legal rights is thus crucial, and this is indeed part of the activity of national equality bodies, in all countries where such bodies exist. Still, important margins for progress remain.

Second, it should be possible for victims of discrimination to successfully bring their case to court. Proving a discrimination claim is inherently difficult, since the elements of proof are generally in the hands of the defendant, *i.e.* the employer. In this respect, the type of evidence required by courts is of central importance. The issue is not straightforward. On the one hand, if evidentiary requirements are so demanding that an action before the courts is doomed to failure, individual legal rights are not really enforceable in practice. On the other hand, it should not be possible to bring a case before courts merely on the basis of gender or ethnic origin each time someone feels they were unfairly not chosen for a job or were passed over for promotion, otherwise the overall framework would be unsustainable.

Virtually all European countries have lowered the burden of proof for the plaintiff in discrimination cases, in response to European Directives on this issue. Basically, the plaintiff has to provide proof of differential treatment, and only *prima facie* evidence of the link between this different treatment and his or her gender or ethnic origin. He or she does not have to prove discriminatory intent or practices *per se*. If the claimant succeeds in doing so, it is for the defendant to prove that the differential treatment was disconnected from any discriminatory intents or practices. However, in the absence of further legal guidance or institutional support, even *prima facie* evidence may be difficult to gather for a complainant. And in many countries complainants still lack such support. Countries such as Australia, Canada and the United States follow an alternative approach. While the burden of proof rests entirely on the plaintiff, the equality bodies have relatively strong investigative power, which allows them to effectively help individuals to gather the required elements of proof. Thus, establishing a discrimination case before the courts may not be more difficult in these countries than in many European countries with less demanding proof requirements, but where the equality body has more limited investigative powers.

Third, at the very least, the cost of taking legal action should be lower than the benefit if the complainant wins his or her case. Beyond the intrinsic difficulty of proving a discrimination case, victims of discrimination may also become victims of retaliation for having filed a complaint. This may constitute a serious barrier in enforcing anti-discrimination legislation. In virtually all countries, legal provisions protecting individuals from employer retaliation have been introduced in anti-discrimination laws, but proof requirements in the case of retaliation are often more demanding and evidence suggests that retaliation is not uncommon in discrimination disputes.

Finally, while costs are likely to be very high, benefits are uncertain in many cases: legal guidelines covering compensation are often not clearly specified in anti-discrimination laws. In a number of countries, monetary

compensation is defined through normal civil, administrative or penal laws, or in the labour code. To evaluate the costs and benefits of taking a legal action, victims of discrimination have to understand the provisions of these various laws and codes, a difficult task that is likely to restrain them from filing a claim. ■

What is the role of legal action?

Lodging a complaint before a court remains a costly, complex, time-consuming and adversarial process. In many cases, legal action is thus unlikely to constitute a true option for individual workers to solve a discrimination dispute with their employer. However, successfully prosecuted discrimination cases, even if there are very few of them, might be an important vehicle of cultural change, if they are sufficiently publicised. In fact, many of the potential benefits of pursuing discrimination cases are collective, while many of the costs of pursuing them are individual.

So in general, legal rules will have more impact if enforcement is not exclusively dependent on individuals deprived of their rights. In a number of countries, there are specialised bodies empowered to investigate companies and organisations, and to take legal action against employers who operate discriminatory practices, even in the absence of individual complaints. While not directly supporting individuals who are currently victims of discrimination, such actions may raise the profile of equality issues and establish the value of eliminating discrimination.

Equality bodies are generally not empowered to provide plaintiffs with legal representation in individual cases of discrimination. And in countries where they do have such power, legal representation is not provided in a systematic way. In the United Kingdom for instance, the Equality and Human Rights Commission will take legal action on behalf of individuals provided that there is a chance to create a legal precedent or to clarify and improve the law. Similarly, in the United States, the Equal Employment Opportunity Commission litigates on behalf of the public interest, which in practice provides legal representation to claimants, but in a limited number of cases. Overall, the main aim of free legal representation provided by equality bodies, NGOs or trade unions is often to serve the general public interest.

For many potential victims of discrimination, the general effect of legal rules may thus be indirect. By bringing discrimination issues to the public debate, they may help to change people's behaviour and contribute to the social acceptance of the principle of equal treatment. In most countries, national equality bodies disseminate information and statistics that help raise public awareness of discrimination, in general, and of its concrete manifestation in the workplace, and run information campaigns to change public opinion. And indeed, populations appear to have a clear perception of discrimination and to be supportive of equal treatment policies. On average, in European countries where such information is available, almost half of the population thinks that a woman would be less likely than a man, with equivalent qualifications or diplomas, to get a job, be accepted for training or be promoted. When it comes to ethnic minorities, this proportion rises

to 60%. And in both cases, a large majority of public opinion supports adopting specific measures to provide equal employment opportunities. In addition, the few available evaluations of some existing anti-discrimination laws (notably, in the United States) suggest that these laws may have contributed significantly to reducing ethnic and gender disparities in the labour market. ■

What is the role of mediation and conciliation procedures?

Individual victims of discrimination who wish to continue working with their current employer face particularly strong barriers to enforcing their legal rights by bringing their case before the courts. Alternative mechanisms of dispute resolution, such as formal mediation or conciliation, are available in most OECD countries. These procedures present several advantages for both parties involved in a discrimination dispute.

First, they increase the likelihood that the discrimination complaint is resolved quickly. Mediation or conciliation procedures take on average between two and eight months, in countries where such information is available. Moreover, they are free for both parties since they do not require legal representation by a private lawyer. Besides, effective mediation or conciliation procedures can also achieve considerable savings to the public purse, by sparing many days of court hearings.

Second, mediation procedures typically take place in a non-adversarial setting. This not only increases the probability of compromise, but also reduces the risk of irreparably damaging the employment relationship. Indeed, in virtually all countries, mediation relies on voluntary acceptance by both parties. In addition, such procedures are assisted by a third neutral party and offer the parties confidentiality. By playing the role of an unbiased advisor, the mediator can help the parties re-evaluate unrealistic assumptions and thus bridge the gap between their initial positions, while the confidentiality afforded by mediation allows the parties to make acknowledgements and concessions necessary to reach a compromise solution. Since a mediator is not a decision maker, any decision is left to the parties, increasing the parties' acceptance and overall satisfaction with the outcome and providing the basis for rebuilding a fractured employment relationship.

Mediation procedures have been shown to be effective in solving discrimination disputes, in countries that have a long experience in using them. The flip side is that mediation may allow individuals to achieve personal remedies without securing overall systemic change in the behaviour that led to their complaint and preventing the establishment in case-law of clear precedents. It is not obvious, therefore, that extensive use of mediation increases overall enforcement or reduces overall discrimination. More generally, mediation should probably be seen as an alternative to, but never as a replacement for, effective enforcement through the legal system. Indeed, replacing meaningful enforcement with conciliation and mediation could remove the sting of the legislation, but mediation will always work better against the background threat of litigation. ■



For further information

These issues are analysed in greater detail in Chapter 3 of the OECD *Employment Outlook 2008*. For more information about this Policy Brief and OECD work on discrimination in labour markets, please contact: Andrea Bassanini, e-mail: andrea.bassanini@oecd.org, tel.: +33 1 45 24 90 32 or Anne Saint-Martin, e-mail: anne.saint-martin@oecd.org, tel.: +33 1 45 24 85 90, or visit www.oecd.org/els/employment/outlook.

For further reading

OECD (2007), **International Migration Outlook**, ISBN: 978-92-64-03285-9, € 75, 399 pages.

OECD (2007), **Jobs for Immigrants**, Vol. 1: *Labour Market Integration in Australia, Denmark, Germany and Sweden*, ISBN: 978-92-64-03359-7, € 42, 288 pages.

OECD (2008), **Employment Outlook**, Chapter 3: "The Price of Prejudice: Labour market discrimination on the grounds of gender and ethnicity", ISBN: 978-92-64-04632-0, € 80, 275 pages.

OECD (2008), "The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity. Legal and Institutional Framework in force in 2007", available online at www.oecd.org/els/employmentoutlook/2008.

For more on the OECD's work on employment issues, see www.oecd.org/employment.

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