



4. Frequently Asked Questions

Q. How is discrimination defined?

A. Direct discrimination occurs when a person is treated in an unfavourable manner when compared to the way other persons in a similar situation were, are being or would be treated, and when the reason for this treatment is associated with a specific ground as specified in specific legislation. For evidence of prohibited discriminatory treatment, it is therefore important to show unfavourable treatment in the context of a comparator: unfavourable treatment when compared to treatment received by a person in a similar situation.

Indirect discrimination is also enshrined in international, regional and national legislation and practice and relates to situations emerging from a rule, criterion or practice that is neutral but which has a negative impact on persons or groups of persons falling within the above-mentioned protected grounds. The importance of the comparator principle is also highlighted in these situations. With indirect discrimination, what is relevant is ultimately the impact of the rule, criterion or practice and not necessarily its intentions.

These definitions and principles are also reflected in Maltese legislation and practice, which are largely in line with contemporary EU and ECtHR jurisprudence.

Q. What is harassment?

A. Harassment, also prohibited by anti-discrimination legislation, is conduct (also verbal) that has the purpose or effect of violating a person's dignity and that creates an intimidating, hostile, degrading or offensive environment. Harassment may be sexual harassment if the conduct is of a sexual nature, but also related to the other grounds of discrimination as, for example, racial harassment.

Q. How can the United Nations be at all relevant?

A. Malta has ratified a number of international human rights treaties that specifically prohibited discriminatory treatment, and contain specific obligations that Malta must fulfil. These conventions include the Convention on the Elimination of all Forms of Disability Against Women (CEDAW), the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on Rights of Persons with Disabilities. It is to be noted that most of these United Nations conventions establish monitoring bodies mandated to supervise their implementation by signatory states, including through the receipt of individual complaints from victims of human rights violations. Persons

within Malta's jurisdiction may therefore also seek redress from these bodies, but only as a means of last resort.

Q. Against whom can an action alleging discrimination be brought?

A. Anti-discrimination legislation protects individuals from several actors including the Maltese Government, in relation to legislation, policies and practices, as well as private entities such as employers and service-providers (insurance companies, banks, shops, lessors, etc.).

Q. What grounds does anti-discrimination legislation protect?

A. The traditional protected grounds are age, disability, gender, sexual orientation, race/ethnic origin and religion/belief. These are the grounds specifically mentioned in the European Union's principal equality directives. However it must be noted that the interplay between international human rights law, EU law, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), together with the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have expanded the real understanding of these terms. For example, gender also includes gender identity and there have been a number of cases where a perceived or imputed ground was also taken into consideration.

It should also be noted that the Charter of Fundamental Rights of the European Union (2000), now legally binding across the EU, contains a far wider list of protected grounds to include: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (Article 21). Furthermore, the list in this article is merely inclusive and not exhaustive, meaning it can be expanded according to the circumstances of individual case if the CJEU so decides. comment

All of the above applies to Malta as an EU MS and signatory of the ECHR.

Q. Are positive discrimination measures permitted (also known as reverse discrimination, temporary special measures, preferential treatment, and affirmative action and positive action)?

A. Positive discrimination remains a controversial and difficult issue for states to interpret and implement. Under EU and national anti-discrimination legislation these are permitted insofar as they are understood to be effective means to ensure a de facto equality, meaning a substantive equality, as opposed to a mere de jure, or formal, equality. The idea emerges from the

understanding that discrimination occurs not only in scenarios where persons in similar situations are treated differently but also where persons in different situations are treated in a similar manner. They are seen as being compensatory measures, and permitted under international, regional and also national legislation. Where these measures are permitted their acceptance is generally accompanied by a series of necessary guarantees so as to ensure they do not have the reverse effect. Such guarantees often include the requirement that the measures are of a strictly temporary and necessary nature and that they are not unconditional and absolute.

In the field of disability discrimination, there is also the rule under international, regional and national legislation that an employer will be discriminating against a person with a disability if he/she fails to make 'reasonable accommodation' for such person. The term 'reasonable accommodation' is explained as those measures that ensure the accessibility of the workplace to the person, including structural and management revisions. It is to be noted that such measures would need to be reasonable for them to be required of an employer, with due consideration given to their financial implications for the employer.

Q. In terms of evidence, what is required to establish a treatment or effect that could be discriminatory?

A.Anti-discrimination legislation acknowledges the difficulties faced by victims of discrimination in having access to the evidence necessary to prove discriminatory treatment. This is particularly relevant in the private sector as for example having limited access to notes taken during employment interviews and the probable impossibility of proving that a reason for different treatment was based on one or more of the protected grounds. In view of this difficulty, anti-discrimination legislation requires that complainants merely provide a prima facie case, that is that they bring sufficiently credible evidence to indicate that discriminatory treatment may have occurred. Once the presumption of discrimination is raised, the burden of proving that the different treatment was not discriminatory shifts onto the agency, department or company being complained against.

Q. How is it possible to prove discrimination?

A.It should be noted that it is not necessary to prove a discriminatory intent, since what is relevant is the end result: whether different treatment on the basis of a protected ground occurred or otherwise. By virtue of the prohibition of indirect discrimination, very well-intentioned laws, policies and practices may also have this prohibited result. Within the EU context, it is also relevant to highlight that the CJEU does not require individual victim status for it to receive a discrimination claim. As practical

advice, it seems that in several cases before the ECtHR and the CJEU statistical evidence proved to be very useful in proving the trend of specific laws and policies to have a discriminatory effect.

Complainants are further advised to keep detailed records of all facts, statements and actions that could be relevant to the complaint.

Q. How can an employer defend a claim of discriminatory treatment?

A.Not all discriminatory treatment is prohibited by law and it is possible for perpetrators to bring successful defences in support of their actions. Anti-discrimination legislation does in fact envisage such exceptions, and these are generally phrased on the basis of the existence of an objective and reasonable justification, in the pursuit of a legitimate aim. Furthermore, the elements of proportionality and necessity are also to be observed.

In other contexts, anti-discrimination legislation also permits discriminatory practices where "by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate." Examples where this has been accepted include artistic professions such as singers, actors, dancers and models. No exhaustive list of permissible situations exists as these will be ascertained on a case by case basis.

Q. Does equality legislation have retroactive effect, or does it only bind laws, policies and practices adopted since its coming into force?

A.According to case-law anti-discrimination legislation does have retroactive effect in the sense that all laws, policies and practices existing at the time of the adoption of the legislation must be brought in compliance with it or face a declaration of violation. In the disability context, particularly with reference to accessibility, it has been stated that anti-discrimination legislation requiring adequate accessibility for persons with disabilities also applies to premises built before the coming into force of the relevant legislation.

Nonetheless, the general rule remains that only actions performed following the coming into force of national anti-discrimination legislation may be subject to these laws.

**Office of the United Nations High
Commissioner for Human Rights**

<http://www2.ohchr.org/english/bodies/petitions/individual.htm>

**Q. What means of redress are available in
Malta for victims of discrimination, and how
long do these procedures usually last?**

A. A number of different fora are available for victims of discrimination, and the choice of which to access depends on several factors including: sphere of activity in which the treatment complained of occurred (employment, rental, provision of services, social welfare, etc.); protected ground on which the discriminatory treatment was probably based; the nature of the proceedings and possible available remedy.

The following institutions are available, largely depending on the above considerations: the National Commission for the Promotion of Equality (NCPE); the National Commission Persons with Disability (KNPD); the Industrial Tribunal; the Office of the Ombudsman; the Ombudsman of the University of Malta; the local courts; the European Court of Human Rights and the United Nations treaty-monitoring bodies.

The national institutions do not generally take too much time to investigate and decide a case, although this of course depends on the cooperation of all parties. As a general rule, it can be said that complaints are dealt with in a matter of weeks. Cases that are presented before the national or regional and international courts would probably last a number of years to be finalised.

Q. From where may I obtain further information?

A. All of the above-mentioned institutions have website providing further information, as follows:

National Commission for the Promotion of Equality

www.equality.gov.mt

National Commission Persons with Disability

www.knpd.org

Office of the Ombudsman

www.ombudsman.org.mt

Industrial Tribunal

[http://www.industrialrelations.gov.mt/industryportal/
industrial_relations/industrial_tribunal/service_trib.aspx](http://www.industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/service_trib.aspx)

European Court of Human Rights

http://www.echr.coe.int/ECHR/homepage_en

Court of Justice of the European Union

http://curia.europa.eu/jcms/jcms/j_6/

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