



Advancing equality for older people



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Acknowledgements

This report was commissioned by HelpAge International and produced by the Equal Rights Trust. The research was led, and the report developed by Sam Barnes, Legal Officer at the Equal Rights Trust.

The report was made possible by the generous contributions of a wide range of stakeholders. Special thanks are owed to the Report's Advisory Committee, for their helpful comments and feedback on the international law analysis, and the need for a binding UN human rights instrument on the rights of older people:

Andrew Byrnes (Emeritus Professor of Human Rights at the University of New South Wales, Sydney); Bill Mitchell (Principal Lawyer at Townsville Community Law); Nena Georgantzi (Policy Coordinator at AGE Platform Europe); William Alvarado Rivera (Senior Vice President for Litigation at AARP Foundation); and Bridget Sleaf (Senior Researcher, Rights of Older People, Human Rights Watch).

Initial country assessments on eight jurisdictions were completed with the kind pro-bono support of the following law firms:

Bruchou, Fernández Madero & Lombardi (Argentina); NRA Legal (India); SyCip Salazar Hernandez & Gatmaitan (the Philippines); Kinstellar (Serbia); Allen and Overy LLP (the Republic of Korea); Bowmans (Tanzania); and Simmons & Simmons LLP (Great Britain).

Thanks are also owed to the following individuals for expanding out the initial legal framework analysis and providing feedback on the country summaries:

Nicolás Forero-Villarreal (Argentina); Charlotta Blomqvist (Finland); Jessamine Mathew (India); Soraya Bauwens (Jordan); Margaret Muga (Kenya and Tanzania); Natalia Chudyk (Paraguay); and Benjamin Velasco (the Philippines).

Finally, thanks are due to the following national law experts for their helpful inputs on the country studies and comments on the application of the anti-discrimination law framework in practice:

María Isolina Dabove (Argentina); Jayna Kothari (India); Arwa Al-Najdawi (Jordan); Sarah Kinyanjui (Kenya); Sardorbek Abdukhalilov (The Kyrgyz Republic); Wilnor Papa (Philippines); Cheolung Je (Republic of Korea); Evelyn Collins (Northern Ireland); Kosana Beker (Serbia); and Livingstone Byekwaso (Tanzania).

We express our sincere gratitude to all those that have contributed to the production of this report, and our continued solidarity with those equality defenders working throughout the world to advance rights protections for older people.

This report was developed with generous funding by AARP.



Ben Small/HelpAge International

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Introduction

Since the World Health Organization declared a global coronavirus pandemic in March 2020, countries around the world have scrambled to put into place laws and policies designed to combat the spread of the virus and protect limited national health resources. State responses in the delivery of healthcare, in the implementation of lockdown measures and in policies designed to mitigate economic impacts have had disproportionate and discriminatory impacts – both foreseen and unforeseen – affecting a wide range of groups. Amongst those most severely affected have been older people. Discriminatory measures restricting older people’s movement have been used at every stage of the response. Older people have been denied access to essential health-care services, the risk of violence has risen, and existing inequalities in areas such as employment have been amplified.

The widespread use and acceptance of measures that discriminate on the basis of age during the pandemic reflects the inconsistency of legal guarantees prohibiting age discrimination in national legislation. Despite their

international law obligations, anti-discrimination laws in many countries do not explicitly prohibit age discrimination. Others prohibit discrimination on the basis of age only in specific, limited areas of life or do so only as a single ground. Often, such laws do not recognise intersectional discrimination, for example on the grounds of age and sex. This lack of legal protection results in the adoption and continuation of laws and policies which discriminate because of older age, the failure to effectively prohibit discrimination by public and private actors and the perpetuation of ageism.

This study sets out to examine State practice in legislating to prohibit discrimination on the basis of age and promote the equal participation of older people in all areas of life. It does so by examining the legal frameworks of 12 States, from a range of global regions, analysing them for consistency with international legal standards and drawing comparisons between the practice in these diverse countries. In so doing, the report aims to identify the principal gaps, inconsistencies and barriers which prevent the realisation of the rights to equality and non-discrimination for older people, and to highlight good practices and promising developments.

Definitions and terminology

The law on age discrimination is complicated and complex, for a number of reasons, not the least of which is the challenge of reaching clear definitions of some of the key terms and concepts. Some of the key concepts are discussed, defined and described throughout Chapters 4–7 of the publication. Others are dealt with here:

Age: Age is a complicated concept that may acquire different meanings in different contexts. In some laws and policies ‘age’ is used as a criterion to determine access to certain benefits or rights, or to distinguish between groups. When used in this way, ‘age’ refers to a person’s chronological age. However, age is also a social construct “whereby social, economic and political contexts determine whether an individual is considered old”.¹ The understanding of age in this broader sense is important and key to addressing forms of ageism that are prevalent in societies.²

Age Discrimination: Discrimination is defined under many international human rights treaties as “any distinction, exclusion, or restriction which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Discrimination is prohibited on the basis of particular ‘grounds’. Age discrimination, therefore, refers to any of the actions listed above that occurs on the basis of age. Age discrimination may affect individuals at any age, including both older and younger people. There are a number of different forms of discrimination, and States are required to define and prohibit all of them; the five principal forms of discrimination recognised at international law are direct discrimination, indirect discrimination, harassment, failure to make reasonable accommodation and segregation. Definitions of each of these forms of discrimination are provided in Chapter 4. Discrimination can be intentional or unintentional.

While some States tie the prohibition of age discrimination to chronological age (for instance, prohibiting discrimination against people aged 65 and above), this approach is not consistent with international law and best practice. Age discrimination may be experienced by any person. Indeed, it has been noted that age discrimination in employment “often starts in mid-life rather than at the later stages of life that governments and employers often define as ‘older age’ by reference to chronological age thresholds”.³ This report focuses primarily on age discrimination as it affects older people. However, the term ‘age discrimination’ must be understood as any differential treatment or impact arising on the basis of age – irrespective of the age of the person.

Ageism: Broadly, the term ‘ageism’ relates to stereotypes, prejudices or stigma based on age. Ageism is a cause and a driver of age discrimination. However, ageist beliefs will not necessarily result in acts of age discrimination, and age discrimination does not only arise as a result of ageist beliefs. As with age discrimination, ageism may be experienced by people across the chronological age spectrum. This report examines ageism in the context of older people. We therefore adopt the definition of the Independent Expert on the enjoyment of all human rights by older persons in this area. Accordingly, ageism should be understood as “stereotypes, prejudice and/or discriminatory actions or practices against older people that are based on their chronological age or on a perception that the person is ‘old’ (or ‘elderly’)”.⁴ This includes ageist attitudes held by older adults themselves.

Older People: Different States use different terminology when referring to older people, and in many national laws (as well as some international and regional documents), there are references to the ‘elderly’, ‘seniors’, or ‘senior citizens’. These phrases, whilst commonplace, carry pejorative connotations, which may promote ageist assumptions. For this reason, they are best avoided. In this report we refer to ‘older people’.⁵

Methodology, scope and limitations

The report compares and critically examines the national legal frameworks on equality and non-discrimination in 12 jurisdictions, assessing and analysing them against international human rights standards. These jurisdictions are:

 Argentina	 The Kyrgyz Republic
 Finland	 Paraguay
 Great Britain	 The Philippines
 India	 The Republic of Korea
 Jordan	 Serbia
 Kenya	 Tanzania

The project countries were selected on account of their geographic diversity, their different legal traditions, and varying stages of development in the enactment and implementation of equality law.

The research for the report was undertaken in a number of stages. In the first stage, a comprehensive analysis of the international legal framework on equality and non-discrimination on the basis of age was conducted. In parallel with this, legal mapping was undertaken in the 12 countries under review, with uniform research guidance and a standard template used to ensure the consistency and comparability of the research.

At the second stage of the process, both the international legal framework analysis and the initial national legal framework assessments were subjected to verification and validation by relevant experts. In the final stage, the findings of these two research processes were drawn together and analysed, in order to produce a comparative analysis of the legal frameworks in the 12 countries under review.

Alongside the development of this comparative report, national legal framework assessments have been produced for each country. These assessments describe, analyse and assess the law in the 12 countries considered in this report, providing a level of detailed discussion which cannot be provided in a comparative report. This study should be considered alongside the national legal framework assessments, which discuss in detail aspects of law which are covered here only with the comparative lens. In addition to this study and the national legal assessments, an advocacy toolkit has been developed for the benefit of national stakeholders engaged in – or wishing to start – efforts to promote equality law reform.

As part of the research for the report, key stakeholders have been consulted who have provided insight into the realities of age discrimination and commented on the effectiveness of the national law framework in practice.

It should be noted that the focus of this study is on national legal frameworks on equality and non-discrimination as they apply to older people. Alongside anti-discrimination provisions, in many countries, specific laws, policies or other measures for older people have also been enacted, which establish particular rights (for instance, to social security, or healthcare). The discussion of these specific measures falls beyond the scope of this report.

The report finds that, in the majority of the jurisdictions reviewed, protections against age discrimination are weak, and do not meet the requirements of international human rights law. Whilst three of the States under consideration have adopted comprehensive (or near comprehensive) anti-discrimination legislation, these laws do not provide the full range of protections and obligations which are necessary to realise the rights to equality and non-discrimination for older people. Beyond these three countries, State practice varies enormously. While some positive practice can be identified, the States considered which do not have comprehensive anti-discrimination laws provide at best only limited protection from discrimination, in specific areas of life, or with limited enforcement opportunities.

The report concludes that States must take immediate action if they are to realise the rights to equality and non-discrimination for older people.

Executive summary

This report is divided into seven chapters.

Chapter 1 begins by exploring developments in the protection of the rights of older people at the international level. ‘Age’ is recognised as a ground of discrimination under the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. However, age is not included in the short list of grounds which are explicitly included in the text of these treaties. This omission has a number of practical implications. The concept of ageism lacks global recognition. In the absence of clear guidance at the international level, national law approaches to age discrimination vary significantly between States. To address these gaps, a ‘two-track approach’ is needed. Firstly, there is a need for improved implementation and application of the existing equality and non-discrimination framework to older people. Secondly, systemic change requires the adoption of a new legal instrument at the international level. Whilst this report focuses on the first of these requirements, the authors recognise the clear need for a Convention to mainstream the rights of older people within the UN treaty body system, and to fully articulate States’ obligations to address ageism and other forms of age-related harm. Both elements of this approach are crucial to improving human rights protection in practice.

Chapter 2 sets out the international human rights law framework on equality and non-discrimination. Each State examined has accepted equality and non-discrimination obligations through the ratification of international human rights instruments. These obligations apply equally to all grounds of discrimination – including age – though it remains a fact that the content of the right to equality and non-discrimination in older age is not properly understood by most relevant actors, including not only States but also the UN system. Nevertheless, broad consensus has been reached on the content of the rights to equality and non-discrimination as they apply to all grounds. There is consensus that if States are to meet their obligations, they must adopt comprehensive anti-discrimination legislation. This legislation should prohibit all forms of discrimination in all areas of life on an open-ended and extensive list of grounds, including age. This law should establish the framework for promoting equality for all groups exposed to discrimination, including older people. States must also put in place effective enforcement and implementation mechanisms to ensure access to justice and remedy for victims. These requirements are explored in detail in Chapters 4–6 of the report, which also examine State practice in the countries under review.

Chapter 3 introduces the countries that are the subject of this report and examines their record of participation in the ratification of international and regional human rights instruments. The chapter goes on to summarise the principal means through which each State has sought to give effect to their equality and non-discrimination obligations through national legislation.

Chapter 4 concerns the prohibition of discrimination. The right to non-discrimination has four main components: the personal scope of the right (*who* is protected); the material scope (*where* does the prohibition on discrimination apply); forms of prohibited conduct (*what* constitutes ‘discrimination’) and justifications and exceptions (*when* might a distinction arising on the basis of a ground be permitted). Each component is discussed in detail in this chapter, which begins with a summary of the main legal concepts recognised under international law, before examining and evaluating State practice.

Alongside eliminating discrimination, States are required to advance equality for members of discriminated groups. This, in turn, requires the adoption and effective implementation of a comprehensive package of proactive and targeted equality measures which seek to identify and address structural barriers to equal participation. These measures are discussed in **Chapter 5**. In some States, equality duties have been enacted that require public authorities, and other duty-bearers such as employers and educators, to assess the impact of their policies and mainstream the rights of groups exposed to discrimination in their work. This is a positive example of best practice.

Chapter 6 concerns enforcement and implementation. To ensure access to justice for victims of discrimination, a wide range of measures are required. This includes the establishment and adequate resourcing of institutions empowered to enforce the legal framework; the amendment of national rules governing evidence and proof in discrimination cases; and the provision of legal aid and assistance, alongside procedural accommodation and accessibility measures, to remove financial and physical justice barriers. While States may adopt different approaches to the enforcement and implementation of equality law, in all cases, people who have been subjected to discrimination must be ensured the right to seek legal redress and an effective remedy.

Chapter 7 summarises the report’s main findings and recommendations, which are addressed to the international community, State actors and civil society. In each of those countries where comprehensive anti-discrimination laws have been adopted, protections against discrimination are more clearly articulated, apply in broader areas of life, and establish the necessary enforcement and implementation mechanisms needed to ensure the protection of older people’s rights. While there remain gaps in legislative protections, these laws establish a strong foundation to challenge age discrimination, and establish the infrastructure to address ageism, and other drivers of age inequality.

The first principal recommendation of the report focuses, therefore, on the need for States to enact, enforce and implement comprehensive anti-discrimination legislation. At the international level, practice on age-discrimination has been weak, and State and non-State actors have called for increased clarity in this area. For the reasons set out in Chapter 1, systemic change can only be achieved through the adoption of an age-specific international instrument.

The second principal recommendation of the report focuses, therefore, on the need for a UN Convention on the Rights of Older Persons.

Introduction endnotes

1. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 31.
2. *Ibid.*, paras. 34 and 37.
3. Human Rights of Older Persons, 20th Informal ASEM Seminar on Human Rights, 2021, p.18.
4. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 21.
5. *Ibid.*, para. 21.

Chapter 1: Protecting the rights of older people



Fabeha Monir/Age International



Age discrimination in context

On 11 March 2020, the World Health Organization declared COVID-19 a global pandemic. In the following months, as the virus spread across the globe, governments began implementing “unprecedented restrictions on movement both within and between countries”.⁶ These and other measures – in the delivery of healthcare, in policies designed to mitigate economic impacts and in programmes to adapt education and essential services – have had disproportionate and discriminatory impacts. While these impacts have affected a wide range of groups exposed to discrimination, few have suffered more severely than older people.

With the stated aim of protecting older people, several States adopted age-discriminatory ‘lockdown’ measures that prohibited older people from leaving their homes, except in exceptional circumstances. In some countries, these measures were overturned by national courts,⁷ but in others, they were upheld as legitimate responses in a time of national emergency.⁸ A range of other measures adopted by States to respond to the pandemic have had discriminatory impacts – both foreseen and unforeseen – on older people. Older people in many countries have been denied equal access to essential health-care, as a result of the suspension of elective health-care services.⁹ In some cases, as national health systems came under pressure, age was used as a criterion to determine access to medical support, in clear contravention of international human rights standards.¹⁰ Other services used by older people, particularly in the areas of care and support, have also been strained. Within care facilities, many older people were physically isolated and left unable to leave their rooms.¹¹

Lockdowns have also contributed towards social isolation and highlighted the lack of inclusion of older people within the wider community.¹² This, in turn, has “increased the risk of violence, abuse and neglect”.¹³ In some contexts, older people have been blamed for the imposition of restrictive measures,¹⁴ and derogatory and ageist comments have been recorded in online forums and in the media.¹⁵

Throughout the pandemic, older people have been negatively portrayed “as uniformly frail and vulnerable”.¹⁶ This is not a new phenomenon. Whilst coronavirus has “brought to light entrenched ageism and age discrimination in many areas” and “shone a spotlight on the gaps in human rights protection”, ageism is an endemic and long-standing problem that can be identified in cultures across the globe.¹⁷ Older people are all too frequently stereotyped as “burdens to societies”¹⁸ or as the “recipients of expensive social benefits and services”.¹⁹ These assumptions are reflected in national legal and policy frameworks, which often address the human rights of older people from a charitable, welfare, or medical perspective²⁰ – a perspective which is fundamentally paternalistic and which undermines the position of older people as rights holders.

To make progress towards equality for older people, a transformational shift is needed. This requires the adoption of a human rights-based approach that challenges ageism and age discrimination, and which recognises older people as human beings born equal in dignity and rights.²¹ This in turn requires States to adopt, enforce and implement laws which prohibit discrimination on the basis of age and create obligations to advance equality for older people.

In their 2021 annual report, the United Nations Independent Expert on the enjoyment of all human rights by older persons recognised that “a human rights-based approach is the most appropriate and effective framework to challenge ageism”.²² This approach should be “integrated in laws, policies and institutional practices related to ageing and older persons” and “guarantee dignity, equality, autonomy and participation during the entire life course”.²³ Similarly, the World Health Organization’s *Global Report on Ageism*, also published in 2021, highlighted the central role of law as the first of three strategies to combat ageism, noting that “enactment of policies and laws constitutes an important strategy that can be used to reduce or eliminate ageism, especially discrimination on the grounds of age”.²⁴

Pandemic recovery offers a unique opportunity to make progress towards “a more inclusive, equitable and age-friendly society” that ensures the protection of the human rights of older people.²⁵ The UN Secretary-General has called on States to “fully integrate a focus on older persons into the socio-economic and humanitarian response to COVID-19”. This, in turn, requires the “strengthening [of] the national and international legal framework to protect the human rights of older persons” and the integration of a human rights perspective into pandemic recovery planning.²⁶ As of 20 May 2020, 146 States – including each of the 12 countries that are the subject of this study – had signed a statement supporting the Secretary-General’s Policy Brief on the impact of COVID-19 on older people.²⁷

The need for change is clear. However, this change can only be achieved if all stakeholders commit to an approach that fully integrates the human rights perspective on older people and gives effect to their rights to non-discrimination and equal participation. Unfortunately, to date, practice in this area at the domestic, regional and international levels has been inadequate.

A two-track approach

The sculptor Michelangelo is reputed to have said that: “[t]he sculpture is already complete within the marble block before I start my work. It is already there. I just have to chisel away the superfluous material”. This is an apt metaphor for the status of the right to non-discrimination on the basis of age under international law.

International law requires States to eliminate all forms of discrimination arising on the basis of age, including all forms of discrimination against older people. This obligation arises directly under Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which require States to guarantee the enjoyment of the rights protected under those instruments “without distinction of any kind”. It is reinforced by the free-standing right to non-discrimination, established by Article 26 of the ICCPR, which provides that “[a]ll persons are equal

before the law and are entitled without any discrimination to the equal protection of the law” and requires that States’ law “guarantee to all persons equal and effective protection against discrimination on any ground”. As discussed in Chapter 2, the consistent practice of the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights – the bodies responsible for interpreting the Covenants – has underlined the fact that age is protected as a characteristic. Both bodies have recognised age as a form of ‘other status’ – a ground of discrimination protected by these instruments – rendering what was implied in the Covenants explicit.

Nevertheless, for a number of reasons – including in particular the fact that age is not explicitly listed as a ground of discrimination in the non-discrimination provisions of the core UN human rights instruments – this obligation to eliminate discrimination on the basis of age is not well-recognised, properly understood or universally accepted. The sculpture is in the rock, but it is not yet visible.

At its simplest level, this lack of visibility means that States have not moved to enact laws which prohibit discrimination against older people in the same way that they have for other grounds of discrimination, such as sex and gender, race or disability. It also means that in States which have adopted laws focused explicitly on age discrimination or the rights of older people – as opposed to recognising age as one of a number of grounds meriting equal protection in comprehensive anti-discrimination laws – these laws often reflect paternalistic or charitable understandings, focusing on the provision of care or services, rather than on recognising rights.

The lack of visibility also means that the specific elements of an effective guarantee of non-discrimination and equal participation for older people are as yet uncodified, leaving a gap in interpretation, which can create a gap in protection. In particular, an inability to identify, or a reluctance to challenge, ageist stereotypes means that acts of discrimination against older people have been found to be justified, where such acts arising on any other ground would not be accepted. At the same time, there is a failure to recognise that measures ostensibly intended to benefit older people in fact reflect paternalistic approaches and unconscious bias about the capacities of older people and are directly discriminatory in their effect.

In this context, there is a clear and pressing need for action at the international level to adopt a specific international legal instrument on the rights of older people. In the absence of such an instrument, the endemic and deeply embedded nature of ageism means that older people’s right to non-discrimination will not be realised. At the same time, as we set out below, there is an urgent need to strengthen the interpretation and implementation of the existing international legal framework on non-discrimination as it applies to older people.

A range of specific policy programmes and initiatives have been undertaken at the international level aimed at improving human rights protections for older people. In 1982, the Vienna International Plan of Action on Ageing was adopted at the World Assembly on Ageing. Almost 10 years later, in 1991, the United Nations Principles for Older Persons were approved, followed in close succession by the Global Targets on Ageing and Proclamation on Ageing in 1992; and subsequently the Political Declaration and Madrid International Plan of Action on Ageing in 2002.²⁸

Some legal recognition of the human rights of older people has been achieved through the development of regional human rights mechanisms. In 2015 the Inter-American Convention on Protecting the Human Rights of Older Persons was adopted. The Convention contains important non-discrimination guarantees and details the obligations of States and other duty-bearers in a wide range of areas, though it has been criticised for using chronological age in its definition of ‘older persons’. In January 2016, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa was adopted. However, the protocol has only been ratified by three States, and is yet to come into force.²⁹ Some provisions of the Protocol have also been criticised by the Special Rapporteur on the rights of persons with disabilities for ‘contradicting’ provisions of the Convention on the Rights of Persons with Disabilities and for failing to uphold “all the standards of the Convention”.³⁰ The Charter of Fundamental Rights of the European Union explicitly prohibits discrimination

on the basis of age.³¹ However, the charter only applies to the implementation of European Union Law and does not create an independent right to non-discrimination outside of this area. The Council of Europe has issued guidance in the form of a Recommendation on the Rights of Older Persons.³² Whilst other regional laws establish particular rights for older people, these are limited in their scope of application.³³

At the international level, as noted above, the right to non-discrimination under both the ICCPR and ICESCR applies to ‘age’ as a ground of discrimination. This creates specific obligations for States, which are discussed in the next chapter. However, with only a couple of exceptions,³⁴ age is not expressly listed as a protected characteristic in the international human rights instruments. And whilst international human rights law does not draw a distinction between listed and unlisted grounds, this omission has a number of important, practical implications.³⁵

Age discrimination has not been sufficiently addressed in the work of the UN human rights treaty bodies, and older people are rendered largely invisible within the treaty body system.³⁶ Specific concepts, such as ageism, have not been expressly recognised or elaborated.³⁷ And whilst some important issues of age discrimination have been explored, this process has been piecemeal, and in certain areas, the language used by treaty bodies may in fact serve to reinforce ageist stereotypes, in conflict with the human rights-based approach described above.³⁸ To date, practice has been limited, and there is a lack of clear guidance on how States should meet their equality and non-discrimination obligations towards older people.³⁹



DimaNeer/HelpAge International Moldova



In the absence of clear guidance, this report finds that national approaches to age discrimination vary significantly between States. In a majority of the countries examined, protections against discrimination are fragmented across multiple laws and policies, which vary in their personal and material scope. In some States, age-specific laws have been adopted, although these often lack enforcement mechanisms or are limited to particular areas of life, such as employment. In some countries there are few explicit protections from age discrimination under national legislation. In some States, comprehensive anti-discrimination laws have been adopted which prohibit discrimination on the basis of age (amongst other grounds), in multiple areas of life, and establish detailed rules for the operation of the equality law framework. Whilst this ‘comprehensive’ approach offers significantly increased human rights protection for older people, there remain gaps and weaknesses within these frameworks that undermine protections afforded in practice.⁴⁰

To address these gaps, a ‘two-track approach’ is needed.⁴¹

Firstly, there is a need for **improved engagement with the topic of older people’s rights** at the international level. States possess clear equality and non-discrimination obligations through the ratification of international human rights treaties, and there is an established consensus on the core normative content of these rights, which applies to age discrimination as it does to other recognised grounds. In practice, however, the limited engagement with the right to non-discrimination for older people – and notable examples of poor or inconsistent practice – means that there is a need to reinforce the fact that international standards apply equally to discrimination against older people. This track is discussed in detail in Chapter 2 of this report, whilst specific equality concepts are elaborated in the subsequent chapters which examine and evaluate national legal practice.

Secondly, there is a need for **the adoption of a new UN convention on the rights of older persons**. Ageism is widespread in societies. In order to move away from charitable and social welfare models towards a human rights-based approach, a transformative shift in understanding is needed. Similar transformative shifts have been witnessed in relation to other groups that experience discrimination, where dedicated international instruments have been established.⁴² The Convention on the Rights of Persons with Disabilities, for instance, marked a clear departure from a ‘medical’ conception of disability, and in the years since it was adopted, various advancements in the understanding of disability issues have occurred: from the recognition of denial of reasonable accommodation as a form of disability discrimination, to improved clarity of concepts such as autonomy, accessibility and equal legal capacity.⁴³ Other ground-specific instruments have generated ideas and practices that have been applied in other areas, and in respect of new groups, strengthening the human rights framework and treaty body system as a whole.⁴⁴

Even with the best of intentions, it is unlikely that improved engagement of existing human rights institutions with the topic of age discrimination will result in more than incremental improvements in human rights protection for older people.⁴⁵ As the Office of the UN High Commissioner for Human Rights has noted, “in assessing what existing mechanisms might be able to do it is important to keep in mind the mandates, workloads, expectations and expertise of those mechanisms and the practical constraints that these entail”.⁴⁶ There are several explanations for the lack of engagement on age discrimination to date, including “competing substantive priorities on the agenda of the individual treaty bodies (...) the relatively limited amount of time to explore more issues in the constructive dialogue with States (...) and limited expertise of committee members in the field of ageing”.⁴⁷

An independent international human rights instrument would clarify States’ legal obligations towards older people in different areas of life; improve understanding of equality concepts such as ageism, elder abuse and age discrimination; offer increased impetus for legal reform at the national level; and facilitate the shift towards a human rights-centred approach. Whilst the remainder of this report focuses principally on the improved application of existing equality and non-discrimination standards, **a core recommendation is for the adoption of a new convention on the rights of older people** to mainstream the rights of this group within the UN treaty body system, and to fully articulate States’ obligations to address ageism and other forms of age-related harm. Both elements of this approach are crucial to improving human rights protection in practice.

Chapter 1 endnotes

6. Equal Rights Trust and HelpAge International, et. al., *Call to Action: Addressing discrimination and inequality in the global response to COVID-19*, 2020, p.1.
7. HelpAge International, 'How civil society overturned Buenos Aires' age-based isolation policy', 13 October 2020, available at: www.helpage.org/blogs/ellie-parravani-30707/how-civil-society-overturnd-buenos-aires-agebased-isolation-policy-1123/; Radio Free Europe, 'Coronavirus In Court: Bosnia's Age-Based Lockdowns Are Ruled Discriminatory', 24 April, 2020, available at: www.rferl.org/a/coronavirus-in-court-bosnia-s-age-based-lockdowns-are-ruled-discriminatory/30574453.html
8. In Serbia, all people aged 65 and over were required to stay indoors. People belonging to this age group were allowed to leave the house just once a week for 30 minutes for grocery shopping. Whilst Article 21 of the Constitution prohibits discrimination on the basis of age, age is not included in the list of grounds under Article 202 of the Constitution, which governs derogation in times of national emergency. Consequently, the Constitutional Court held that the measures adopted – in this regard – were legitimate. See Constitutional Court of the Republic of Serbia, Decision No. IUo-45/202.
9. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/75/205, para. 37.
10. *Ibid.*, paras 36 and 38.
11. *Ibid.*, para. 41. See also para. 44, discussing the disproportionately high rate of deaths in care facilities.
12. *Ibid.*, para. 42.
13. *Ibid.*, paras. 48–51.
14. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 17.
15. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/75/205, paras. 52–53. In one example, a UK journalist suggested that 'culling' older people would have a beneficial economic effect. See Equal Rights Trust and HelpAge International, et. al., *Call to Action: Addressing discrimination and inequality in the global response to COVID-19*, 2020, p.4.
16. World Health Organization, *Global Report on Ageism*, 2021, p.IX, available at: www.who.int/publications/i/item/9789240016866
17. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 17.
18. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/75/205, 2020, para. 32.
19. Human Rights of Older Persons, 20th Informal ASEM Seminar on Human Rights, 2021, p.48.
20. *Ibid.*, p.50–51. See also, Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 33.
21. *Ibid.*
22. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 76.
23. *Ibid.*
24. World Health Organization, *Global Report on Ageism*, 2021, Chapter 6.1, p.94, available at: www.who.int/publications/i/item/9789240016866
25. UN Secretary-General, *Policy Brief: The Impact of COVID-19 on Older Persons*, 2020, p.16, available at: www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/COVID-Older-persons.pdf. See also, United Nations Department of Economic and Social Affairs, Virtual EGM on 'Building forward Better for Older Persons post COVID-19', 2–5 March 2021, available at: www.un.org/development/desa/ageing/meetings-and-workshops-2/expert-group-meeting-on-building-forward-better-for-older-persons-post-covid-19-2-5-march-2021.html?preview=true
26. UN Secretary-General, *Policy Brief: The Impact of COVID-19 on Older Persons*, 2020, pp.3,13 and 16, available at: www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/COVID-Older-persons.pdf
27. This list includes Argentina; Finland; India; Jordan; Kenya; Kyrgyzstan; Paraguay; Philippines; Serbia; the United Republic of Tanzania; the Republic of Korea; and the United Kingdom. See United Nations Department of Economic and Social Affairs, '146 Member States support the SG Policy Brief on COVID19 and Older Persons', 20 May 2020, available at: www.un.org/development/desa/ageing/uncategorized/2020/05/140-member-states-support-the-sg-policy-brief-on-covid19-and-older-persons/
28. For further discussion of these instruments, see United Nations General Assembly, Report of the Secretary General to the General Assembly on the Human Rights of Older Persons, UN Doc. A/66/173, 2011, paras. 17–20.
29. The protocol will enter into force once ratified by fifteen Member States.
30. Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/74/186, 2019, para. 15.
31. Charter of Fundamental Rights of the European Union, Article 21.
32. See, in particular, the Council of Europe Recommendation on the Rights of Older Persons, 2014.
33. See, in particular, Article 23 of the Revised European Social Charter, which sets out the right of elderly people to social protection.
34. See, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 1 and 7. Article 8(1)(b) of the Convention on the Rights of Persons with Disabilities imposes a specific obligation on States to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life".
35. These implications are discussed in Chapter 2A of this report.
36. See further 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, paras. 66–99.
37. Although guidance has been provided by the United Nations Independent Expert on the enjoyment of all human rights by older persons. See, UN Doc. A/HRC/48/53, 2021, paras. 17–34.
38. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 43.
39. The lack of clear guidance in this area was identified as an obstacle to the enjoyment of human rights by older people by national law experts in Jordan and the Republic of Korea consulted as part of this report.
40. See further, the discussion in Chapters 4–7 of this report.
41. 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. 207.
42. Human Rights of Older Persons, 20th Informal ASEM Seminar on Human Rights, 2021, p.50.
43. *Ibid.*
44. In this connection the UN Independent Expert on the enjoyment of all human rights by older persons, has noted that "the development of specific norms can facilitate the cross-fertilization of general human rights provisions and address intersectional challenges more efficiently and comprehensively". See UN Doc. A/HRC/48/53, 2021, para. 50.
45. *Ibid.*, paras. 207–211.
46. *Ibid.*, para. 210.
47. *Ibid.*, para. 210.

Chapter 2: The right to equality and non-discrimination



Ben Small/HelpAge International

Equality and non-discrimination are fundamental rights which sit at the core of the international human rights law framework. Almost every State in the world has accepted equality and non-discrimination obligations through the ratification of international human rights treaties which guarantee these rights. Whilst the exact process for the incorporation of human rights obligations into domestic law differs from State to State, the duty to address discrimination and advance equality is a clear, immediate, overarching, and cross-cutting legal requirement.

Age discrimination in international law

Discrimination is prohibited on the basis of particular ‘grounds’. Both the ICCPR and the ICESCR prohibit discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁴⁸ With some exceptions,⁴⁹ international human rights treaties do not include ‘age’ as an explicitly listed ground of discrimination. However, age is uniformly recognised as a protected characteristic under international law: both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights

have recognised age as a form of ‘other status’, a position which has been followed by the other UN treaty bodies. Indeed, age is one of dozens of characteristics which are not explicitly listed in an international instrument – gender identity, health status, marital status and sexual orientation being other examples – but which are recognised as forms of ‘other status’.⁵⁰ As the Committee on Economic, Social and Cultural Rights has recognised:

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of ‘other status’ is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in Article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.⁵¹

Discrimination is prohibited under Articles 2(1) and 26 of the ICCPR. Article 2(1) guarantees non-discrimination in the enjoyment of the other civil and political rights guaranteed by the covenant, while Article 26 provides a free-standing right to non-discrimination, which applies in all areas of life regulated by law.⁵² Interpreting these provisions, the Human Rights Committee has stated clearly that “a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of other status”.⁵³ The committee has recognised age as a ground of discrimination in its General Comments on the interpretation of the ICCPR, and has called on States to prohibit age-based discrimination through the adoption of comprehensive anti-discrimination law in its review of compliance with the covenant.⁵⁴

Article 2(2) of the ICESCR prohibits discrimination in respect of all economic, social and cultural rights. In 2010, the Committee on Economic, Social and Cultural Rights (the CESCR Committee) adopted its General Comment No. 20 on Non-Discrimination, which lists age as a protected characteristic falling within the scope of ‘other status’.⁵⁵ The committee has also listed age as a protected characteristic in other General Comments, concerning, *inter alia*, the right to adequate housing, the right to work, and the right to social security.⁵⁶



Ganesh Bista/Ageing Nepal

In addition to these treaties, ground-specific conventions have been adopted which prohibit all forms of racial discrimination, discrimination on the basis of sex and gender, and discrimination against persons with disabilities. The committees charged with interpreting these treaties have each recognised that the prohibition of discrimination which they provide includes discrimination that occurs based on two or more grounds (multiple or intersectional discrimination).⁵⁷ In their General Comments and Recommendations, each committee has recognised age as a ground of discrimination as part of this broader prohibition.⁵⁸

Similar developments have taken place at the regional level. For instance, in its Guidance to States on the implementation of economic, social and cultural rights, the African Commission on Human and Peoples’ Rights has noted that “prohibited grounds of discrimination include (...) age”.⁵⁹ Interpreting the term “any other social condition”, the Inter-American Court of Human Rights has commented that “the prohibition of discrimination related to age, in the case of older persons, is protected by the American Convention”.⁶⁰ The European Court of Human Rights, and the European Committee of Social Rights have also recognised age as a ground of discrimination.⁶¹

These various interpretive statements make clear that States have an immediate and cross-cutting obligation to eliminate age-based discrimination. However, the practice of human rights bodies on this ground has been limited. In most cases, age discrimination has only been partially addressed, or discussed only in certain areas of life and rights. Little specific guidance has been provided to States and there has been limited substantive engagement on the particular experiences of older people. This is exemplified in the Concluding Observations of the Committees made in respect of the twelve countries examined as part of this report: only a handful of references have been made relating to age discrimination, a majority of which concern the risk of multiple discrimination in the areas of social security, healthcare and pensions.⁶²

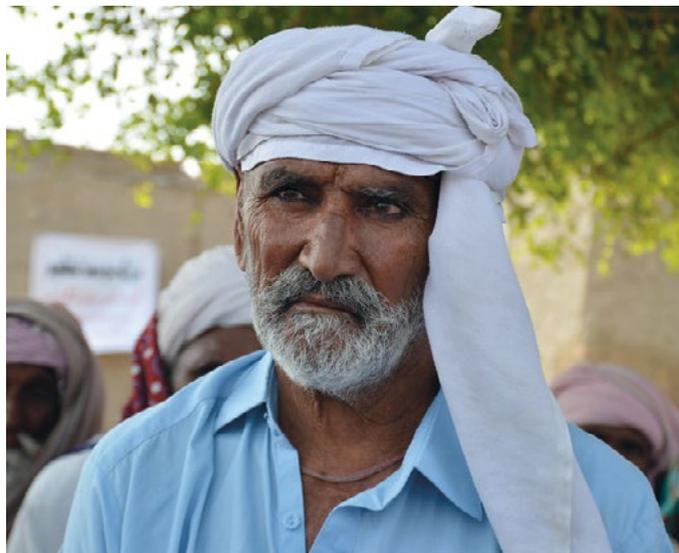
This lack of detailed and comprehensive discussion by the UN treaty bodies does not alter or diminish States’ obligations. The ICCPR prohibits any discrimination in the enjoyment of civil and political rights, and provides a free-standing right to non-discrimination that applies in all areas of life regulated by law – areas ranging from employment to healthcare to the provision of goods and services. The ICESCR prohibits discrimination in respect of all Covenant rights, including but not limited to the rights to work, education and healthcare; moreover terms such as ‘cultural life’ have been interpreted broadly by the CESCR Committee, offering an enhanced scope of protection.⁶³ Thus, the fact that the Human Rights Committee and the CESCR Committee have discussed age discrimination only in certain cases or areas of life does not in any way restrict or limit the areas of life in which the prohibition on age discrimination applies.

Similarly, the obligation to prohibit intersectional discrimination arising on the basis of age and characteristics protected by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) applies in all areas of life regulated by law.⁶⁴

International human rights law does not recognise a normative distinction between grounds that are ‘listed’ or ‘unlisted’, or any hierarchy of grounds. Whilst some regional human rights bodies, such as the European Court of Human Rights, have held that certain grounds of discrimination may be subject to ‘stricter scrutiny’ than others, there has been no such finding at the international level, and in all cases, States remain bound by their international human rights obligations.

In practice, however, the omission of age from the grounds listed in the international human rights instruments has had important implications. The OHCHR has noted that the fact that age has not been explicitly listed may “send the message that an omitted ground is of lesser importance than the listed grounds and may be subjected to less rigorous scrutiny than other explicitly listed grounds”.⁶⁵ Such an interpretation would be inconsistent with international human rights law, but it is nevertheless a reality that States and other actors will draw such distinctions. Indeed, in many States, decisions in cases concerning age discrimination reflect ageist stereotypes, and in some instances, these stereotypes are evident in the decisions of regional tribunals.⁶⁶ As this indicates, this problem is particularly pertinent in respect of age discrimination because ageism is deeply embedded within societies, and – as noted by the OHCHR – the concept lacks global recognition and “is not taken as seriously as other forms of discrimination such as racism, sexism, and ableism”.⁶⁷

In the absence of an independent UN human rights instrument, and as a result of insufficient engagement with the topic of age discrimination at the international level, there is a lack of clarity on how States should seek to give effect to their equality and non-discrimination obligations towards older people. This lack of clarity does not absolve States of their duty to eliminate discrimination against older people. Nor does it indicate an absence of rights or of protection. Rather, it demonstrates the need to elaborate and codify the right to non-discrimination as it applies to older people.



Oscar Franklin/Age International

A comprehensive anti-discrimination law

Since June 2020, the Office of the UN High Commissioner for Human Rights and the Equal Rights Trust have been working in partnership to produce a “Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation”.⁶⁸ The guide sets out, for the first time, the core normative content of the rights to equality and non-discrimination, derived from the UN human rights instruments and the interpretation of these instruments by the UN human rights treaty bodies. The guide has been developed in consultation with a broad range of stakeholders, including UN human rights institutions, special procedure mandate holders, governments, national human rights institutions, equality bodies, academics and other experts in equality law and civil society.

The guide confirms that for States to meet their equality and non-discrimination obligations, they must:

- Prohibit discrimination on an open-ended and extensive list of grounds – which must explicitly include age – in all areas of life regulated by law. The law must recognise and protect against all forms of multiple and intersectional discrimination, as well as discrimination based on association and perception, including as they arise on the basis of age or against older people.
- Define and prohibit all recognised forms of discrimination, including direct and indirect discrimination, harassment, denial of reasonable accommodation and segregation. Age-based distinctions may only be justified where necessary, appropriate and proportionate to a legitimate aim. Stereotypes (based on age or other grounds) cannot serve as an objective or reasonable justification, and certain forms of discrimination, such as harassment, can never be justified.

States are required to advance equality for members of groups who experience discrimination, including older people. This, in turn, requires the implementation of a comprehensive package of proactive and targeted equality measures which seek to identify and address structural barriers to equal participation. In this regard, national legislation should:

- Both explicitly permit and require the adoption of positive action measures designed to advance equality for groups exposed to discrimination, including older people. These measures should be proportionate, time limited, and subject to regular review to ensure their continued legitimacy.
- Require the adoption of a comprehensive programme of awareness-raising, education, training and other measures, alongside other measures necessary to combat prejudice, stigma and stereotypes including ageism and other discriminatory stereotypes that may affect older people. Older people and groups working on their behalf should be consulted and actively engaged in the development of such measures, and systems should be put in place for the effective monitoring of the equality law framework.

To give effect to their equality obligations as outlined above, States should enact statutory equality duties that require public authorities and other duty-bearers such as employers and educators to assess the impact of their policies and mainstream the rights of older people in their work. At a minimum, these duties should:

- Require the adoption of equality impact assessment (EIA) to identify, anticipate and eliminate the discriminatory impacts of policies before they are adopted. Such assessment is essential for States to meet their obligations to refrain from discrimination. In completing an EIA, duty-bearers should collect relevant data (including qualitative data) and actively consult and engage older people amongst other groups who may be impacted by the proposed policy.
- Ensure the adoption of specific equality policies and strategies that *inter alia* promote the equal participation of older people in society; and provide for the mainstreaming of the rights of older people in the development of all other policies and strategies (for instance, those concerning employment, education, and public planning or decision-making).

Finally, States must adopt measures to ensure access to justice for older people and other victims of discrimination. While States may adopt slightly different approaches to the enforcement and implementation of equality law, in all cases older people who have been subjected to discrimination must be ensured the right to seek legal redress and an effective remedy. This requires, *inter alia*:

- The establishment and adequate resourcing of institutions empowered to enforce the legal framework. This may include the development of independent equality bodies, which should possess a broad mandate, and promotion, prevention, litigation and support functions.
- The amendment of national rules governing evidence and proof in discrimination cases; and the provision of legal aid and assistance, alongside procedural accommodation and accessibility measures, to remove financial and physical barriers to justice.

The guide confirms that States' obligations can only be met through the adoption of dedicated, comprehensive anti-discrimination legislation. The need for such legislation has been recognised across the UN treaty body system.⁶⁹ The research for this report has demonstrated the clear benefits of approaching the problem of age discrimination and inequality for older people through the enactment, enforcement and implementation of comprehensive anti-discrimination legislation.

The standards set out above provide a sound basis for evaluating the adequacy of national legal frameworks on combatting age discrimination and advancing equality for older people against the relevant international legal standards. It is to this task that the report now turns.



Vitaliy Kononov/HelpAge International

Chapter 2 endnotes

48. International Covenant on Civil and Political Rights, Articles 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2(2).
49. Articles 1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families expressly prohibit age-based discrimination. Additionally, Article 8(1)(b) of the Convention on the Rights of Persons with Disabilities imposes a specific obligation on States to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”. Some regional instruments also list ‘age’ as a protected characteristic. These instruments are discussed in Chapter 1 of this report.
50. The recognition of age as a protected characteristic is discussed in more detail below.
51. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 27.
52. Human Rights Committee, General Comment No. 18, 1989, para. 12.
53. Human Rights Committee, *Love et al. v. Australia*, Communication No. 983/2001, 2003, para. 8.2.
54. In particular, the Committee has recognised States’ obligations to ensure that “laws and their interpretation and application do not result in discrimination in the enjoyment of the right of peaceful assembly, for example on the basis of race, colour, ethnicity, age, (...) or other status”. See Human Rights Committee, General Comment No. 37, UN Doc. CCPR/C/GC/37, 2020, para. 25. See, also, the Committee’s Concluding Observations on Vietnam, UN Doc. CCPR/C/VNM/CO/3, 2019, para. 14; and on Italy, UN Doc. CCPR/C/ITA/CO/6, 2017, para. 9.
55. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 29.
56. See respectively, Committee on Economic, Social and Cultural Rights, General Comment No. 4, 1991, para. 6; General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 33, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 65; and General Comment No. 19, UN Doc. E/C.12/GC/19, 2008, para. 29. It is important to note, however, that the language used by the committee in some of these General Comments does not comply with the human rights-based approach described in Chapter 1 of this report.
57. These concepts are discussed in Chapter 4 of this report.
58. See, respectively: Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 21; Committee on the Elimination of Discrimination against Women, General Comment No. 27, UN Doc. CEDAW/C/GC/27, 2010, para. 13; and Committee on the Elimination of Racial Discrimination, General Comment No. 36, UN Doc. CERD/C/GC/36, 2020, paras. 13, 18, and 60.
59. African Commission on Human and Peoples’ Rights, African Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, Part 1, para. 1(d)
60. Inter-American Court of Human Rights. *Case of Poblete Vilches et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349, para. 122.
61. European Court of Human Rights, *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, 2017, paras. 45, and 48-56; *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, complaint No 74/2011, 2013, paras. 115-117.
62. A notable example of positive engagement in this regard is the CEDAW Committee’s recommendations on Tanzania, which express concern regarding violence against older women accused of witchcraft. See Committee on the Elimination of Discrimination against Women, Concluding Observations: Tanzania, UN Doc. CEDAW/C/TZA/CO/7-8, 2016, paras. 18 and 44. The Concluding Observations of the Committees can be easily accessed through the online Universal Human Rights Index, available at: <https://uhri.ohchr.org/en/>
63. Committee on Economic, Social and Cultural Rights, General Comment No. 21, UN Doc. E/C.12/GC/21, 2009.
64. See International Covenant on Economic, Social and Cultural Rights, Article 26, International Convention on the Elimination of All Forms of Racial Discrimination, Article 5, Convention on the Elimination of All Forms of Discrimination against Women, Article 15, and Convention on the Rights of Persons with Disabilities, Article 5, and the interpretation of these provisions by the treaty bodies.
65. 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.
66. See, in particular, criticisms of the Court of Justice of the European Union in Chapter 4. It should be noted, however, that the court is charged only with the interpretation of European Union Law. Unlike at the international level, there is no broad prohibition of age-based discrimination under the Equal Treatment Directives. To the extent that EU member States have ratified international human rights instruments, they continue to be bound by the equality and non-discrimination obligations of those treaties.
67. *Ibid.*
68. OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation*, forthcoming, 2022, on file with the authors.
69. In respect of those countries that are the subject of this study, see illustratively: Committee on the Elimination of Racial Discrimination, Concluding Observations on Kyrgyzstan, UN Doc. CERD/C/KGZ/CO/8-10, 2018, para. 11; Human Rights Committee, Concluding Observations on Paraguay, UN Doc. CCPR/C/PRY/CO/4, 2019, paras. 14-15; Concluding Observations on the Philippines, UN Doc. CCPR/C/PHL/CO/4, 2012, para. 10; Concluding Observations on the Republic of Korea, UN Doc. CCPR/C/KOR/CO/4, 2015, paras. 12-13; and Concluding Observations on Jordan, UN Doc. CCPR/C/JOR/CO/5, 2017, paras. 8-9; Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C.12/KEN/CO/2-5, 2016, paras. 19-20; Concluding Observations on Tanzania, UN Doc. E/C.12/TZA/CO/1-3, 2012, para. 5; and Committee on the Elimination of Discrimination against Women, Concluding Observations on India, UN Doc. CEDAW/C/IND/CO/4-5, 2014, paras. 8-9.

Chapter 3: National law approaches



Ida Shiang/HelpAge USA

Twelve jurisdictions have been selected as case studies for this report, in order to identify patterns and trends in national legal practice on age discrimination from a range of regions. These jurisdictions are: Argentina, Finland, Great Britain, India, Jordan, Kenya, The Kyrgyz Republic, Paraguay, the Philippines, the Republic of Korea, Serbia, and Tanzania. The countries were chosen in order to ensure that information was collected and compared from diverse regions of the world, including States with different legal traditions and at varying stages of development in the enactment and implementation of equality law.

Acceptance of non-discrimination obligations

Every country examined in this study has accepted obligations to respect, protect and fulfil the rights to equality and non-discrimination, through the ratification of international human rights treaties. Many States are also party to regional human rights instruments which supplement protections provided at the international level. Whilst different processes may govern the incorporation of human rights obligations into the domestic legal order, as noted in Chapter 2, the duty to eliminate discrimination is an overarching obligation.

Ratification of international human rights instruments

Each State considered in the study is a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As noted above, these covenants provide a right to non-discrimination on grounds which include ‘other status’; the bodies responsible for interpreting and monitoring compliance with these covenants have stated unequivocally that ‘other status’ includes ‘age’, amongst other characteristics not explicitly listed in the text of the instruments.

Each of the 12 States has also ratified three ground-specific treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). Again, as noted above, the bodies charged with

interpreting these treaties have each recognised age as a ground of discrimination which intersects with the grounds of discrimination which are the focus of the instrument in question. See Figure 1 below.

In addition to these treaties, each State is party to the Convention on the Rights of the Child; ten are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁷⁰ and three are party to the International Convention for the Protection of All Persons from Enforced Disappearance.⁷¹ Four States are party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which, under Articles 1(1) and 7, expressly prohibits discrimination on the basis of age, amongst other grounds.⁷²

Figure 1: Ratification of / Succession / Accession to the core UN human rights instruments on equality and non-discrimination

No.	Country	ICCPR	ICESCR	ICERD	CEDAW	CRPD
1.	Argentina	8 Aug 1986	8 Aug 1986	2 Oct 1968	15 Jul 1985	2 Sep 2008
2.	Finland	19 Aug 1975	19 Aug 1975	14 Jul 1970	4 Sep 1986	11 May 2016
3.	Great Britain	20 May 1976	20 May 1976	7 Mar 1969	7 Apr 1986	8 Jun 2009
4.	India	10 Apr 1979	10 Apr 1979	3 Dec 1968	9 Jul 1993	1 Oct 2007
5.	Jordan	28 May 1975	28 May 1975	30 May 1974	1 Jul 1992	31 Mar 2008
6.	Kenya	1 May 1972	1 May 1972	13 Sep 2001	9 Mar 1984	19 May 2008
7.	The Kyrgyz Republic	7 Oct 1994	7 Oct 1994	5 Sep 1997	10 Feb 1997	16 May 2019
8.	Paraguay	10 Jun 1992	10 Jun 1992	18 Aug 2003	6 Apr 1987	3 Sep 2008
9.	The Philippines	23 Oct 1986	7 Jun 1974	15 Sep 1967	5 Aug 1981	15 Apr 2008
10.	Republic of Korea	10 Apr 1990	10 Apr 1990	5 Dec 1978	27 Dec 1984	11 Dec 2008
11.	Serbia	12 Mar 2001	12 Mar 2001	12 Mar 2001	12 Mar 2001	31 Jul 2009
12.	Tanzania	11 Jun 1976	11 Jun 1976	27 Oct 1972	20 Aug 1985	10 Nov 2009

Individual communication procedures

A majority of States have recognised the competence of one or more UN treaty body to hear individual complaints. In so doing, the States establish the opportunity for victims of discrimination to bring a complaint to the treaty body established by the instrument in question. Treaty bodies are made up of recognised experts in international human rights law, nominated by their country of origin, and elected by States. Complaints can only be lodged with the treaty bodies following the exhaustion of domestic remedies, and decisions are non-binding. Nevertheless, the individual complaints procedure provides an important avenue for those seeking recognition and remedy for the harm which they have experienced.

Seven States are party to the First Optional Protocol to the ICCPR, which allows individual complaints to be submitted to the Human Rights Committee. By contrast, just two States – Argentina and Finland – have ratified the Optional Protocol to the CESCR.

Four States have made a declaration under Article 14 of the ICERD allowing the CERD Committee to receive individual communications.⁷³ A majority of States permit individual communications under the CEDAW (India, Jordan and Kenya are the exceptions); whilst six States have ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities. See Figure 2 below.

Figure 2: Acceptance of individual communications procedures

No.	Country	CCPR-OP1	CESCR-OP	ICERD (Art. 14)	CEDAW-OP	CRPD-OP
1.	Argentina	Y	Y	Y	Y	Y
2.	Finland	Y	Y	Y	Y	Y
3.	Great Britain	N	N	N	Y	Y
4.	India	N	N	N	N	N
5.	Jordan	N	N	N	N	N
6.	Kenya	N	N	N	N	N
7.	The Kyrgyz Republic	Y	N	N	Y	N
8.	Paraguay	Y	N	N	Y	Y
9.	The Philippines	Y	N	N	Y	N
10.	Republic of Korea	Y	N	Y	Y	N
11.	Serbia	Y	N	Y	Y	Y
12.	Tanzania	N	N	N	Y	Y

Regional human rights instruments

Some of the States are also party to regional human rights instruments; other States have signed only some or none of the instruments in their region, while yet others are in regions without a regional human rights architecture.

Both Kenya and Tanzania have ratified the African Charter on Human and Peoples' Rights, which prohibits discrimination on an open-ended list of grounds. Additionally, In February 2022, it was announced that Kenya had ratified the Protocol to the Charter on the Rights of Older Persons in Africa. However, at the time of writing, the Protocol has yet to enter into force. Tanzania has not yet signed or ratified this instrument.

In January 2016, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa was adopted. However, the Protocol has only been ratified by a handful of States, and is yet to enter into force.

Argentina and Paraguay are both State parties to the American Convention on Human Rights. However, only Argentina has ratified the Inter-American Convention on Protecting the Rights of Older Persons, which provides age-specific equality guarantees. Argentina has also ratified the Inter-American Convention Against all Forms of Discrimination and Intolerance, which expressly lists age as a protected characteristic.⁷⁴ Paraguay has yet to ratify the Convention.

In Europe, three States – Finland, the UK, and Serbia – have ratified the European Convention on Human Rights, which prohibits discrimination under Article 14. However, only Finland and Serbia have ratified Protocol 12 to the convention, which provides a free-standing right to non-discrimination. The UK is the only of the three States not to have ratified the Revised European Social Charter. Finland is an EU member State and is directly bound by the requirements of the Charter of Fundamental Rights of the European Union, which prohibits age discrimination in the application of EU law; and the Framework Employment Directive, which prohibits age discrimination in employment.⁷⁵ As a pre-accession State, Serbia is required to harmonise its legislation with EU law. Following its formal withdrawal from the EU in January 2020, the Charter of Fundamental Rights and the EU Equality Directives are no longer directly applicable in the UK.

The Philippines is a signatory to the ASEAN Human Rights Declaration, which provides, at Article 3, that “[e]very person is entitled without discrimination to equal protection of the law”. However, the declaration is not a legally binding document, and is instead considered a framework for human rights cooperation in the region. The remaining States under review – India, Jordan, the Kyrgyz Republic, and the Republic of Korea – are in regions of the world which do not have regional human rights instruments.

Reception of international law

States adopt different approaches to the incorporation of international human rights obligations in their national legal systems. In some States, such as Kenya, ratified treaties, together with general principles of international law, form part of the domestic legal order without the need for implementing legislation. This is often referred to as a ‘monist’ approach.⁷⁶ In other countries, such as the United Kingdom, human rights instruments need to be domesticated into national law through the legislature.⁷⁷ This is often referred to as a ‘dualist’ approach. In some States, such as Jordan, the status of international law in the national legal system is not clearly defined.⁷⁸

Figure 3: Reception of international law

Formally monist approach	Argentina Kenya The Kyrgyz Republic Paraguay Republic of Korea Serbia
Formally dualist approach	Finland Great Britain India The Philippines Tanzania
Unclear / not-specified	Jordan

In practice, the distinction between ‘monist’ and ‘dualist’ systems is not clear-cut, and other factors, including rules regulating the hierarchy of legal norms, and the direct or indirect effect of treaty provisions, have an important impact on the reception and application of international human rights standards.⁷⁹ States retain discretion as to the means they choose to give effect to their human rights obligations.⁸⁰ However, all States remain bound by the provisions of the treaties they have ratified, irrespective of their method of incorporation.⁸¹

Methods for combatting age discrimination

National legal approaches to combatting age discrimination vary between States. In some countries, comprehensive (or near comprehensive) anti-discrimination laws have been adopted, which prohibit discrimination on an extensive list of grounds – including age – in multiple areas of life. In a number of others, age-specific equality legislation has been enacted, though the scope, content and enforceability of the protections they provide varies significantly. In a third group, there are countries where protections against age discrimination are spread across different laws and policies, which offer varying degrees of protection (and in some cases, very little or no protection at all). Legal approaches to combatting age discrimination can thus be divided into three broad categories:

Figure 4: Legal approaches to combatting age discrimination

Comprehensive approaches	Finland Great Britain Serbia
Age-specific equality law	Argentina The Kyrgyz Republic Paraguay The Philippines The Republic of Korea
Patchwork protection	India Jordan Kenya Tanzania



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Comprehensive approaches

Three States examined in this Study – Finland, Great Britain, and Serbia – have adopted comprehensive (or near comprehensive) anti-discrimination laws that prohibit all forms of discrimination, in all areas of life regulated by law, on an extensive list of grounds which includes age, and which establish clear procedures for enforcement and implementation of the rights to equality and non-discrimination.

- In **Finland** the primary piece of anti-discrimination legislation is the Non-Discrimination Act, which sits alongside gender-specific legislation, criminal sanctions, consumer protection provisions, employment law, and a constitutional equality guarantee.⁸²
- In **Great Britain**, the primary anti-discrimination law is the Equality Act of 2010. The act applies in England, Scotland and Wales, and prohibits discrimination on the basis of age and eight other ‘protected characteristics’.⁸³ Separate laws apply in Northern Ireland.
- In **Serbia**, the main piece of anti-discrimination legislation is the Law on the Prohibition of Discrimination (LPD), which sits alongside gender and disability specific equality laws, constitutional equality guarantees, and anti-discrimination provisions in other legal fields.⁸⁴

All three of these laws prohibit age discrimination in a wide range of areas of life regulated by law. Whilst there are gaps and problems in the legal frameworks of each State, the ‘comprehensive’ approach affords a high degree of protection to older people in practice and establishes a clear structure for promoting equality for members of this group.

Age-specific legislation

In five States – Argentina, the Kyrgyz Republic, Paraguay, the Philippines, and the Republic of Korea – age-specific equality laws have been adopted, which typically sit alongside constitutional equality guarantees, and non-discrimination provisions in other areas of law. In practice, these age-specific equality laws vary significantly in their purpose, scope and effect.

In two States – Paraguay and the Kyrgyz Republic – age-specific equality legislation does not establish an independent and enforceable right to non-discrimination:

- In 2002 **Paraguay** adopted Law No. 1885 on Older Persons. According to the law, older people are afforded priority in areas such as health care, housing, food, transportation, education, and employment. Article 3 of the law declares the right of all older people to non-discrimination in the exercise of public or private functions. However, there are no specific mechanisms established to enforce this guarantee, limiting its effectiveness. The Constitution also prohibits discrimination, although age is not listed as a protected characteristic, and this right cannot be enforced by individual victims. Outside of these laws, singular non-discrimination provisions have also been adopted that apply in particular fields of life. Principal amongst these is the Labour Code, which prohibits discrimination against workers in the area of employment.⁸⁵
- In 2011, the **Kyrgyz Republic** adopted a law “on Senior Citizens in the Kyrgyz Republic”. The law operates primarily as a framework document, establishing specific rules for the development of equality policies and strategies relating to older people. However, it does not create an enforceable right to non-discrimination. The principal guarantee against age discrimination in the country stems from Article 24 of the Constitution, which prohibits discrimination on the basis of age, alongside other grounds. This constitutional protection is accompanied by non-discrimination provisions that prohibit discrimination on different grounds in different areas of life.⁸⁶ The Kyrgyz Republic has also adopted laws on gender equality, the rights of persons with disabilities and people living with HIV, but none of these laws offer explicit protection to older people.

In two States, the Philippines and the Republic of Korea, legislation has been adopted that prohibits age discrimination specifically – and only – in the area of employment:

- For the purposes of this report, the main anti-discrimination law in the **Philippines** is the Anti-Age Discrimination in Employment Act. The act sits alongside gender and disability specific equality legislation,⁸⁷ singular anti-discrimination provisions that prohibit discrimination on different grounds in different legal fields,⁸⁸ and other laws that provide specific rights guarantees for older people.⁸⁹

The Philippines Constitution does not expressly prohibit discrimination, although Section 1 of the Bill of Rights declares that no person shall “be denied the equal protection of the laws”, and Section 11 of Article 2 establishes the responsibility of the State to ensure full respect for human rights. However, as noted in Chapter 4, these provisions lack effective enforcement mechanisms, which limit their scope of application.

- The **Republic of Korea** has adopted several specific equality laws that prohibit discrimination in different areas of life, and provide a framework for promoting equality for particular groups.⁹⁰ Notable amongst these laws is the Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for Older People (the AEP).⁹¹ The act is supplemented by a constitutional equality guarantee, which prohibits “discrimination in political, economic, societal or cultural life on account of sex, religion or social status”.⁹² Age is not expressly listed as a protected characteristic in the Constitution, but the term ‘social status’ is broad in scope and could be interpreted to encompass protection on this ground. In 2001, the Republic of Korea adopted the National Human Rights Commission of Korea (NHRCK) Act, which establishes a national human rights institution mandated to promote and protect the fundamental human rights set out in the Constitution. Age is listed as a ground of discrimination under the Act.⁹³ However, the Commission’s enforcement powers are limited, creating barriers to justice for older people.

One of the countries examined – Argentina – has adopted age-specific legislation that creates an enforceable right to non-discrimination that applies in multiple areas of life.

- In 1988 **Argentina** adopted Federal Law No. 23.592, which contains a broad prohibition of discrimination, although age is not expressly listed as a protected ground. This law supplements constitutional equality guarantees;⁹⁴ provincial-level anti-discrimination legislation;⁹⁵ and discrete non-discrimination provisions in particular legal fields, such as employment.⁹⁶ In 2017, Argentina ratified the Inter-American Convention on the Protection of Human Rights of Older Persons. Due to the unique status afforded to international human rights treaties under the national Constitution, this law operates *de facto* as age-specific equality legislation that can be enforced in national courts.⁹⁷

Patchwork protection

Four States – India, Jordan, Kenya and Tanzania – have not adopted comprehensive or age-specific equality legislation. Protections against age discrimination in these countries are typically weak and fragmented across different laws and policies, providing inconsistent and inadequate protection. Some of these States have adopted criminal sanctions for discrimination. However, the use of criminal law to combat discrimination raises unique issues, including in respect of the requirement in anti-discrimination law to provide for the transfer of the burden of proof and the conflict of this approach with the presumption of innocence.⁹⁸ The discussion of these sanctions therefore falls outside of the scope of the present report.

- In **India**, the primary protection against age-based discrimination stems from the constitutional equal protection clause, which guarantees the right to equality before the law to citizens.⁹⁹ The courts have applied and interpreted this provision, but beyond this, few substantive protections against age-based discrimination are provided under national legislation.
- In **Jordan** Article 6 of the Constitution declares all Jordanians “equal before the law with no discrimination between them in rights and duties even if they differ in race, language or religion”. This article does not expressly list age as a protected characteristic, however the State has indicated in its engagement with the UN treaty bodies that the word ‘Jordanians’ can be interpreted broadly to cover other groups.¹⁰⁰ Outside of this guarantee, Jordan has adopted specific legislation on the rights of persons with disabilities, and singular anti-discrimination provisions, which apply in particular legal fields, none of which expressly list age as a ground.
- Article 27 of the Constitution of **Kenya** provides for equality before the law, and expressly prohibits discrimination by the State or any other person on the basis of age amongst an extensive list of grounds. Some positive judicial practice has arisen in respect of this provision. Guarantees against age discrimination are also included in other laws although age is notably omitted from the (closed) list of grounds in the Employment Act of 2007.
- Article 13 of the Constitution of **Tanzania** prohibits discrimination and declares all people equal before the law, although age is not expressly listed as a protected characteristic. Outside of this constitutional protection, Tanzanian law establishes singular anti-discrimination provisions that apply in different areas of life. The main piece of legislation is the Employment and Labour Relations Act, which prohibits discrimination on the basis of age and establishes equality obligations for employers.

The effectiveness of these patchwork protections depends on a range of factors, which are discussed in the following chapters. In practice, the legal and policy frameworks established in some of these States offer significantly more protection against age discrimination than others.

Summary of approaches

The 12 States examined as part of this report have each adopted different approaches to the elimination of age discrimination, ranging from the adoption of comprehensive anti-discrimination legislation through to the enactment of singular anti-discrimination provisions that vary in their scope of application. The following chapters of this report examine the compliance of these different legal frameworks with international equality and non-discrimination standards. Each chapter begins with a discussion of these international standards, before examining the approach taken in comprehensive systems and then the position in countries with age-specific laws and patchwork provisions

The report finds a strong correlation between the strategy adopted by States, and the relative strength of the legal framework. In those countries where comprehensive anti-discrimination laws have been adopted, protections against age discrimination are better articulated; apply in broader areas of life; and are supported by the enforcement and implementation mechanisms needed to ensure access to justice and remedy. Conversely, States which have adopted either age-specific instruments, or which rely upon a patchwork of individual provisions in their Constitution and other laws, provide levels of protection which are inconsistent and inadequate. Notably, the report finds that – with some limited exceptions – age-specific instruments in the countries under review do not offer significantly enhanced protection from discrimination on the basis of age when compared with States which retain a patchwork of provisions.



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Chapter 3 endnotes

70. India and Tanzania are the only States subject to this study that have not ratified the Convention.
71. This list includes Argentina, Paraguay, and Serbia.
72. This list includes Argentina, Kyrgyzstan, Paraguay and the Philippines.
73. This list includes Argentina, Finland, the Republic of Korea, and Serbia.
74. Inter-American Convention Against all Forms of Discrimination and Intolerance, Article 1(1).
75. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 1.
76. Several States contain elements of this ‘monist approach’. See for example, Constitution of Argentina, Article 75(22); Constitution of Kyrgyzstan, Article 6(3); Constitution of Paraguay, Article 137; Constitution of the Republic of Korea, Article 6(1); and Constitution of the Republic of Serbia, Articles 16, 18, and 194.
77. For instance, in 1998, the Human Rights Act was adopted, expressly incorporating provisions of the European Convention on Human Rights and ensuring its application in UK law. Section 6 of the act imposes a duty on public authorities to respect human rights, whilst Section 3 of the act requires the courts to read – as far as possible – national legislation in a manner compliant with the convention. Finland, India, the Philippines and Tanzania have each been observed to adopt elements of this ‘dualist’ approach.
78. See further, Equal Rights Trust, *Shouting Through the Walls: Discriminatory Torture and Ill-Treatment, Case Studies from Jordan*, 2017, pp.34–35.
79. For further discussion on this point, see European Commission for Democracy through Law, Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, 2014, pp.5–17.
80. Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, 2010, para. 31.
81. In this connection, treaty bodies have emphasised that the provisions of domestic law cannot be relied upon to justify a failure to realise its treaty obligations. The right to non-discrimination forms part of the “object and purpose” of human rights treaties, and cannot be derogated from, including in times of national emergency. See, for instance, Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, paras. 4–5; and Human Rights Committee, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add/11, 2001, para. 8.
82. See respectively, Finland, Non-Discrimination Act (1325/2014); Act on the Equality between Women and Men (609/1986); Criminal Code (39/1889; Employment Contracts Act (55/2001), Section 2; and Constitution of Finland (731/1999), Section 6. This study focuses on the Anti-Discrimination Act as the primary piece of equality legislation. Criminal sanctions fall beyond the scope of this report.
83. Equality Act 2010.
84. Law on the Prohibition of Discrimination (LPD), “Official Gazette of the Republic of Serbia”, No. 22/2009; Law on the Prevention of Discrimination against Persons with Disabilities (LPDPD), “Official Gazette of the Republic of Serbia”, Nos. 33/2006 and 13/2016; Law on Gender Equality (LGE), “Official Gazette of the Republic of Serbia”, No. 52/2021; and Constitution of the Republic of Serbia, 2006, Article 21. For a discussion of non-discrimination provisions or provisions guaranteeing ‘equal rights’ in other legal fields, as well as criminal code provisions, see Equal Rights Trust, *Equality in Practice: Implementing Serbia’s Equality Laws*, 2019, pp.71–78 and Annex 3.
85. Labour Code, Article 9. It should be noted that this provision does not expressly recognise age as a protected characteristic, although age may be encompassed within the term ‘social condition’.
86. For an in-depth assessment of these laws, see Equal Rights Trust, *Looking For Harmony: Addressing Discrimination and Inequality in Kyrgyzstan*, 2016, Chapter 2.2.3.
87. See, in particular, the Magna Carta of Women, and the Magna Carta for Disabled Persons.
88. For example, the Mental Health Act provides that individuals with “any lived experience of any mental health condition” should be able to exercise their rights without discrimination *inter alia* on the basis of age. The Labour Code of the Philippines contains specific provisions prohibiting gender-based discrimination, and age discrimination against children. See Mental Health Act; Labour Code, Articles and 133 and 138.
89. See the Senior Citizens Center Act; the Expanded Senior Citizens Act of 2010; An Act Providing for the Mandatory Health Coverage for all Senior Citizens; and an Act Authorizing the Commission On Elections to Establish Precincts Assigned to Accessible Polling Places Exclusively For Persons With Disabilities And Senior Citizens.
90. See, in particular, the Anti-Discrimination against and Remedies for Persons with Disabilities Act, and the Framework Act on Gender Equality. These laws are supplemented by other ground-specific laws and policies.
91. Act on Prohibition of Age Discrimination in Employment and Employment Promotion for Older People, Article 4-4.
92. Constitution of the Republic of Korea, Article 11.
93. National Human Rights Commission of Korea Act, Article 2(4).
94. Article 16 of the Constitution provides for equality before the law.
95. See in particular, Law No. 5.261 in 2015 (the Buenos Aires Anti-Discrimination Law).
96. Section 17 of Law 20.744 on Employment Contract prohibits discrimination against workers, *inter alia*, on the basis of their age. Under national law, age discrimination may also be punished by criminal sanctions. However, as noted below, the discussion of criminal prohibitions of discrimination falls beyond the scope of this report.
97. There are, nonetheless, caveats to this general rule, which are discussed later in this publication.
98. For detailed discussion of the challenges posed by the use of criminal sanctions in cases of discrimination which do not involve violence or other criminal acts, see: OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation*, forthcoming, 2022, on file with the authors, Part 2(III)(A).
99. Constitution of India, Article 14.
100. See, in respect of women, Committee on the Elimination of Discrimination against Women, *State Party Report: Jordan*, UN Doc. CEDAW/C/JOR/6, 2015, p.11. Notably, Article 6 does not apply to non-citizens.

Chapter 4: The prohibition of age discrimination



As noted in Chapter 2, there has been limited substantive engagement with the topic of age discrimination at the international and regional levels. As a result, little specific guidance has been provided to States on their obligations in this area. Nevertheless, there is a clear consensus on the content of the right to non-discrimination. The right applies equally to all grounds of discrimination – age included. While States obligations in respect of discrimination against older people may not have been elaborated to date, this does not alter the substance of the right to non-discrimination, nor limit its application to older people.

States' international law obligations in respect of the rights to equality and non-discrimination obligations have been compiled and synthesised in the forthcoming Practical Guide on the Development of Comprehensive Anti-Discrimination, developed by the OHCHR in partnership with the Equal Rights Trust. The Guide reflects standards that are firmly established across the international and (in many areas) regional human rights systems.¹⁰¹ The standards as set out in the Guide are used below to discuss the content of the right to non-discrimination and States' obligations to protect it.

Discrimination is defined as “any distinction, exclusion, or restriction which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise,

on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.¹⁰² The term ‘age discrimination’, refers to any of the actions listed above that occurs (exclusively or in part) on the basis of age. From this general definition, the right to non-discrimination can be understood to possess four main components. These are:

- The personal scope of the right (who is protected from discrimination?)
- The material scope of the right (in what areas does the prohibition apply?)
- Forms of prohibited conduct (what constitutes ‘discrimination’?)
- Justification (when might an age-based distinction be permitted?)

For States to meet their equality and non-discrimination obligations, international law recognises that anti-discrimination laws should have a broad personal and material scope, should recognise and define different forms of prohibited conduct, and establish clear rules relating to justification and exception, based on individualised assessment and reasonable and objective criteria. Stereotypes cannot be relied upon to justify differential treatment or impacts. As demonstrated below, the national legal frameworks in many States fall below these standards.

Personal and material scope

As discussed in Chapter 2, international law requires States to prohibit all forms of age discrimination,¹⁰³ though as noted, this prohibition remains unrealised and, to some extent, invisible.

As with other forms of discrimination, age discrimination can be intentional or unintentional, overt or covert, and may be experienced by individuals of all ages, including older and younger people. In some States worldwide, the prohibition of age discrimination is tied to chronological age. For instance, legislation might prohibit discrimination against ‘older people’ who are defined as people aged 65 and above. This approach is problematic and may lead to gaps in protection. In the area of employment, for instance, it has been noted that age discrimination “often starts in mid-life rather than at the later stages of life that governments and employers often define as ‘older age’ by reference to chronological age thresholds”.¹⁰⁴ Age discrimination frequently stems from ageist stereotypes and as we explain in further detail below, people may be treated differently because they are considered ‘elderly’ or ‘old’, irrespective of whether they fall into a particular age cohort.

International law does not distinguish between the experiences of age discrimination at different ages or stages of life, and to meet their obligations, States must ensure that definitions of age discrimination in national laws do not restrict the scope of the right.

Personal and material scope – protections against age discrimination

As noted above, the first dimension of the right to non-discrimination is the personal scope – the grounds of discrimination which are protected. In an assessment of the protection of discrimination against older people therefore, the first question to be examined is, simply, whether the States in question have laws which prohibit discrimination on the basis of age. Given this focus on the protection of a single ground, the most useful way to examine the scope of protection is to consider it together with the question of which areas of life age discrimination is prohibited – that is, to consider the personal and material scope of the protection together.

The right to non-discrimination applies in all areas of life regulated by law. Article 26 of the ICCPR provides that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”, and the Human Rights Committee has noted that this requires the prohibition of discrimination in all areas “regulated and protected by public authorities”.¹⁰⁵ This includes – but is not limited to – activities of the State and the exercise of public functions; employment (including in respect of access to work, pay and conditions and termination); education; health and other public services; social security (including pensions and housing); the provision of goods and services; and

participation in clubs and associations. In order to meet their non-discrimination obligations, States must provide protection from discrimination through the enactment, enforcement and implementation of laws which prohibit discrimination by public and private actors.¹⁰⁶ This includes, but is not limited to, anyone carrying out a public function, employers, educators, healthcare and other public services providers, and the providers of goods and services. **To meet their obligations under international human rights law, States must ensure that their national legislation prohibits discrimination on the basis of age (and other grounds) by public and private actors in all areas regulated by law.**

The majority of the countries that are included within this report have adopted laws that expressly prohibit age discrimination.¹⁰⁷ However, the material scope of these laws and provisions differs significantly. The broadest scope of protection is afforded in those countries where comprehensive anti-discrimination legislation has been enacted.

Comprehensive approaches to combatting age discrimination

The Finnish Non-Discrimination Act prohibits discrimination on an open-ended list of grounds that expressly includes age. It applies to both public and private activities (‘religious activity’ and private and family life are outside the scope of the law) and it also defines specific obligations for employers, educators and public authorities to promote equality.¹⁰⁸

In Serbia, the Law on the Prohibition of Discrimination has a similarly broad personal scope, prohibiting discrimination on the basis of an open-ended and extensive list of grounds that expressly includes age. Article 13 of the law defines “severe forms of discrimination”, which – since June 2021, includes “provoking and encouraging inequality, hatred and intolerance on the grounds of (...) age”. Furthermore, Article 23 establishes a general prohibition of age discrimination, noting the right of the older people “to dignified living conditions without discrimination, and in particular the right to equal access and protection from neglect and harassment in the use of health and other public services”. The obligation to “respect the principle of equality” (including the right to non-discrimination) applies to “everyone”,¹⁰⁹ defined under Article 2 to include all individuals “residing on the territory of the Republic of Serbia or a territory under its jurisdiction, regardless of whether that individual is a national of the Republic of Serbia, some other State or a stateless person, as well as any legal entity registered or operating on the territory of the Republic of Serbia”.¹¹⁰ The law has a broad material scope: Part III of the law prohibits discrimination in different areas of life, including labour relations; the provision of public services, and use of public premises and public spaces; education; and the provision of health care services.¹¹¹ This list has recently been expanded to include the area of housing.¹¹²

Unlike the two laws referenced above, the prohibition of discrimination under Great Britain's Equality Act of 2010 contains a closed list of grounds and age is expressly listed as a protected characteristic.¹¹³ The Equality Act has a broad material scope, creating obligations for both public and private bodies in different areas of life.¹¹⁴ However, the act does not apply to Northern Ireland, which is governed by separate regulations.¹¹⁵

These regulations only apply in specific fields, and there is no express protection against age discrimination in the provision of goods and services, contrary to the requirements of international law. Northern Ireland's equality body has called for reform in this area,¹¹⁶ and UN treaty bodies have urged the UK to ensure equal legal protection across the whole territory of the United Kingdom.¹¹⁷

Age discrimination in Northern Ireland: A submission from the Equality Commission¹¹⁸

There are significant gaps between equality law in Great Britain (GB) and Northern Ireland (NI); gaps which have widened following the introduction of single equality legislation in Great Britain – the Equality Act 2010. These differences mean that in a number of key areas, individuals in Northern Ireland have less protection against discrimination and harassment than people in other parts of the United Kingdom.

At present, in Northern Ireland age discrimination law only applies to employment, vocational training and further and higher education. There is currently no protection in Northern Ireland against age discrimination when accessing goods, facilities and services, in the exercise of public functions, and by private clubs or associations. Included within the Equality Act 2010 are provisions that ban age discrimination in the provision of services and public functions, which came into force in Great Britain on 1 October 2012.

The Equality Commission in Northern Ireland continues to call for age equality legislation to be strengthened and extended in Northern Ireland – including to protect people of all ages against unlawful age discrimination and harassment when accessing goods, facilities and services. If introduced, this legislation will have a significant impact on addressing key inequalities which older people, young adults, and children and young people face when accessing goods, facilities and services whether they are provided by the public, private and voluntary/community sectors. For example, when accessing health and social care, financial services (such as grants, loans, credit or finance or insurance) and other services (such as retail services or transport provision), or facilities for entertainment.

It is important that people of all ages do not receive an inferior service or have access to a product restricted simply on the basis of their age. Everyone, regardless of their age, has the right to be treated fairly and have the opportunity to fulfil their potential.

Age-specific equality legislation and patchwork protections

The material scope of anti-discrimination law in the other countries considered as part of this report – those which do not have comprehensive anti-discrimination law – varies significantly.

A majority of States have adopted **constitutional equality guarantees**. In principle, these provisions have a wide scope, however, there are many factors that may limit the level of protection afforded in practice. Some Constitutions, such as that of the Kyrgyz Republic, expressly prohibit age discrimination. Others, such as the equality provisions of the Constitutions of Jordan and the Republic of Korea, do not make this protection explicit.¹¹⁹ As discussed in further detail below, in some States, such as the Philippines, constitutional equality protections are largely rhetorical or declaratory – there are no practical mechanisms available to enforce these guarantees. These protections can also vary in respect of duty-bearers.¹²⁰ Perhaps the biggest limitation of these provisions is that they rarely establish any clear procedure for victims to bring claims to court, including in particular the specific procedural rules relating to the transfer of the burden of proof in discrimination cases which are necessary for the effective functioning of the right. As discussed in further detail in Chapter 7, this is a significant shortcoming, and may impede access to justice for victims. Moreover, as set out below, these laws rarely specify the forms of conduct that are prohibited, resulting in possible gaps in coverage.¹²¹

Of all the countries examined, Argentina's Constitution offers *de facto* the greatest degree of protection against discrimination through the direct incorporation of international human rights treaties.¹²² Where an individual's right has been violated, they may launch *amparo* proceedings (a specific proceeding for the protection of constitutional rights) seeking an end to the discriminatory conduct. A civil claim for damages may also be initiated under the Civil Code.

Both Kenya and India have broad constitutional equality and non-discrimination guarantees that can be relied upon by individuals in national courts to assert their rights.¹²³ However, of the two, only Kenya's Constitution expressly lists age as a protected characteristic. Article 27(1) establishes the right of “every person” to equality before the law and equal protection of the law. The right to equality includes “the full and equal enjoyment of all rights and fundamental freedoms”.¹²⁴ Article 27(4) of the Constitution expressly prohibits the State from discriminating against individuals on the basis of their age, amongst other grounds. Non-state actors must also refrain from discrimination on this ground, by virtue of Article 27(5). In addition to these guarantees, Article 57 of the Constitution requires the State to adopt specific measures to ensure to older people the right to “fully participate in the affairs of the society; to pursue their personal development; to live in dignity and respect and be free from abuse; and to receive reasonable care and assistance”. The Constitution of India contains a closed list of grounds which omits age, although the national courts have recognised protection against forms of age discrimination in some limited cases.

In the Kyrgyz Republic, age discrimination is prohibited under Article 24 of the Constitution. None of the Constitutions of the Republic of Korea, Tanzania, or Jordan make this protection explicit. Article 11 of the Constitution of the Republic of Korea does provide protection against discrimination on the basis of ‘social status’.¹²⁵ Similarly, Article 13(5) of the Constitution of Tanzania prohibits discrimination on the basis of a person's ‘station in life’. Both of these provisions are broad enough, in principle, to encompass protection against age discrimination, however, there has been limited judicial practice on this point. The Jordanian Constitution lists just three grounds – race, language and religion – in its principal equality guarantee.¹²⁶



The Philippines Constitution does not expressly prohibit discrimination, although Section 1 of the Bill of Rights declares that no person shall “be denied the equal protection of the laws”, and Section 11 of Article 2 notes the responsibility of the State to ensure full respect for human rights. The Constitution also establishes some specific rights guarantees for older people.¹²⁷ However, these provisions do not give rise to an individual cause of action and are therefore of limited effect. In Paraguay, Article 46 of the Constitution declares that “inhabitants of the Republic are equal in dignity and rights”. This same provision sets out a broad prohibition of discrimination. However, no grounds are listed under this article, and it is unclear, therefore, whether ‘age’ would be recognised as a protected characteristic. Moreover, as noted under the heading of enforcement, below, there are no clear mechanisms established under the Constitution to enforce this guarantee, and so its impact is substantively limited.

Outside of these constitutional guarantees, a number of States have enacted **age-specific equality laws**, though many of these laws have significant weaknesses.

As noted above, the Kyrgyz Republic adopted the Law “On Senior Citizens in the Kyrgyz Republic”. The law provides the framework for the development of State policy in relation to ‘senior citizens’, who are defined as men aged 63 and over, and women aged 58 and over, who have reached retirement age.¹²⁸ Articles 4 and 5 of the law establish the main principles of State policy in this area, whilst Article 8 provides for the engagement and participation of older people in policy development. Article 10 of the law contains a broad non-discrimination guarantee. However, no enforcement mechanisms are established under the law meaning that this provision is largely aspirational.



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Paraguay has also adopted a specific law on the rights of older people: Law No. 1885 of 2002 on Older Persons. According to the law, older people are afforded priority in areas such as health care, housing, food, transportation, education, and employment. Article 3 of the law further establishes the right of all older people to non-discrimination in the exercise of public or private functions. It is notable that Law No. 1885 only prohibits discrimination against older people, who are defined under the law as people aged 60 years and older. Other people who experience discrimination due to perceptions relating to their age that fall outside of this chronological age group (for instance, workers in their 50s who are perceived as elderly due to their hair colour, or workers in their 40s perceived to possess weaker technology skills due to ageist stereotypes) are not protected. This is a significant protection gap. Moreover, as with the Constitution, there are no specific mechanisms established to enforce this guarantee, limiting its effectiveness. Outside of these laws, singular non-discrimination provisions have also been adopted that apply in particular fields of life. For instance, Article 9 of the Labour Code prohibits discrimination against workers on the basis of “race, colour, sex, religion, political opinion, or social condition”. Whilst age is not expressly listed as a protected characteristic, it could be considered a form of ‘social condition’. Article 47 of the code further provides that clauses of employment contracts which set lower salaries based on age, amongst other factors, shall be declared null and void.

Two countries, the Republic of Korea and the Philippines, have adopted age-specific legislation that prohibits discrimination on the basis of age in the area of employment, the contents of which are discussed in more detail throughout the remainder of this report.

In addition, many States have adopted **singular anti-discrimination provisions in different legal fields**. These provisions vary both in their material scope (the areas of life covered) and their personal scope (the grounds that are protected). Most countries under review have adopted provisions that prohibit discrimination in employment, although in some States these laws do not provide express protection against age discrimination.

The main piece of employment legislation in Jordan is the Labour Law, which, *inter alia*, contains provisions on wage equality for women, and protection against unfair dismissal for particular groups (including members of trade unions, pregnant women, and for people on sick leave). None of these provisions provide explicit protection to older workers. In 2019, the Labour Law was revised to prohibit the automatic termination of contracts upon reaching the retirement age.¹²⁹ Whilst this is a welcome development, the law as a whole offers few substantive legal protections against age discrimination.

Under Article 3 of the law, particular categories of workers are excluded from protection, including public employees, family members of an employer, domestic workers and certain agricultural workers. Specific bylaws have been adopted relating to members of the civil service. Under Article 4 of the bylaws, non-discrimination on the basis of gender, race, religion, or social status is stated as a general principle of the civil service. Again, this list does not explicitly reference older people, although age could – in principle – be considered as a form of social status. Article 67 of the bylaws requires civil service employees to observe the principle of non-discrimination in their work, and in their interactions with the public. However, the law does not establish effective enforcement mechanisms, limiting the impact of this guarantee.

In the Kyrgyz Republic, several specific non-discrimination provisions have been adopted.¹³⁰ The main prohibition of discrimination applies in the area of employment: Article 9 of the Labour Code provides that “everyone has an equal opportunity to exercise their labour rights and freedoms”, and that “no one” may be restricted in the exercise of these rights “or receive any advantages in their realisation on the basis of (...) age” amongst other grounds.¹³¹ Discrimination on the basis of age is also prohibited under Criminal Code.¹³²

In Kenya, singular non-discrimination provisions have also been adopted that apply in particular fields of life.¹³³ Principal amongst these is the Employment Act of 2007, which, at Section 5(3)(a), prohibits discrimination in both public and private sector employment. Age is not expressly listed as a protected characteristic under this provision, although national courts have held that age discrimination is prohibited under the act.¹³⁴

Tanzania has also adopted equality protections in its labour legislation that prohibit discrimination on the basis of age and establish particular equality obligations for employers.¹³⁵

In many States, **specific equality legislation** has also been adopted, which prohibits discrimination against groups such as women and persons with disabilities. As noted below, some older people may benefit from protection under some of these laws, although this is by no means a straightforward process.

In 1988, Argentina adopted Federal Law No. 23.592. Article 1 of the law contains a general prohibition of discrimination, which has a broad scope. Accordingly, “any person”, who “in any way impairs the full exercise on an equal footing to the fundamental rights and guarantees recognised in the National Constitution, shall be obliged, at the request of the injured party, to render the discriminatory act without effect or cease to perform it and repair the moral and material damage caused”.

As such, the provision is open-ended in respect of grounds of discrimination. However, the article also provides that “particular consideration shall be given to discriminatory acts or omissions founded on motives such as race, religion, nationality, ideology, political or trade union opinion, sex, wealth, social status or physical characteristics”. Age is not expressly included within this list, although the term ‘physical characteristics’ may encompass protection on this ground. The reference to discriminatory ‘motives’ is potentially problematic: international law recognises that discrimination may be committed intentionally or unintentionally. Moreover, unlike laws adopted at the provincial level, the act does not provide for the adoption of specific equality measures or establish detailed rules for the enforcement of the anti-discrimination framework.¹³⁶

Discrimination based on association or perception

There is an established consensus at the international level that a person does not need to possess a particular characteristic in order to benefit from protection against discrimination, and that discrimination may occur on the basis of the perception that an individual has a particular characteristic, or their association with someone who possesses a characteristic. For example, the CRPD Committee has noted that discrimination on the basis of disability may occur against people “who are presumed to have a disability, as well as those who are associated with a person with a disability”.¹³⁷ Similarly, the CESCR Committee has noted that the ban on discrimination covers acts based on a person’s “association with a group characterised by one of the prohibited grounds (...) or [a] perception by others that an individual is part of such a group”.¹³⁸

In many cases, discrimination on the basis of age occurs due to perceptions relating to ageing, even if a person does not identify as being an older person, or if they do not fall into a particular age cohort. For example, a person may be treated differently in employment because they have greying hair. Similarly, a person with dementia may be denied access to healthcare because their medical conditions are considered a consequence of older age.¹³⁹ Discrimination may also occur due to an individual’s association with an older person. For example, a family member providing care for an older person with disabilities may be treated differently than a similarly aged person providing care for a child. **To ensure that all forms of age discrimination are prohibited, national legislation must therefore recognise and prohibit age discrimination based on perception and association.**

Comprehensive approaches to combatting age discrimination

In the three countries that have adopted comprehensive anti-discrimination legislation, there are clear protections against discrimination based on perception and association.

Section 8(1) of Finland's Non Discrimination Act prohibits discrimination based on a (real or inaccurate) perception that a person belongs to a protected group, or due to a person's association with someone who belongs to such a group. Similarly, the Serbian Law on the Prohibition of Discrimination states that discrimination may be "overt or covert", involve both acts and omissions, and includes discrimination based on association and perception.¹⁴⁰ In Great Britain, the Equality Act of 2010 does not explicitly define these concepts in relation to older people, but both concepts have been recognised by the courts.¹⁴¹

Age-specific equality legislation and patchwork protections

Protections afforded against discrimination based on association and perception in other countries that were examined as part of this report are either absent or far less developed. None of the Indian, Kenyan, Kyrgyz, Paraguayan, Tanzanian, or Jordanian laws expressly recognises the principles, resulting in possible protection gaps. In other countries, these concepts have been recognised only partially, in respect of distinct groups.

Both the Philippines and the Republic of Korea have adopted specific legislation on the rights of persons with disabilities. In the Republic of Korea, Section 6 of the Anti-Discrimination against and Remedies for Persons with Disabilities Act prohibits discrimination based on a 'presumed' disability. Similarly, the definition of 'disability' under the Magna Carta for Disabled Persons in the Philippines includes people "regarded as having (...) an impairment".¹⁴² Section 36(d) of the Act also prohibits discrimination in the provision of goods and services against a person due to their association or relationship with a person with disabilities. Together, these provisions would offer direct protection to older people who are presumed to have an impairment for reasons relating to their age, or on the basis of their association with a protected person (for example, when refused access to a service when providing care for a person with disabilities). Nevertheless, these provisions clearly provide only a very narrow base of protection from discrimination on the basis of perception or association for persons with disabilities.

The Constitution of Argentina does not expressly prohibit discrimination based on association or perception. However, as the Constitution incorporates international law, and as each of these concepts has been recognised by UN treaty bodies, a degree of protection is – at least in principle – afforded under national law.



Multiple and intersectional discrimination

The concept of 'intersectionality' recognises that "different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics involved".¹⁴³ For example, as the UN Independent Expert on the enjoyment of all human rights by older persons has noted, while older men are often "seen as wise and experienced", older women face "pressure to hide physical signs of ageing".¹⁴⁴ Such attitudes lead to distinct experiences of discrimination. Older women working in high profile positions within the media, for instance, may be replaced by younger women considered 'more attractive'. In this situation, discrimination does not arise solely on the basis of gender or age – older men and younger women may both be employed within an organisation. Instead, the harm arises at the intersection of these grounds, resulting in unique disadvantage.

Intersectional discrimination affecting older people can occur on the basis of any combination of age and other protected characteristics. The UN Special Rapporteur on the rights of persons with disabilities, for instance, has noted that older persons with disabilities may be denied access to assistive devices "because they are seen as incapable or unwilling to adopt and adapt to new technologies".¹⁴⁵ Older LGBT people may feel more pressure to conceal their sexual orientation, gender identity or expression, due to historic discrimination, leading to worse healthcare outcomes.¹⁴⁶ Older people may also experience intersectional discrimination for reasons relating to their age and ethnicity, health status, or religion, amongst other grounds. **To address these forms of harm, a specific response is needed from States, which includes the adoption of legislation that prohibits discrimination based on multiple, and intersecting grounds.**

Several UN treaty bodies have recognised that the prohibition on discrimination includes intersectional age discrimination.¹⁴⁷ Notably, in 2018, a complaint was brought under the individual communications procedure established under the Optional Protocol to the CESCR.¹⁴⁸ The applicant was an older woman who had worked for several years as an unpaid domestic worker. She had been disqualified from eligibility to a pension scheme due to a short period of non-contribution. In the applicant's submission, this disqualification, alongside the absence of a general non-contributory pension scheme, indirectly discriminated against women contrary to Articles 2(2) and 3 of the Covenant, and violated the right to social security, as established under Article 9. The CESCR agreed with this assessment. According to data collected within the State "those engaged exclusively in unpaid domestic care work" were "almost entirely female".¹⁴⁹ Finding a violation of Article 2(2) of the Covenant, the CESCR acknowledged the importance of recognising the specific interaction between the applicant's age and gender, which meant that they were "particularly vulnerable to discrimination in comparison with the general population".¹⁵⁰ In this context, the scheme required a high level of scrutiny, and in the present case, its differential impact could not be justified.¹⁵¹

Comprehensive approaches to combatting age discrimination

To differing extents, forms of multiple discrimination have been recognised in each of the countries that have adopted comprehensive anti-discrimination laws. However, in comparison with other areas – in which these laws broadly comply with international standards – in this area, these laws contain gaps and weaknesses that may undermine protections afforded in practice.

Section 14 of the Equality Act of Great Britain prohibits "combined discrimination". The wording of this provision is problematic, as it is limited to claims that are based on just "two grounds" of discrimination. Moreover, unlike other provisions of the act, Section 14 has not been brought into force, meaning that there is currently no protection against multiple discrimination.

Despite the clear recommendations of the bill's drafting committee,¹⁵² the Non-Discrimination Act of Finland does not expressly prohibit intersectional discrimination. The government has noted that such discrimination is prohibited under national law, and there is some relevant practice from the National Non-Discrimination and Equality Tribunal of Finland to this effect, in cases concerning multiple gender and age discrimination.¹⁵³

Nonetheless, the lack of explicit protection is a notable protection gap, and the Ministry of Justice has recommended that "legal safeguards (...) be developed to better recognise multiple discrimination and the particularly vulnerable position of its victims in both support services and the judicial process".¹⁵⁴

Multiple and intersectional discrimination are both listed as severe forms of discrimination under the Serbian Law on the Prohibition of Discrimination.¹⁵⁵ Whilst this recognition is positive, international human rights law does not distinguish intersectional discrimination as a more serious form of harm than discrimination that occurs on the basis of a single ground.

Age-specific equality legislation and patchwork protections

In those countries that have adopted age-specific equality legislation, and those which provide patchwork protection, guarantees against intersectional discrimination arising on the basis of age and other characteristics are weak or absent.

In Paraguay and India, none of the laws or provisions prohibiting discrimination include an express protection against multiple discrimination.

In the Kyrgyz Republic, none of the laws discussed above provide express protection against multiple or intersectional discrimination. Whilst the State has adopted specific laws on gender equality, the rights of persons with disabilities and people living with HIV/AIDS, these laws do not explicitly prohibit discrimination on the basis of age or a combination of characteristics.¹⁵⁶

In Kenya, with one small exception, none of the laws outlined above provide express protection against multiple or intersectional discrimination occurring on the basis of age or any other grounds. Section 2 of the Persons with Disabilities Act defines the term 'discriminate' to include differential treatment based 'solely or mainly' on the ground of disability. Although age is not listed as a potential source of differential treatment, multiple discrimination based on the grounds of age and disability could – in principle – be covered by this provision. However, disability must be the 'main' cause of disadvantage, limiting the scope of protection.

In Jordan, Article 27 of the 2017 Law on the Rights of Persons with Disabilities discusses the need to ensure that institutions for 'the elderly' are made accessible to persons with disabilities, including through the adoption of accessibility measures and reasonable accommodation. Similarly, Article 29 of the law calls for the mainstreaming of the rights of persons with disabilities in the development of poverty alleviation strategies and policies developed for the welfare of the elderly, as well as in programmes on the detection and prevention of violence. However, there is no general recognition of a prohibition of multiple or intersectional discrimination under the law or in other legislation.

The Constitution of Tanzania does not expressly define the term ‘discrimination’ to include forms of multiple or intersectional discrimination. The extent to which these concepts are recognised is therefore unclear. The same is true of the Employment and Labour Relations Act, with one exception: the harassment of an employee under Section 7(5) of the act is prohibited on the basis of “any one, or combination of grounds”. Different wording is used under Section 7(4), and it is therefore unclear whether the prohibition of intersectional discrimination in employment applies to other forms of discrimination. Tanzania has adopted specific legislation on the Rights of Persons with Disabilities. This act provides that the government shall “prohibit all forms of discrimination on the basis of disability and guarantee [to] persons with disabilities equal and effective legal protection against discrimination on all grounds”.¹⁵⁷ Section 6(c) of the act further requires government to “take appropriate measures” to advance equality for persons with disabilities and “to ensure that reasonable changes are provided to persons with disabilities of all ages and gender”. On this basis, the act appears to provide some protection against intersectional discrimination arising on the basis of age and disability. However, this is not explicit, and no national judicial practice could be found to support this interpretation.

In the Philippines, the Anti-Age Discrimination in Employment Law does not expressly prohibit multiple or intersectional discrimination. However, the State has adopted specific legislation on the rights of women, which provides protection for older women exposed to intersectional discrimination. Under Section 4(b) of the Magna Carta of Women, discrimination against women is defined to include “discrimination compounded by or intersecting with other grounds, status, or condition,

such as ethnicity, age, poverty, or religion”. The law also contains a specific provision, which sets out the responsibility of the State to protect older women from forms of gender discrimination.¹⁵⁸

In the Republic of Korea, none of the laws previously referenced expressly prohibit multiple or intersectional discrimination. The personal scope of these laws is therefore ambiguous. However, the State has adopted specific legislation on the Rights of Persons with Disabilities, which may provide some protection to older people. In particular, Article 5 of the Anti-Discrimination against and Remedies for Persons with Disabilities Act provides that “where two or more causes of discrimination exist and a disability is deemed to be a primary basis, such acts shall be deemed discrimination”. Although age is not listed as a potential cause, multiple discrimination based on the grounds of age and disability would – in principle – be covered by this provision. However, disability must be the ‘primary’ cause of disadvantage, limiting the scope of protection which it provides.

In Argentina, national legislation does not expressly define the concepts of multiple and intersectional discrimination. However, each of these concepts has been recognised by international and regional human rights bodies and so – in principle – falls within the scope of protection of Argentinian law. Multiple discrimination is explicitly prohibited under Article 2 of the Inter-American Convention on Protecting the Human Rights of Older Persons, including discrimination on the basis of (older) age and one or more additional grounds (such as disability, or gender). As the Convention creates an enforceable right to non-discrimination within the State, there would, therefore, appear to be clear protection in this area.



Fedaa Qatatah/Help Age International

Prohibited conduct

Discrimination may be manifested in different ways and accordingly, international law recognises a number of different forms of discrimination – forms of prohibited conduct. States are required to ensure that all forms of discrimination are recognised and prohibited under their domestic law. Capturing developments in understanding at the international level, the CRPD Committee’s General Comment No. 6, published in 2018, identifies four ‘main forms’ of discrimination that must be recognised, defined and prohibited if States are to meet their obligations to protect the right to non-discrimination.¹⁵⁹ These include:

1. direct discrimination;
2. indirect discrimination;
3. denial of reasonable accommodation; and
4. harassment.

These four forms of prohibited conduct have also been recognised by the other UN treaty bodies and by regional bodies as forms of discrimination prohibited under the instruments which they interpret.¹⁶⁰

Forms of prohibited conduct recognised under international law

Direct discrimination occurs when people “are treated less favourably than other persons because of a different personal status in a similar situation for a reason related to a prohibited ground”.¹⁶¹ Direct discrimination involves differences in *treatment*. For example, a manager at an electronics store may adopt a policy of rejecting applicants over the age of 50, because of an ageist assumption about the digital literacy skills of individuals belonging to this age group. Here, people over the age of 50 are being treated differently from other applicants. This is a typical example of direct age discrimination. However, it is important to note that direct discrimination may be both intentional – as in this case – and unintentional, and that it may also be both overt and covert.

Indirect discrimination occurs where “laws, policies or practices [which] appear neutral at face value (...) have a disproportionate negative impact on a person” on the basis of a protected characteristic.¹⁶² While direct discrimination relates to differential treatment, indirect discrimination involves identical treatment, but with differential *impacts*. For example, a hospital may adopt a policy during a national pandemic of delaying non-urgent surgeries, to ensure greater hospital capacity and to limit the number of hospital acquired infection cases. This policy may disproportionately impact older people, who may rely more on these services, due to health needs associated with ageing. To determine whether a policy having this disproportionate impact is discriminatory would require an assessment of justifications, which are discussed further below.

It is important to note that the difference between the two forms of discrimination is not one of intent.¹⁶³ A directly discriminatory policy or decision might be adopted with no aim or intention of discriminating. For example, an employer at a warehouse advertising a job which requires heavy lifting may decide not to employ an older person due to health and safety concerns. Here the decision not to hire is ostensibly linked to the applicant’s own welfare or indeed to the employer’s understanding of relevant regulations. However, the decision here is built upon ageist and paternalistic assumptions, rather than an appraisal of each prospective employee’s ability to meet the inherent requirements of the job itself. If the employer in this circumstance feared that the applicant could not complete the tasks required by the job (which may constitute a valid justification for differential treatment) the discrimination could be averted by implementing a test designed to replicate actual job requirements.

To meet their equality and non-discrimination obligations, States are required to ensure that their national legislation addresses both direct and indirect discrimination arising on the basis of age.¹⁶⁴

Reasonable accommodation is defined in Article 2 of the CRPD as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. The denial of reasonable accommodation is defined as a form of disability discrimination under the Convention.¹⁶⁵ The concept has also been employed in broader contexts. For instance, the UN Special Rapporteur on the right to freedom of belief, has noted the importance of accommodations on the ground of religion.¹⁶⁶ Similarly, the UN Special Rapporteur on the rights of persons with disabilities has applied the concept at the intersection of ageing and disability.¹⁶⁷

It should be noted that a general duty to provide reasonable accommodations to older people has not been expressly recognised by any of the UN treaty bodies. However, such a duty may be implied. As noted at the outset of this chapter, the ICCPR and ICESCR establish rights to non-discrimination which apply to all grounds recognised under international law and, to the extent that a reasonable accommodation is required to ensure the enjoyment of rights without discrimination, failure to provide it would constitute a violation. Accommodations are frequently needed to avoid the indirectly discriminatory impact of a policy or programme. For example, an older person wishing to register for a particular social security benefit might experience difficulties completing an online form, because they do not have access to a home computer. To avoid this discriminatory impact, a government might arrange for the printing and distribution of physical forms at local advice centres for those who require them and arrange for their free postage and return. Other examples of reasonable accommodations to older people might include modifying a role or permitting a more flexible

working schedule for older employees; improving the physical accessibility of a building to accommodate the mobility needs of older people, and modifying equipment, or purchasing assistive devices to accommodate the needs of older people with disabilities. **To be effective, anti-discrimination legislation should provide a general right to reasonable accommodation. This right should extend, *inter alia*, to all older people.**

Whether an accommodation is ‘reasonable’ depends on its success in achieving its objective.¹⁶⁸ For example, an employee might request an altered working schedule to accommodate weekly medical appointments. If an employer offered a single day’s leave, this would not be ‘reasonable’ as it would not address the needs of the employee. A legitimate justification for the denial of a reasonable accommodation may be that it imposes an ‘undue burden’ on the accommodating party.¹⁶⁹ For example, an employer at a small organisation may not have the financial capacity to reassign an older employee with mobility issues to a new role if they cannot complete work tasks. It may, however, be possible to share responsibilities between current staff members, which would remove this barrier to equal participation. It should be noted that the CRPD Committee has also clarified that the right to non-discrimination includes a right to procedural accommodation as an aspect of ensuring equal access to justice for persons with disabilities; unlike other forms of reasonable accommodation, procedural accommodations are not subject to the undue burden test. It is not clear whether and to what extent a right to procedural accommodations extends beyond the ground of disability, though there are compelling reasons to recognise a need to remove age-specific barriers as an aspect of States’ obligation to ensure equal access to justice.¹⁷⁰

Harassment is defined as “unwanted conduct related to (...) prohibited grounds [which] takes place with the purpose or effect of violating the dignity of a person [or] of creating an intimidating, hostile, degrading, humiliating or offensive environment”.¹⁷¹ It should be noted that ‘harassment’ based on a ground such as age is distinct from sexual harassment, which concerns acts of a sexual nature. The prohibition of ground-based harassment is widely recognised as a form of discrimination by the UN treaty bodies. However, there has been little discussion of the application of the concept to age as a protected characteristic. As part of their thematic mandate, the UN Independent Expert on the enjoyment of all human rights by older persons has expressed concern regarding harassment in the area of housing, noting the continued ‘threats’ made against older people “to make them leave their place of residence” as part of gentrification processes.¹⁷² The CRPD Committee has noted that harassment may take many forms including “actions or words that have the effect of perpetuating (...) difference and oppression”.¹⁷³

An example in the context of age discrimination may include the situation where a manager makes repeated negative comments about the capabilities of an older employee during staff meetings. **To be effective, anti-discrimination legislation should ensure that all forms of ground-based harassment, including harassment on the basis of age, are prohibited.**

In addition to the ‘main’ forms of discrimination set out above, treaty bodies have also recognised **victimisation** as a form of prohibited conduct which falls within the scope of the right to non-discrimination. The term refers to “adverse treatment or adverse consequences as a reaction to complaints or to proceedings aimed at enforcing compliance with equality provisions”.¹⁷⁴ This would include, for example, the situation where an older person – having made a complaint about age-based discrimination experienced in the workplace – is subsequently assigned menial work tasks and is excluded from important meetings.

Segregation is recognised under international law as a form of discrimination which applies in respect of a wide range of grounds. Although segregation on the basis of age has only been discussed to a limited extent by the treaty bodies,¹⁷⁵ it is particularly important in the context of older people’s rights due to the common practice of placing older people in “long-term care facilities” where staff routinely “exercise control over [a] person’s daily life and make decisions about the person’s care, including their placement in segregated, locked wards”.¹⁷⁶ In some States, older people are denied equal legal capacity, restricting their right to independence and ability to challenge care decisions. Addressing this practice, the UN Special Rapporteur on the rights of persons with disabilities has urged States to move towards a more inclusive, support-based approach to care.¹⁷⁷ Similarly, the CRPD Committee has noted States’ obligations to address the segregation of older people with disabilities, and to replace “substituted decision-making regimes with supported decision-making alternatives”.¹⁷⁸ Any decision that implicates an individual’s right to live independently as a member of the community, according to the CRPD Committee, should be appealable, with “age-appropriate procedural accommodations” provided to ensure older people access to justice.¹⁷⁹

In some States these concepts may be treated as discrete forms of harm; in others they may be seen to derive from the general prohibition of direct discrimination, indirect discrimination, and harassment. Victimisation is also frequently discussed as an element of access to justice. Irrespective of their conceptualisation, **it is important that both segregation and victimisation are effectively prohibited under national law.**



Comprehensive approaches to combatting age discrimination

By a clear margin, the legislative frameworks of those States that have adopted comprehensive anti-discrimination law come closest to compliance with international legal standards in respect of the definition and prohibition of the different forms of prohibited conduct.

In Finland, the Non-Discrimination Act explicitly defines direct discrimination, indirect discrimination, harassment, instruction or order to discriminate, and victimisation as forms of prohibited conduct.¹⁸⁰ Denial of reasonable accommodation is also prohibited; however, the personal scope of protection is confined to the ground of disability.¹⁸¹ Human rights organisations have noted that in some situations, a medical diagnosis may be required before an accommodation is provided. In practice “these restrictions [may] create additional difficulties for older people to receive equal treatment as old age disabilities are not necessarily linked to a specific condition, while medical professionals tend to attribute some of the difficulties encountered ‘just to old age’”.¹⁸²

The Equality Act in Great Britain explicitly defines direct discrimination, indirect discrimination, harassment, and victimisation as forms of prohibited conduct.¹⁸³ Denial of reasonable accommodation is also prohibited; however, as in Finland, the personal scope of protection is confined to the ground of disability.¹⁸⁴

In Serbia, Article 5 of the Law on the Prohibition of Discrimination defines forms of prohibited conduct to include:

1. direct discrimination;
2. indirect discrimination;
3. violation of the principle of equal rights and obligations;
4. victimisation;
5. associating for the purpose of exercising discrimination;
6. hate speech;
7. harassment, degrading treatment and sexual harassment; and
8. incitement to discrimination.¹⁸⁵

Segregation is also prohibited.¹⁸⁶ Each of these forms of discrimination is detailed under Articles 5–12 of the law. Whilst denial of reasonable accommodation is not explicitly listed as a form of discrimination, the amended Article 14 provides that “employers are obliged to take appropriate measures, if necessary, in a particular case in order to provide access, reasonably adapted workplace, participation, professional development and advancement in the work of employees who are in an unequal position in relation to other employees”. This requirement applies *inter alia* to ‘the elderly’. Consistent with international standards, the denial of an accommodation in employment is not prohibited, where such an accommodation imposes a “disproportionate burden on the employer”. Measures will not be considered disproportionate, if they can be “reduced by appropriate public and employment policy measures”.¹⁸⁷ The recognition of a right to reasonable accommodation for older people under Article 14 of the law is a positive development: providing a means to remove barriers for older people in the workplace and ensure their equal participation. However, denial of reasonable accommodation is not recognised as a discrete form of discrimination, and the duty only applies in the area of employment, excluding other areas of life where such accommodations may be required, such as the provision of goods and services.

Age-specific equality legislation and patchwork protections

As in other areas, the recognition of forms of prohibited conduct in those countries that have adopted age-specific equality legislation and patchwork discrimination protections varies significantly. In the majority of cases, national laws do not explicitly define any of the forms of prohibited conduct listed above, though in a number of jurisdictions, provisions guaranteeing the right to non-discrimination could be interpreted by national courts as covering certain forms, in addition to direct discrimination.



In Kenya, the Constitution expressly prohibits direct and indirect discrimination by State and non-State actors.¹⁸⁸ However, other forms of conduct are not listed, resulting in uncertainty in the coverage of the law. Like the Constitution, Section 5(3) of the Employment Act of 2007 prohibits both direct and indirect discrimination. The harassment of an employee is also prohibited. Whilst this term is not defined, Section 6 of the act defines sexual harassment as a separate form of harm. Consequently, it may be inferred that the reference to ‘harassment’ under Section 5(3) refers to ground-based harassment. A definition of harassment is included in the National Cohesion and Integration Act of 2008 as “unwanted conduct which has the purpose or effect of violating [a] person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment”.¹⁸⁹ This definition is consistent with international law and best practice.¹⁹⁰ However, the act does not expressly refer to older people, and the ban on harassment only covers the ground of ethnicity. Nonetheless, this definition may offer interpretive guidance to national courts in their application of Section 5(3) of the Employment Act. None of the above laws expressly recognise denial of reasonable accommodation as a form of discrimination, either on the basis of age, or other grounds. The Constitution does not expressly recognise **denial of reasonable accommodation** as a form of discrimination. However, in recent cases, Kenyan courts have noted that Article 27 may include a duty to

accommodate.¹⁹¹ This duty is made explicit under the Persons with Disabilities Act, which obliges certain duty-bearers, including employers and educators, to make reasonable accommodations to persons with disabilities.¹⁹² However, judicial understanding of the concept is still at an emerging stage in development in Kenyan jurisprudence, and to date, it has not been applied to the ground of age.

The Constitution of India does not expressly define forms of prohibited conduct, although it is clear that the ban encompasses direct discrimination. In recent cases, the Supreme Court of India has also recognised the concept of indirect discrimination, although it has described jurisprudence in this area as being “at a nascent stage” of development.¹⁹³ Sexual harassment is prohibited under the Sexual Harassment of Women at Workplace Act of 2013. However, the act only affords protection to women and its material scope is limited to the area of employment. Indian legislation does not expressly recognise ground-based harassment as a form of prohibited conduct, contrary to best practice. Denial of reasonable accommodation is listed as a form of disability discrimination under the Rights of Persons with Disabilities Act, and the act makes clear that “all forms of discrimination” are covered.¹⁹⁴ However, other forms of discrimination are not expressly listed, and in the absence of a clear ban on intersectional discrimination, the law is of limited relevance to older people, including those that experience disadvantage on the basis of their age and disability.

With one small exception, Kyrgyz legislation does not define forms of prohibited conduct: the prohibition of direct and indirect gender-discrimination is made explicit under Article 5 of the Law “on State Guarantees of Equal Rights and Equal Opportunities for Men and Women”.¹⁹⁵ However, this law does not expressly apply to older people, and there has been little judicial practice relating to indirect discrimination on other grounds.¹⁹⁶ Other forms of discrimination, including ground-based harassment, denial of reasonable accommodation, or victimisation are not defined as forms of prohibited conduct under national law, and the extent to which these concepts are covered by the constitutional equality guarantee or Labour Code protections is unclear.

In the Philippines, the Anti-Age Discrimination in Employment Law does not define forms of prohibited conduct. Direct discrimination in job adverts, appointment, terms and conditions of service, training opportunities, promotion, and termination, is clearly prohibited.¹⁹⁷ However, other forms of discriminatory conduct, such as indirect discrimination, harassment, or denial of reasonable accommodation, are not listed. At the time of writing, there have been no Supreme Court judgments relating to the interpretation of the law, and it is therefore unclear whether any of these forms of harm are covered. The Magna Carta of Women provides protection against both direct and indirect forms of gender discrimination affecting older women.¹⁹⁸ These forms of discrimination are also prohibited under the Magna Carta for Disabled Persons, which additionally requires that reasonable accommodations are provided to persons with disabilities in specific areas of life. However, as noted, there is no express prohibition of intersectional discrimination under this law and protections to older people are, therefore, limited. Moreover, the denial of reasonable accommodation (in the form of modifications) is only recognised as a form of discrimination in the provision of goods and services.¹⁹⁹ The Committee on the Rights of Persons with Disabilities has criticised the law in this regard.²⁰⁰ Amendments to the Magna Carta in 2006 add a new offence of ‘public ridicule’, which may offer some protection against harassment to persons with disabilities. However, this offence is broadly defined, and differs from the definition of harassment adopted by the CRPD Committee.²⁰¹ Moreover, again, it does not expressly protect older people. Some accommodating measures for older people are required under separate legislation.²⁰² However, there is no general requirement to provide reasonable accommodation to older people in the Philippines.

The Constitution of the Republic of Korea does not define forms of prohibited conduct. Similarly, whilst the National Human Rights Commission of Korea Act clearly prohibits direct discrimination and sexual harassment,²⁰³ other forms of discriminatory conduct are not listed, and it is unclear whether these forms of harm are covered.

The prohibition of age discrimination is set out under Article 4-4 of the AEPA. Under Article 4-4(1) direct discrimination is prohibited in the areas of:

1. recruitment and employment,
2. salary, the provision of money and valuables and other welfare benefits,
3. education and training,
4. placement, transfer, or promotion, and
5. retirement or dismissal.

Article 4-4(2) further provides that “any markedly disadvantageous result caused to a certain age group as a result of applying standards other than age without justifiable grounds is deemed age discrimination”. This provision has been interpreted as a prohibition of indirect discrimination.²⁰⁴ Article 4-9 of the AEPA prohibits victimisation. According to that provision, “no employer shall engage in any unfavourable treatment, such as dismissal, transfer, or disciplinary action, against a worker on the ground that the worker has filed a petition, lawsuit or report, or provided data, response or testimony regarding an act of age discrimination banned by this act”.²⁰⁵ Violation of this provision may result in a prison sentence of up to two years, and a fine of up to 10 million KRW.²⁰⁶ Contrary to best practice, harassment and denial of reasonable accommodation are not explicitly recognised as forms of discrimination under the AEPA, limiting the protective scope of the law. This is a notable gap. Ground-based harassment and denial of reasonable accommodation are prohibited under the Anti-Discrimination against and Remedies for Persons with Disabilities Act. Some protection may, therefore, be afforded to older people through Article 5 of the law, which – as noted above – prohibits discrimination based on “two or more causes”. However, this protection would only extend to older persons with disabilities. In addition, the definition of harassment differs in significant respects from that adopted by the Committee on the Rights of Persons with Disabilities.²⁰⁷

The ban on discrimination in Tanzania clearly encompasses direct discrimination. However, other forms of prohibited conduct are not clearly defined under national law, and the extent to which they are prohibited is unclear. Article 13(2) of the Constitution provides that no law shall discriminate in its “purpose or effect”. This phrase can be interpreted to cover laws and policies that have an indirectly discriminatory effect, although the concepts are not identical, and the CEDAW Committee has criticised Tanzania for failing to explicitly prohibit indirect gender discrimination under its Constitution.²⁰⁸ Both direct and indirect age discrimination are expressly prohibited under Section 7(4) of the Employment and Labour Relations Act.²⁰⁹ Harassment of an employee is also listed as a form of discrimination, although the term ‘harassment’ is not defined.²¹⁰ Section 29(3) of the Employment and Labour Relations Code of Good Practice specifies that harassment may include acts “of a sexual nature or otherwise”, indicating that both sexual harassment and ground-based harassment are covered.

Denial of reasonable accommodation is identified as a form of disability discrimination under the Act on the Rights of Persons with Disabilities. As noted above, this act requires government “to ensure that reasonable changes are provided to persons with disabilities of all ages”.²¹¹ However, there is no general duty to accommodate older people, and the concept is not included in national employment law.

National law in Argentina does not expressly define different forms of prohibited conduct, but through the direct incorporation of international and regional human rights instruments in the national legal system, direct discrimination, indirect discrimination, harassment, and denial of reasonable accommodation, are each – in principle – prohibited within the State. However, it should be noted that the understanding of these concepts has developed over time through treaty body practice. Without a clear definition of these forms of conduct under national legislation, older people and duty-bearers may be unclear of their legal rights and obligations, creating barriers to justice in practice.

In Paraguay, none of the laws governing the right to non-discrimination distinguish, or define, different forms of prohibited conduct. Whilst direct discrimination would clearly fall within the legal provisions on the right to non-discrimination, it is not clear whether indirect discrimination or ground-based harassment, are covered.

In Jordan, the constitutional equality guarantee does not define forms of prohibited conduct and the extent to which the constitutional equality guarantee encompasses these forms of discrimination is unclear. Similarly, discrimination is not defined under the Labour Law or Civil Service Bylaws. The Law on the Rights of Persons with Disabilities does refer to “direct or indirect” restrictions or limitations of rights in its definition of disability discrimination, which also includes the denial of reasonable accommodation. However, this law does not expressly extend to discrimination on the basis of age. There is no general prohibition of ground-based harassment under Jordanian law.²¹²



Phillip Sheppard/LSHTM

Justifications and exceptions

Not every differentiation will result in a finding of discrimination. There are sometimes valid reasons for distinguishing between groups, or for adopting a rule, policy or practice that has a differential impact. However, these cases are rare, and international law requires that any justification for differential treatment or disproportionate impact arising on the basis of a ground are carefully scrutinised and well evidenced by reference to a standard set of criteria. As noted above, relatively few cases of age discrimination have been heard by the UN human rights treaty bodies. However, a detailed justifications framework has been developed in relation to the right to non-discrimination broadly, irrespective of the ground at issue. **To comply with their equality and non-discrimination obligations, States are required to apply these principles in all discrimination cases, including those based on age.**

The justification test under international human rights law

In cases concerning direct and indirect discrimination, the CESCR Committee and the Human Rights Committee have held that a differentiation can only be justified when it is based on “**reasonable and objective**” criteria.²¹³ In their practice, these bodies have distilled this test into three central components: to avoid a finding of discrimination, measures adopted must pursue a **legitimate aim** and be **necessary** and **proportionate** to that aim.

The first stage of the justification test involves “an assessment as to whether the aim and effects of [a] measure or omissions are legitimate”.²¹⁴ In practice, a wide range of aims may be considered ‘legitimate’. However, in different contexts, UN treaty bodies have consistently recognised that for an aim to be legitimate, it must not be based on discriminatory stereotypes. In its recent General Recommendation on Racial Profiling, for example, the CERD Committee has noted that the use of police powers cannot be justified by reasons relating to an individual’s race.²¹⁵ Similarly, the CESCR Committee has noted that the refusal to hire “women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men” is not a valid justification.²¹⁶

Once the first stage of the justification test is satisfied, it must still be shown that there is “a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects”.²¹⁷ The test of proportionality is a holistic one, which seeks to ensure that the harm caused by the less favourable treatment or policy impact does not outweigh the benefits of the aim pursued.

The final element of the justification test is the condition of necessity.²¹⁸ The Human Rights Committee has explained that this condition requires an assessment of possible alternative measures, to identify whether the legitimate aim pursued could be achieved through “less restrictive means”.²¹⁹

As noted, this three-part test – assessing legitimate aim and then examining whether the means to achieve that aim are proportionate and necessary – applies in respect of discrimination arising on any ground. However, the application of the test can result in different outcomes, including outcomes which are inconsistent with a human rights approach to the rights of older people. Thus, for example, in *Solis v. Peru*, the Human Rights Committee considered ‘age’ to be an “objective distinguishing criterion” without assessing whether there were reasonable and objective grounds to justify an age differentiation.²²⁰ Such cases underscore the need for a specific international instrument on the rights of older people, to increase understanding of ageism and the need to ensure that stereotypes based on age do not lead to incorrect findings that discriminatory conduct is justified.

Comprehensive approaches to combatting age discrimination

Each of those States that has adopted comprehensive anti-discrimination legislation has adopted clearly defined rules relating to justification in discrimination cases. However, in some of these States, age is treated differently from other characteristics. This is clearly highly problematic, as it has the effect of limiting the scope of the protection available to older people exposed to discrimination.

In Great Britain, direct discrimination under the Equality Act can *only* be justified if it is on the ground of age.²²¹ Direct discrimination arising on other grounds cannot be justified, but may be the subject of a specific exception provided in the law. The test for justification of direct age discrimination is stated in exactly the same terms as the test for justification of indirect discrimination on all grounds. Jurisprudence establishes that the range of legitimate aims that can be relied on to justify *direct* age discrimination is confined to labour market and social policy objectives. The UK Supreme Court has noted that direct age discrimination – such as mandatory retirement – may only be justified by legitimate aims related to employment policy, the labour market and vocational training, and that a distinction must be drawn between these types of social policy objectives, and purely individual reasons that are specific to the situation of a particular employer such as cost reduction or improving competitiveness, which cannot be used to justify differential treatment.²²² National courts and tribunals have accepted different aims as legitimate, including the need to guarantee the ‘dignity’ of older people and to ensure ‘intergenerational fairness’. These objectives are frequently underpinned by ageist assumptions and generalisations regarding working capacity.²²³

It is thus extremely important that arguments made to support the legitimacy of such aims are carefully scrutinised and well evidenced.

In the UK, once a legitimate aim for direct age discrimination has been evidenced, it must still be shown that measures adopted are proportionate.²²⁴ For example, in a recent case before an employment tribunal, a professor challenged the University of Oxford's Employer Justified Retirement Age (EJRA) policy, which required all its academics to retire at the end of the academic year preceding their 68th birthday, unless they were able to make a successful application for an extension. Such extensions were only granted in exceptional circumstances. The university highlighted five aims of the EJRA policy, of which the employment tribunal accepted the following four as legitimate:

1. safeguarding high standards,
2. intergenerational fairness,
3. facilitation of succession planning and
4. promoting equality and diversity.

The tribunal considered that in order to be proportionate to the clear and extensive direct discrimination, the EJRA needed an extremely effective way of achieving its legitimate aims. It was not immediately obvious that the policy was beneficial, and the university was unable to present concrete evidence to demonstrate its effectiveness. The employment tribunal therefore upheld the claim of direct age discrimination.²²⁵

The Non-Discrimination Act of Finland establishes specific rules relating to justifications and exceptions. Section 11(1) of Chapter 1 of the act provides that a differentiation on any ground, including age, will not constitute discrimination if it is "based on legislation and it otherwise has an acceptable objective and the measures to attain the objective are proportionate".



Centre for Ageing Better

As part of making an assessment against these criteria, the courts have stressed that a differentiation will "not be permissible if the means used were inappropriate or excessive (...) or if the means used were not necessary, because the same aim could have been achieved by other means more compatible with equal treatment".²²⁶ The requirement that justifications are prescribed by legislation is exempted under Section 11(2), "if the treatment has an acceptable aim in terms of basic and human rights, and the measures to attain the aim are proportionate". Certain areas of life, grounds of discrimination, and duty-bearers are excluded from the ambit of this provision.²²⁷ Section 12(1) of the act further provides that unequal treatment may be justified where "the treatment is founded on genuine and determining requirements concerning the type of occupational tasks and their performance, and the treatment is proportionate to achieve the legitimate objective". This provision is supplemented by Section 12(2), which establishes a specific exception relating to age. Accordingly, "different treatment based on age (...) is also justified if the treatment has an objectively and appropriately justified employment policy objective or an objective concerning the labour market, or if the different treatment is attributable to the age limits adopted for qualification for retirement or invalidity benefits". Thus, in this respect, age is treated differently from other protected characteristics under the Non-Discrimination Act. This exception is particularly problematic as older people often experience discrimination in the workplace and in accessing services.

In Serbia, the LPD specifies that differential treatment on the basis of age may be justified only where measures adopted pursue a legitimate aim and are necessary and appropriate to that aim.²²⁸ Examples of legitimate differences in treatment are set out under Article 23, which largely mirrors the wording of Article 6(1) of the European Union Framework Employment Directive. This includes, for instance, the setting of special conditions of training and employment, including in relation to the remuneration and dismissal of older people to "ensure their protection" – a broad term which could be open to paternalistic or otherwise stereotyped interpretations. Article 16 contains a general exception relating to genuine occupational requirements, which applies in the area of work. To be legitimate, measures adopted pursuant to this provision must be 'justified'. Concerningly, Article 16 also permits the adoption of "protection measures" for certain categories of people. This includes, for example, pregnant women, persons with disabilities, and parents amongst others. Whilst older people are not expressly included in this list, there is a risk that paternalistic measures built on ageist assumptions could be adopted with the goal of 'protecting' older workers, particularly given the wording of Article 23. It is important, therefore, that Articles 23 and 16 are interpreted narrowly and strictly in line with the State's broader human rights obligations.

Exceptions and stereotypes

Under the European Union Framework Employment Directive, direct and indirect discrimination on the basis of age can be justified, provided that measures adopted “within the context of national law, they are objectively and reasonably justified by a legitimate aim (...) and if the means of achieving that aim are appropriate and necessary”.²²⁹ The provision lists “legitimate employment policy, labour market and vocational training objective” as examples of legitimate aim.

In this way, age is treated differently from other grounds included in the directive, which prohibits direct discrimination on other grounds in all circumstances, except where a specific exception is established under national law. Article 4(1) of the directive provides that Member States may permit a differentiation relating to a protected ground “where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective [pursued] is legitimate, and the requirement is proportionate”.²³⁰

The Court of Justice of the European Union has noted that in cases of direct age discrimination “a high standard of proof” is required to establish “the legitimacy of the aim relied on as a justification”.²³¹ In practice, however, it has been observed that duty-bearers have been “emboldened by the opportunity to justify direct discrimination”²³² and in some cases, decisions of the court reflect ageist stereotypes. In its recent assessment of practice under the directive, Age Platform Europe has noted that “national and EU courts still consider age discrimination as less severe compared to other grounds and reflect biases about the ability of older people to work”.²³³ The report highlights the importance of adopting an individualised approach to the assessment of a person’s capacity to perform a job, rather than relying “on stereotypical or age-based assumptions”.²³⁴

No exceptions are established to the prohibition of discrimination under the core UN human rights treaties – instead, the justification test discussed above is applied. However, the Human Rights Committee has recently had the opportunity to examine State practice in respect of exceptions, in a case concerning gender discrimination.²³⁵ Italian legislation established a minimum height requirement for employment as a firefighter. This requirement was shown to have a disproportionate impact on the employment of women, who are statistically shorter than men. The State argued that the requirement was “justified by the specific duties assigned to the professional firefighters” which “required particular physical strength and an adequate weight/power ratio”.²³⁶ Applying the standard established by Equal Treatment Directives, Italy noted that “a special derogation from the prohibition on discrimination” was therefore appropriate.²³⁷ The Human Rights Committee rejected this argument. Whilst the objective of ensuring the effectiveness of the fire services was legitimate, the height requirement was “neither necessary or proportionate to the legitimate aim pursued” as there was no clear link between the measure and the capacity of the applicant to perform the requirements of the role, which could have been tested by other means.²³⁸ Through this case, the committee highlighted the importance of individualised assessment of capacity to work and reinforced its position that stereotypes or general assumptions cannot form the basis of justification.

Age-specific equality legislation and patchwork protections

Rules relating to justification differ in each of those countries that have adopted age-specific equality legislation, and patchwork discrimination protections.

Due to an absence of discrimination norms, in Jordan there is no specific justification test set out in legislation. In Argentina, by contrast, the general rules of international law should apply.

In Tanzania, section 7(6)(b) of the Employment and Labour Relations Act specifies that it shall not be discrimination “to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”. According to Section 30(5) of the Employment and Labour Relations Code of Good Practice, selection criteria and conditions of employment should be audited by an employer “to ensure they strictly relate” to inherent job requirements.²³⁹ With regard to training, performance evaluation, and promotions and transfers, employers are required to ensure that “opportunities are determined objectively without discriminating against any groups or classes of employees”.²⁴⁰ These requirements are necessary to ensure that measures adopted are proportionate to their aim and do not rely on ageist or other stereotypical assumptions.

Article 27 of the Constitution of Kenya does not set out specific rules relating to justifications and exceptions, although it does require the State to adopt particular measures designed to advance equality for certain marginalised groups, which may require preferential treatment. These measures are discussed under the heading of positive action, below. The right to equality is listed as a fundamental right, and Article 24(1) of the Constitution provides that such rights “shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. In determining whether a limitation is reasonable, enforcement bodies should have regard to the “nature of the right”, the “importance of the purpose of the limitation”, the “nature and extent of the limitation”, and the availability of any “less restrictive means” to achieve the stated goal. These requirements reflect different aspects of the justification test established under international law, and in some cases national courts have evaluated discrimination claims by reference to the legitimate aims and proportionality of adopted policies.²⁴¹ The Employment Act of 2007 sets out specific exceptions to the prohibition of discrimination. Section 5(4) provides that it shall not be discrimination to “distinguish, exclude or prefer any person based on an inherent requirement of a job”; to “employ a citizen in accordance with the national employment policy”; or to “restrict access to limited categories of employment where it is necessary in the interest of State security”.²⁴²



Malik Alymkulov/HelpAge International

These provisions are drafted broadly, and no criteria are specified for evaluating the legitimacy of measures adopted. This creates a risk that ageist assumptions could be used to justify differential treatment in cases concerning older people, contrary to the requirements of international law and best practice. It is important, therefore, that Section 5(4) is interpreted narrowly, in view of Kenya’s broader human rights obligations. In particular, the UN treaty bodies have stressed that stereotypes cannot be used to justify an otherwise discriminatory policy or practice.²⁴³

In the Kyrgyz Republic, Article 23(2) of the Constitution provides that human rights may be “limited by the Constitution and laws” for specific purposes, including the protection of national security, public order, health and morals, and the rights and freedoms of others. A specific exception to the prohibition of discrimination is provided under Article 9 of the Labour Code, which states that the “establishment of differences, exceptions, preferences and restrictions, which are determined by the requirements inherent in a particular type of work, established by law” shall not constitute discrimination. Differential treatment may also be permitted when “conditioned by the special care of the State for people in need of increased social and legal protection”. As discussed below, this exception is highly problematic. Several age discrimination cases have been heard by the Constitutional Chamber of the Supreme Court. In many of these cases, the court has upheld age-based distinctions, such as those requiring the mandatory retirement of certain classes of worker, as legitimate.²⁴⁴ As set out above, under international human rights law direct discrimination such as this may only be justified in severely limited circumstances and as such, judicial practice in the Kyrgyz Republic does not conform to these standards.

Indian legislation does not establish specific rules relating to justification in discrimination cases,²⁴⁵ although the non-discrimination Articles of the Constitution do permit the State to make “special provision” for certain categories of person, which may *de facto* permit differential treatment in certain circumstances.²⁴⁶ In its case law on Article 14 of the Constitution, the Supreme Court of India has found that differences in treatment may be justified in particular contexts. The court has distinguished illegitimate “class legislation” from permissible “reasonable classification”.²⁴⁷ In order to demonstrate that a classification is reasonable, it “must be founded on an intelligible differentia which distinguishes those that are grouped together from others” and “the differentia must have a rational relation to the object sought to be achieved by the act”.²⁴⁸ It must also be shown that the distinction is not arbitrary.²⁴⁹

In the Philippines, Section 6 of the Anti-Age Discrimination in Employment Law establishes a series of exceptions to the prohibition of age discrimination. Where an employer can demonstrate that “age is a *bona fide* occupational qualification reasonably necessary in the normal operation of a particular business or where [a] differentiation is based on reasonable factors other than age”, there will be no finding of discrimination. Implementing regulations, adopted by the Department of Labor and Employment (DOLE) in 2017, require employers relying on an exception established under Section 6 of the law to “submit a report prior to its implementation to the DOLE regional office which has jurisdiction over the workplace”. Non-compliance with this requirement “shall give rise to the presumption that the employer is not allowed to set [the adopted] age limitation”. Conversely, compliance with the obligation will give rise to a presumption that the age-based distinction is lawful. The regulations do not specify how this presumption may be rebutted, and in practice the notification system may operate as a substitution for assessment of the legitimacy and necessity of measures, thereby permitting age discrimination against older people. These exceptions are drafted extremely broadly and there is a real risk that ageist assumptions could be used to justify differential treatment in cases concerning older people, contrary to the requirements of international law and best practice. Other justifications for age-based distinctions allowed under Section 6 include an intention to “observe the terms of a *bona fide* seniority [wage] system” or “a *bona fide* employee retirement or a voluntary early retirement plan”. The Labour Code establishes a compulsory retirement age of 65 years old. An earlier retirement age may also be established by a collective bargaining agreement or contract of employment.²⁵⁰ The topic of mandatory retirement is discussed in further detail below.

In the Republic of Korea, Article 4-5 of the AEPA sets out a series of exceptions to the prohibition of age-based discrimination. Where an employer can demonstrate that “a certain age limit is (...) required in view of the nature of the relevant duties”, or where “supportive measures are taken for maintaining and promoting the employment of a certain age group” there will be no finding of discrimination. These provisions are drafted broadly, creating a risk that ageist assumptions could be used to justify differential treatment in cases concerning older people, contrary to the requirements of international law and best practice.

The AEPA sets a mandatory retirement age of 60 years or older.²⁵¹ The UN Independent Expert on the enjoyment of all human rights by older persons has called for the abolition of mandatory retirement, which is built upon ageist assumptions relating to older age.²⁵² The OECD has also recommended that the Republic of Korea move in to abolish the mandatory retirement system.²⁵³ If an employer sets the retirement age lower than 60 years, the retirement age will be automatically extended.²⁵⁴ In the situation where a person has been forced to retire, but wishes to be re-employed, an employer “shall endeavour to re-employ him or her in a type of occupation that suits his or her ability to perform the duties”. This duty is mandatory for employers of a certain size.²⁵⁵ The act does not establish how an individual’s ‘working abilities’ should be assessed. In practice, these provisions may permit the dismissal of older workers and their reemployment in less prominent positions on lower pay. These issues are further complicated in the Republic of Korea, by the *de facto* operation of a seniority wage system, which sees older workers earning more as they approach the retirement age. Article 19-2 of the AEPA provides that an employer who extends the retirement age to 60 years or above should consider restructuring its wage system to address this issue. However, the act does not offer guidance on how new wage levels should be set, and ‘wage-peak’ systems, introduced by some employers, may detrimentally affect the rights of older workers.²⁵⁶ Measures to address the seniority wage system, as well as the practice of ‘honorary retirement’ are also needed to effect long-term institutional change.²⁵⁷

In Paraguay, non-discrimination provisions do not establish specific rules relating to justification in discrimination cases, although a particular exception to the ban is established under Article 3 of Law No. 1885. That provision clarifies that the prohibition of discrimination against older people may not apply to persons with “physical or mental disabilities”. The wording of this provision is highly stigmatising. This exception is extremely broad in its scope and is built upon negative stereotypes relating to ageing and disability. In this regard, Article 3 clearly falls short of the requirements of international law, which provides that the right to non-discrimination should apply equally to all people sharing a protected characteristic.

Mandatory retirement: emerging practice

An important emerging topic of age discrimination law is the question of mandatory retirement ages. As noted by Byrnes and others, mandatory or compulsory retirement “involve[s] the termination of the employment of a person who does not wish to leave their job on the basis that they have reached a particular age”.²⁵⁸ Thus, such arrangements are a violation of Article 6(1) of the ICSCR, which establishes *inter alia* the “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”, read together with Article 2(2).

Whilst many countries have removed mandatory retirement age provisions from their national legal frameworks, or else only apply them in relation to certain specific professions, they continue to be enforced in others. Mandatory retirement has been justified on different bases, commonly involving some notion of fostering ‘inter-generational fairness’ and the need to integrate younger people into the workforce.²⁵⁹ A study on this topic, submitted by a group of experts to the 11th Session of the UN Open-Ended Working Group on Ageing, found that these justifications “nearly always involve the use of ageist assumptions and stereotypes” and were “not supported by the available evidence”.²⁶⁰

Retirement ages have drawn the attention of UN treaty bodies on different occasions, and the practice of these bodies has evolved. In the early case of *Love and Others v. Australia*, the Human Rights Committee held that a mandatory retirement age of 60 for airline pilots was based on reasonable and objective criteria. In its decision the committee noted that the policy was adopted with the “aim of maximising safety to passengers, crew and persons otherwise affected by flight travel”, which constituted “a legitimate aim under the Covenant”.²⁶¹ In the later case of *Albareda and others v. Uruguay*, the question of retirement ages came before the committee once again, this time in the context of a differentiation between different categories of civil servants.²⁶² The Supreme Court of Uruguay had suggested that this difference in treatment could be justified on the basis that an individual’s reflexes and memory may decline with age.²⁶³ The committee rejected this analysis, finding a violation of Article 26 of the ICCPR. Whilst noting that a mandatory retirement age “for a particular occupation does not *per se* constitute discrimination on the ground of age”, in the present case, the State had not provided good reasons justifying the differential treatment.²⁶⁴

In 2021 the OHCHR questioned whether the approach taken by courts to justification in the area of mandatory retirement was “consistent with contemporary notions of the equal enjoyment of human rights by older persons”.²⁶⁵ The UN Special Rapporteur on the rights of persons with disabilities has been even more explicit on this point, describing mandatory retirement provisions as “discriminatory” and “an arbitrary restriction on the right to work”.²⁶⁶ In her recent report, the UN Independent Expert on the enjoyment of all human rights by older persons has made similar observations.²⁶⁷

The prohibition of age discrimination – conclusions

In respect of the scope of the right to non-discrimination – and the forms of discrimination prohibited – there is a clear distinction between the three States which have adopted comprehensive anti-discrimination laws and the remaining nine. With the exception of weaknesses in respect of provision for multiple discrimination in Great Britain and Finland, the laws in these three States provide levels of protection from discrimination on the basis of age which are broadly consistent with international standards.

Uniquely among the other States, Argentina provides the best level of protection, by virtue of the direct legal effect given to the Inter-American Convention on the Protection of Human Rights of Older Persons under the Constitution. This means that the legal system provides protection – in principle – from direct discrimination, indirect discrimination, harassment, and denial of reasonable accommodation on the basis of age, in all areas of life regulated by law. However, as many of these concepts are incorporated into national law from the international system, there is a lack of clarity as to their interpretation and application at the national level.

Of the remaining eight States – including the five which have enacted specific equality legislation for older people – the scope of protection and the range of prohibited conducts are limited, patchy and inconsistent with international standards. In the absence of comprehensive anti-discrimination legislation, few of these States provide effective protection from age discrimination in all areas of life regulated by law. Only Kenya and India have broad constitutional equality and non-discrimination guarantees that apply across all areas of life and can be relied upon by individuals in national courts to assert their rights, though the Constitution of India does not explicitly list age as ground of discrimination. The Constitution of the Kyrgyz Republic applies broadly, but only to legislation, not to the acts of public or private actors. None of the Constitutions of Paraguay, the Republic of Korea, Tanzania, or Jordan make this protection explicit, leaving individuals to rely on legislation which applies only in certain areas of life.

Similarly, none of the States which have not enacted comprehensive anti-discrimination laws define and prohibit all forms of discrimination recognised by international law. The Constitution of Kenya prohibits both direct and indirect discrimination, while age-specific legislation in the Republic of Korea prohibits both of these forms of discrimination and victimisation.

Elsewhere – even in States which have enacted age-specific laws – the different forms of discrimination are not clearly defined, creating uncertainty as to the extent of the protection provided.

While there is a clear difference between States with comprehensive systems and all others in respect of personal and material scope of the right to non-discrimination and the forms of prohibited conduct, in the area of justification and exceptions, there is more commonality between the different systems. Indeed, it is notable – and a significant cause for concern – that in all of the three States with comprehensive anti-discrimination laws, age is distinguished from all other grounds of discrimination, being the subject of specific exceptions which permit discriminatory differentiation on this ground where it would be unlawful on any other ground. Similar provisions – permitting direct discrimination against older people in employment, for example – are found both in States with age-specific equality laws and those which prohibit age discrimination in their labour laws. This differentiation between age and other characteristics reflects the pervasive influence of ageism, even in societies with well-developed equality law regimes. Unless and until ageist prejudices and stereotypes are identified and challenged, systemic age discrimination will persist.



Ganesh Bista/Ageing Nepal

Chapter 4 endnotes

101. See OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation*, forthcoming, 2022, and the discussion in Chapter 2B.
102. Most treaty bodies adopt a version of this general definition, with some small differences in wording. See, for example: Human Rights Committee, General Comment No. 18, 1989, paras. 6–7.
103. For the recognition of ‘age’ as a ground of discrimination, see Chapter 2A of this report.
104. Human Rights of Older Persons, 20th Informal ASEM Seminar on Human Rights, 2021, p.18.
105. See Human Rights Committee, General Comment No. 18, 1989, para. 12. The ground specific treaties have a similarly broad material scope of application. See further, the discussion in Chapter 2A.
106. See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN doc. E/C.12/GC/20, 2009, paras. 11 and 37.
107. India and Jordan are the notable exceptions.
108. Non-Discrimination Act, Sections 2, 5, 6 and 7.
109. Law on the Prohibition of Discrimination, Article 4.
110. *Ibid.*, Article 2.
111. Equal Rights Trust, *Equality in Practice: Implementing Serbia’s Equality Laws*, 2019, p.58.
112. Law on the Prohibition of Discrimination, Article 27a.
113. Equality Act 2010, section 5.
114. Equality Act 2010, Parts 3, 4, 5, 6 and 7. The Act prohibits discrimination *inter alia* in access to and services (including public services), premises, employment and education.
115. See in particular Employment Equality (Age) Regulations (Northern Ireland) 2006.
116. Equality Commission for Northern Ireland, Strengthening Protection for all Ages Ending Age Discrimination in the Provision of Goods and Services Proposals for Reform, 2012. These calls have been repeated recently: www.equalityni.org/Footer-Links/News/Delivering-Equality/Equality-Commission-statement-on-Spend-Local-Card
117. See for example, Committee on Economic, Social and Cultural Rights, Concluding Observations on the UK, UN Doc. E/C.12/GBR/CO/6, paras. 22–23, 2016.
118. Written submission received from Dr. Evelyn Collins, Chief Executive of the Equality Commission of NI.
119. In 2018 amendments to the Constitution of the Republic of Korea were proposed, which would add age to the list of explicitly protected grounds. However, at the time of writing, these amendments have not been passed.
120. The majority of the constitutions examined as part of this report establish a general right to equality before the law, which – in principle – implies non-discrimination obligations for both public and private actors. In some constitutions this is made explicit. For instance, whilst Article 25(7) of the Kenyan Constitution provides that “a person shall not discriminate directly or indirectly against another person” on any listed ground.
121. The Constitution of Kenya, cited immediately above, is a notable exception in this regard. The Constitution makes clear that both ‘direct’ and ‘indirect’ discrimination are covered. However, other forms of discrimination recognised under international human rights law are not expressly listed.
122. See the discussion in Chapter 3.
123. Constitution of India, Articles 14-16; Constitution of Kenya, Article 27.
124. Constitution of Kenya, Article 27(2).
125. Constitution of the Republic of Korea, Article 11.
126. Constitution of the Hashemite Kingdom of Jordan, Article 6. As noted in Chapter 3, the government has indicated that the term ‘Jordanians’ within this provision may be interpreted to encompass protection on other grounds.
127. Constitution of the Republic of the Philippines, Article XIII, Section 11, and Article XV, Section 4.
128. Law ‘On Senior Citizens in the Kyrgyz Republic’, Article 2.
129. Labour Law No. 8 of 1996, as amended.
130. For an in-depth assessment of these laws, see Equal Rights Trust, *Looking For Harmony: Addressing Discrimination and Inequality in Kyrgyzstan*, 2016, Chapter 2.2.3.
131. Labour Code, Article 9.
132. Criminal Code, Article 185.
133. For further discussion of some of these provisions see Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, Section 3.2.3. It should be noted that some amendments may have been made since the time the report was published. However, many of these provisions remain unchanged. The report is available at: www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf
134. For further discussion on this point, see Age Discrimination Info, Kenya, 2019, available at: www.agediscrimination.info/international-age-discrimination/kenya
135. See Employment and Labour Relations Act, Section 7.
136. See, in particular, Law No. 5.261 of 2015 (the Buenos Aires Anti-Discrimination Law), and its discussion in Equal Rights Trust, *Together for Equality*, 2021, pp.41–42.
137. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc., CRPD/C/GC/6, 2018, para 20.
138. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 16.
139. The UN Special Rapporteur on the rights of persons with disabilities has noted that “ageist perceptions and attitudes regularly preclude the provision of full and equal access to universal health care for older persons with dementia”. See UN Doc. A/74/186, 2019, para. 21.
140. Article 2 makes clear that discrimination may occur based on “real or assumed personal characteristics” and extends to people, groups, and “members of their families, or persons close to them”.
141. See *Chief Constable of Norfolk v. Coffrey* [2019] EWCA Civ 1061.
142. Magna Carta for Persons with Disabilities, Section 4(c).
143. Smith, B., ‘Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective’, *The Equal Rights Review*, Vol. Sixteen, Equal Rights Trust (2016), p.73 cited by the Constitutional Court of South Africa in *Mahlangu and Another v. Minister of Labour and Others* [2020] ZACC 24, para. 86.
144. Report of the UN Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/76/157, 2021, para. 11.
145. Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/74/186, para. 42.
146. Report of the UN Independent on the enjoyment of all human rights by older persons, UN Doc. A/76/157, 2021, para. 42.
147. See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 21; Committee on the Elimination of Discrimination against Women, General Comment No. 27, UN Doc. CEDAW/C/GC/27, 2010, para 13; and Committee on the Elimination of Racial Discrimination, General Comment No. 36, UN Doc. CERD/C/GC/36, 2020, paras. 13, 18, and 60.
148. Committee on Economic, Social and Cultural Rights, *Trujillo Calero v. Ecuador*, Communication No 10/2015, 2018.
149. *Ibid.*, para. 19.4.
150. *Ibid.*, para. 19.2.
151. *Ibid.*
152. Ministry of Justice, ‘Tense All the Time: Multiple Discrimination Experienced by Sexual and Gender Minorities’, 2018, p.25, available at: https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161239/OMSO_51_2018_Koko_ajan_jannittyneen_Rainbow_Rights_web.pdf
153. Committee on the Elimination of Discrimination against Women, State Party Report: Finland, UN Doc. CEDAW/C/FIN/8, 2019, para. 10; Non-Discrimination and Equality Tribunal, Decision 216/2017, 21 March 2018, available at: www.yvtltk.fi/en/index/opinionsanddecisions/decisions.html
154. Ministry of Justice of Finland, Multiple Discrimination and the Need to Identify it Better, 2019, p.14, available at: <https://yhdenvertaisuus.fi/documents/5232670/5376058/Policy+Brief+moniperustei+nen+syrijint%C3%A4+EN/cb153ed3-ad4a-fd32-8bec-bd2c7580240f/Policy+Brief+moniperustei+nen+syrijint%C3%A4+EN.pdf>. See also the concerns of the UN independent expert on the enjoyment of all human rights of Older Persons, on her recent visit to Finland, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27765&LangID=E>
155. Law on the Prohibition of Discrimination, Article 13(5).

156. See, respectively, Law of the Kyrgyz Republic 'On State Guarantees of Equal Rights and Equal Opportunities for Men and Women'; Law of the Kyrgyz Republic 'On the Rights and Guarantees of Persons with Disabilities'; and Law of the Kyrgyz Republic 'On HIV/AIDS in the Kyrgyz Republic'.
157. Act on the Rights of Persons with Disabilities, Section 6(b).
158. Magna Carta of Women, Section 33.
159. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN doc. CRPD/C/GC/6, para 18.
160. These positions are discussed extensively in the forthcoming *Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation* (OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation*, forthcoming, 2022, on file with the authors, Part 2(II)(B)).
161. *Ibid.*, para 18(a).
162. *Ibid.*, para. 18(b).
163. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN doc. CRPD/C/GC/6, para 18(a).
164. See, for example, in the context of social security, Committee on Economic, Social and Cultural Rights, General Comment No. 19, UN Doc. E/C.12/GC/19, 2008, para. 29.
165. Convention on the Rights of Persons with Disabilities, Articles 1 and 5.
166. Interim Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/69/261, 2014, para. 71.
167. For instance, in the context of older persons with disabilities. See Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/74/186, 2019, paras. 26 and 50.
168. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, para. 25(a).
169. *Ibid.*, para. 25(b).
170. For further discussion of the specific barriers experienced by older people seeking access to justice, see: Help Age International, *Keeping our Dignity*, p.10, available at: www.helpage.org/silo/files/keeping-our-dignity-english.pdf
171. CRPD Committee, General Comment No. 6, para 18(d).
172. See Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/39/50, 2018, para. 48.
173. *Ibid.*
174. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN doc. CRPD/C/GC/6, para. 73(i).
175. See *inter alia* A/HRC/39/50, as well as A/HRC/30/43. In its General Comment 6 on the Economic, Social and Cultural Rights of Older Persons, the CESCR Committee recalled that "Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their wellbeing and share their knowledge and skills with younger generations" (para. 39).
176. See Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/74/186, 2019, paras. 32–35.
177. *Ibid.*, para. 35.
178. CRPD Committee, General Comment No. 5, UN Doc. CRPD/C/GC/5, 2017, para. 48.
179. *Ibid.*, para. 81.
180. Non-Discrimination Act, Sections 8(2), 10, 13, 14, and 16.
181. *Ibid.*, Sections 8(2) and 15.
182. See Age Platform Europe, Questionnaire on the Rights of Older Persons with Disabilities, 2019, p.5, available at: www.age-platform.eu/sites/default/files/AGE_contribution_on_rights_of_older_persons_with_disabilities-April2019.pdf
183. Equality Act 2010, Sections 13–27.
184. See Equality Act, Sections 20 and 21. See also, for discrimination relating to disability, Section 15.
185. Law on the Prohibition of Discrimination, Articles 5-12.
186. Law on the Prohibition of Discrimination, Article 5.
187. *Ibid.*
188. Constitution of Kenya, Articles 27(4) and (5).
189. National Cohesion and Integration Act, 2008, Section 6(1).
190. See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(d).
191. See, for example, in respect of religious accommodations, Court of Appeal at Nyeri, *Fugicha v. Methodist Church in Kenya and Others*, Civil Appeal No. 22 of 2015, 2016. In 2019 this decision was set aside by the Supreme Court on technical grounds.
192. Persons with Disabilities Act, Sections 9(2), 15(2) (c), 15(5).
193. Supreme Court of India, *Nitisha v. Union Of India*, 25 March 2021.
194. Rights of Persons with Disabilities Act, 2016, Section 2(h).
195. However, it should be noted that the definition of 'direct' and 'indirect' discrimination under the law are somewhat confusing and may not fully comply with international standards. See further, Equal Rights Trust, *Looking For Harmony: Addressing Discrimination and Inequality in Kyrgyzstan*, 2016, pp.59–60.
196. Article 185 of the Criminal Code refers to the 'direct or indirect' restriction of rights or conferral of advantages, implying that the ban on discrimination encompasses both direct and indirect discrimination, but this is not explicitly stated.
197. Anti-Age Discrimination in Employment Law, Section 5.
198. Magna Carta of Women, Section 4(b).
199. Section 36(e)(2). In the area of employment, an employer cannot dismiss a person with disabilities without having first sought to make reasonable accommodations (Section 32(g)). However, the Magna Carta does not establish an independent right to reasonable accommodation in this area.
200. See Committee on the Rights of Persons with Disabilities, Concluding Observations: The Philippines, UN Doc. CRPD/C/PHL/CO/1, 2018, paras 10–11.
201. See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras 18(c) and (d).
202. In respect of political participation, for example, see the Act Authorizing the Commission on Elections to Establish Precincts Assigned to Accessible Polling Places Exclusively for Persons with Disabilities and Senior Citizens, Section 10.
203. National Human Rights Commission of Korea Act, Articles 2(4) and 2(5).
204. Chung Soon-dool, Lee Miwoo, 'Age Discrimination in Employment Act in Korea, US, and Netherlands: Its Concepts and Target Groups', 2012.
205. AEPD, Article 4-9.
206. *Ibid.*, Article 23-3.
207. See Anti-Discrimination against and Remedies for Persons with Disabilities Act, Articles 3(21) and 32, and 4(1)(3) and 4(2), respectively. See also Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras 18(c) and (d).
208. See for example, Committee on the Elimination of Discrimination against Women, Concluding Observations on Tanzania, UN Doc. CEDAW/C/TZA/CO/7-8, 2016, paras. 8–9.
209. A definition of the terms 'direct discrimination' and 'indirect discrimination' is included under Section 31 of the Employment and Labour Relations Code of Good Practice.
210. Employment and Labour Relations Act, Section 7(5).
211. Act on the Rights of Persons with Disabilities, Section 6(c).
212. For a discussion of violence and harassment in the workplace, see International Labour Organization, *ILO in Jordan Launches Campaign on the Right to a Workplace Free From Violence and Harassment*, 2020, available at: www.ilo.org/beirut/media-centre/news/WCMS_748671/lang-en/index.htm
213. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, para. 13; Human Rights Committee, General Comment No. 18, 1989, para. 13.
214. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, para. 13.
215. Committee on the Elimination of Racial Discrimination, General Recommendation No. 36, UN Doc. CERD/C/GC/36, 2020, para. 13.
216. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 20.
217. CESCR General Comment No. 20, para. 13.
218. HRC, *Yaker v. France*, UN Doc. CCPR/C/123/D/2747/2016, 2018, para. 8.17.
219. *Ibid.*, paras. 8.8 and 8.17.
220. HRC, *Solis v. Peru*, Comm. 1016/2001, U.N. Doc. A/61/40, 2006.
221. Equality Act 2010, Section 197.
222. See *Seldon v. Clarkson Wright and Jakes (and Secretary of State for Business Innovation and Skills, and Age UK – Intervenor)* [2012] UKSC 16.

223. This has been acknowledged by the courts in respect of the former category. See *Ibid.*, para. 57. For further discussion see Andrew Byrnes, et. al., *The Right of Older Persons to Work and to Access the Labour Market*, 2020, pp.18–22.
224. Equality Act, Sections 13(2), 19(2)(d), and Schedule 9 (on occupational requirements and specific age exceptions).
225. *Professor Paul Ewart v. The Chancellor, Master and Scholars of the University of Oxford*, 3324911/2017; summary and judgment available at: www.agediscrimination.info/case-reports/2019/12/20/ewart-v-university-of-oxford
226. Supreme Administrative Court, Judgment of 6 April 2018, Case 820/3/17, Volume 1620, ECLI:FI:KHO:2018:T1620, available at: [www.finlex.fi/fi/oikeus/kho/muut/2018/201801620?search%5Btype%5D=pika&search%5Bpika%5D=yhdenvertaisuusla%2A "11 §" "perustuu lakiin" - highlight3](http://www.finlex.fi/fi/oikeus/kho/muut/2018/201801620?search%5Btype%5D=pika&search%5Bpika%5D=yhdenvertaisuusla%2A%20%2211%20%22%20perustuu%20lakiin%20-%20highlight3) (accessed 13 October 2021).
227. Non-Discrimination Act, Section 11(2).
228. *Ibid.*, Article 23.
229. Framework Employment Directive (Directive 2000/78/EC), Article 6(1) and 2(b).
230. Framework Employment Directive (Directive 2000/78/EC), Article 4(1).
231. Court of Justice of the European Union, *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07, 2009, para. 67.
232. Equinet Working Group on Equality Law, *Fighting Discrimination on the Ground of Age*, 2018, p.16.
233. Age Platform Europe, *The Right to Work In Old Age*, 2021, p.2, available at: www.age-platform.eu/sites/default/files/The_right_to_work_in_old_age-AGE_Platform_Europe_June2021.pdf
234. *Ibid.*, p.11.
235. Human Rights Committee, *Genero v. Italy*, Communication No. 2979/2017, 2020.
236. *Ibid.*, para. 4.1.
237. *Ibid.*, para. 4.1.
238. *Ibid.*, para. 7.6.
239. See also, Section 35 of the Code.
240. Employment and Labour Relations Code of Good Practice, Section 30(5)(e).
241. See, for instance, the *Fugicha* case cited above.
242. Additionally, as discussed further below, Section 5(4)(a) permits the adoption of positive action measures.
243. See Note 1.
244. For further discussion of these cases, see Equal Rights Trust, *Looking For Harmony: Addressing Discrimination and Inequality in Kyrgyzstan*, 2016, pp.41–43. For a more recent case exploring age-based distinctions in adoptive practices, see Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Case No. 03-r, 2020.
245. A notable exception is Section 3(3) of the Rights of Persons with Disabilities Act of 2016, which permits differentiation on the basis of disability when it can be shown that an “impugned act or omission is a proportionate means of achieving a legitimate aim”.
246. Constitution of India, Articles 15 and 16.
247. Supreme Court of India, *The State Of West Bengal v. Anwar All Sarkarhabib*, 11 January 1952.
248. *Ibid.*
249. Supreme Court of India, *Maneka Gandhi v. Union Of India*, 25 January 1978.
250. Labour Code, Article 302.
251. AEPA, Article 19(1).
252. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, paras. 65 and 81.
253. OECD, *Ageing and Employment Policies*, Working Better with Age: Korea, www.oecd-ilibrary.org/sites/9789264208261-8-en/index.html?itemId=/content/component/9789264208261-8-en
254. *Ibid.*, Article 19(2).
255. *Ibid.*, Article 21.
256. See further, Age Discrimination Info, South Korea, 2018, available at: www.agediscrimination.info/international-age-discrimination/south-korea
257. *Ibid.*
258. Byrnes, et. al., *The Right of Older Persons to Work and to Access the Labour Market*, *University of New South Wales Law Research Series*, 2020, p.18.
259. *Ibid.*, p.20.
260. *Ibid.*, p.19.
261. HRC, *Love et al. v. Australia*, Communication No. 983/2001, 2003, paras. 8.2-8.3.
262. HRC, *Albareda and others v. Uruguay*, Communication Nos. 1637/2007, 1757/2008 and 1765/2008.
263. *Ibid.*, Para. 9.3.
264. *Ibid.*, para. 9.4. Citing this decision, in 2013, the European Committee of Social Rights held that provisions of the Norwegian *Seamen's Act*, which permitted the dismissal of seamen upon reaching the retirement age of 62, was discriminatory. See European Committee of Social Rights, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, 2013, paras. 104–117.
265. 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 111.
266. Report of the Special Rapporteur on the Rights of Persons with Disabilities, UN Doc. A/74/186, 2019, paras. 24 and 39.
267. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, paras. 65 and 81.

Chapter 5: Advancing equality for older people



Fedaa Qatashah/HelpAge International

Alongside eliminating discrimination, States are required to advance equality for members of groups who experience discrimination, including older people. This, in turn, requires the adoption and effective implementation of a comprehensive package of both proactive and targeted equality measures, which seek to identify and address structural barriers to equal participation.

The duty to address ageism

The term ‘ageism’ is not defined in any of the core UN human rights conventions, and the phrase has only recently entered the lexicon of special procedure mandate holders. Broadly, as discussed above, the term relates to stereotypes and prejudices based on age. As with age discrimination, ageism may be experienced by people across the chronological age spectrum, but as this report examines ageism in the context of older people, we adopt the definition of the Independent Expert on the enjoyment of all human rights by older persons. Accordingly, ageism should be understood as “stereotypes, prejudice and/or discriminatory actions or practices against older persons that are based on their chronological age or on a perception that the person is ‘old’ (or ‘elderly’)”.²⁶⁸

Stereotyping leads to the exclusion of older people in many areas of life and is both a cause and consequence

of the discrimination they experience. The Independent Expert on the rights of older persons has noted that “prejudices about older persons being frail, sick and dependent drive their marginalization and legitimize exclusionary practices”.²⁶⁹ In its 2021 working paper, the OHCHR noted that “widespread and systematic ageism [is] one of the major barriers to the full enjoyment by older persons of their human rights”.²⁷⁰ In the world of work, the UN Secretary-General has commented that “ageism is widespread in recruitment, and legislation by itself has not eliminated age-related employment discrimination”.²⁷¹

Despite these findings, there has been little direct discussion of ageism in the work of the UN human rights treaty bodies. Both the CESCR Committee and the Human Rights Committee have called on States to address age-based stereotypes in their Concluding Observations, although only on rare occasions. For example, in its recent Concluding Observations on Mauritius, the CESCR Committee called for the adoption of measures designed to “combat social prejudice against older persons, including through awareness-raising activities”.²⁷² In 2014, the Human Rights Committee called on Sudan to adopt comprehensive anti-discrimination legislation, prohibiting discrimination *inter alia* on the basis of age, and to “prioritize the implementation of programmes to eliminate stereotyping and discrimination and guarantee tolerance and respect for diversity”.²⁷³

It should be noted that these limited discussions of State obligations to address ageism are reflective of a broader pattern – neither the ICCPR nor the ICESCR creates explicit obligations on States to address and counter stigma, prejudice or stereotypes arising on any ground. Instead, the obligation to take such measures derives directly from State obligations to fulfil the right to non-discrimination – to eliminate discrimination and ensure the enjoyment of covenant rights without distinction. Thus, in its General Comment No. 20, the CESCR Committee has elaborated on States’ obligations to “adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de-facto discrimination”.²⁷⁴ This extends to ageism as much as other grounds.

In the absence of detailed consideration of State obligations to combat stereotypes and prejudices under the ICCPR and the ICESCR, the standards set out in the ground-specific human rights instruments, and the interpretation of these standards by the relevant treaty bodies, are relevant in two respects. First, standards from the ICERD, the CEDAW and the CRPD can be used to elaborate and exemplify how State should meet their obligations under the ICCPR and the ICESCR. Second, these standards are directly relevant to the fight against ageism, in so far as they are considered from an intersectional perspective. Article 5(a) of the CEDAW requires States to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. In its General Recommendations, the CEDAW Committee has recognised States’ specific obligations to “eliminate negative stereotyping and modify social and cultural patterns of conduct that are prejudicial and harmful to older women”.²⁷⁵ Under Article 8(b) of the CRPD, States are required to “to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”. In its General Comment No. 6, the CRPD Committee emphasised that this obligation requires States to implement “awareness-raising (...) and [other] measures to change or abolish compounded pejorative (...) stereotypes and negative attitudes”.²⁷⁶

Human rights treaty bodies have identified discrete practical measures that States must adopt to challenge discriminatory stereotypes and prejudice. While some of these practices are drawn from ground-specific human rights instruments, they are nevertheless relevant examples of how States can meet their obligations in respect of all grounds of discrimination arising under the ICCPR and the ICESCR.

Three principal practical measures which States should take have been identified to date, though this is an illustrative, rather than exhaustive, list:

- **Awareness-raising measures:** UN treaty bodies have recognised States’ obligations to raise-awareness on equality. Article 8(b) of the CRPD (on awareness-raising) calls on States to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”. In its commentary on this provision, the CRPD Committee has noted that “discrimination cannot be combated without awareness-raising among all sectors of government and society. Thus, any non-discrimination and equality measure must be accompanied by adequate awareness-raising”.²⁷⁷
- **Educational measures:** The right to education is established under several instruments, and multiple UN treaty bodies have recognised the obligation to ensure education on equality. The CESCR Committee, for instance, has noted that “teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural 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”.²⁷⁸
- **Training measures:** The obligation to provide training on equality has been noted by multiple treaty bodies, in diverse areas, and in respect of diverse groups. In its General Recommendation No. 36, the CERD Committee noted the importance of training to preventing racial profiling by law enforcement officers. According to the committee, the design of such training should be developed in consultation with “stigmatized groups including those representing groups experiencing intersecting forms of discrimination”. This, for instance, could include older people.²⁷⁹

In many cases, training, educational, and awareness-raising measures will be set out in informal policies, and programmes. As a result, it is beyond the scope of this report to examine State practice in this area. It is, nonetheless, important to emphasise **States’ broader international law obligations to address discriminatory stereotypes, including those based on age.**

In practice, however, despite the recent work of UN special procedure mandate holders to elaborate the concept of ageism, and the identification of practical measures to eliminate stereotypes by the UN treaty bodies, the nature of ageism is not well understood. This, in turn, seriously impedes the capacity of States to address ageism at the national level. There is increasing consensus that progress can only be achieved in this area through the adoption of an independent UN instrument governing the rights of older people. The onus is therefore on States to agree upon the need for and the text of such a convention. This is an essential step.

Positive action

It is well established under international law that targeted measures are required to make progress towards equality. These measures are referred to as ‘positive action’.

Positive action under international human rights law

In its General Comment No. 18, on the right to non-discrimination, the Human Rights Committee noted that “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.²⁸⁰

Similarly, in its General Comment No. 20, the CESCR Committee noted that States “may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination”.²⁸¹ Over time, treaty bodies have recognised that positive action is ‘mandated’ rather than simply permissible.²⁸²

Thus, as the Human Rights Committee and the CESCR Committee have clarified, States have an obligation to take positive action measures, which derives directly from their obligation to ensure the enjoyment of rights without distinction, including on the basis of age. As in other areas, however, these committees have not, as yet, elaborated the content of this obligation in great detail. As such, the practice of other treaty bodies in this area is relevant both as it relates to intersectional discrimination affecting older people, and as a means of exemplifying how to interpret the obligations arising under the ICCPR and ICESCR.

The duty to adopt positive action measures has been applied in relation to age by several treaty bodies, albeit in limited instances, to address intersectional inequality, particularly in the area of employment. For example, in regard to promotion and recruitment policies, the CERD Committee has noted States’ obligations to “undertake temporary special measures to effectively address the underrepresentation of various national or ethnic minority groups and of groups experiencing intersecting forms of discrimination based on, *inter alia*, religion, sex and gender, sexual orientation, disability and age”.²⁸³ The CESCR has recognised “the cumulative effects of discrimination against female workers through the life-cycle” which may “require targeted measures to achieve equality and guarantee fair wages, equal opportunities for promotion and equal pension rights”.²⁸⁴

Similarly the CEDAW Committee has noted the obligation of States to “adopt gender-sensitive and age-specific policies and measures, including temporary special measures (...) to ensure that older women participate fully and effectively in the political, social, economic, cultural and civil life, and any other field in their societies”.²⁸⁵

As positive action involves some degree of preferential treatment (which would otherwise amount to prohibited conduct), human rights bodies have set out conditions that must be met for positive action measures to be considered legitimate. In summary, such measures:

- **Must serve the legitimate aim of advancing equality:** Measures adopted should contribute to the improved enjoyment of rights by a group exposed to discrimination.²⁸⁶ In this regard, it is important that measures are not adopted based on assumptions or stereotypes.
- **Must be time limited and subject to review:** CEDAW Article 4(1) provides that the adoption of positive action measures must “in no way entail as a consequence the maintenance of unequal or separate standards”. Accordingly, while such measures may – in fact – exist for a long period of time, they must be reviewed frequently to ensure that they do not result in discrimination and “be discontinued when the objectives of equality of opportunity and treatment have been achieved”.
- **Must be proportionate:** For positive action measures to be legitimate, they must be proportionate to their aim of reducing inequality.²⁸⁷ This is a particularly important consideration in the context of age-based discrimination, as age exists on a continuum and lower or higher age bands could always be adopted in principle.

Not all age-differentiated policies aiming to remove barriers or increase equality for a particular group will meet the requirements of positive action. For example, a workplace recruitment or training programme for the under 30s, designed ostensibly to build the skills development of younger members of the workforce (who are often presumed to be less skilled, and in greater need of support), may have the result of directly discriminating against older workers, particularly those switching profession, or re-entering the workforce after a long period of absence. This includes, in particular, older women, who disproportionately assume childcare responsibilities, and are consequently overrepresented in the informal economy.²⁸⁸ The CRPD Committee has stressed that positive action measures “must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discrimination”²⁸⁹ as a principle of general application. To mitigate this risk, it is important that States “consult closely with and actively involve” organisations working with and on behalf of discriminated groups.²⁹⁰



National legal practice

National legal practice on positive action varies between jurisdictions. In many States, specific measures have been designed for the benefit of older people that are set out in a range of different laws and policies. A discussion of the full range of such measures falls beyond the scope of this publication. Instead, we focus on the legislative framework establishing rules for the operation of these measures. In many States, positive action is permitted as an exception to the prohibition of discrimination, but is not expressly mandated or required, contrary to best practice. Moreover, in many States, provisions *de facto* permitting the adoption of positive action are unqualified, creating a risk that paternalistic measures, based on ageist assumptions may be adopted for the ‘special protection’ of older people.

Comprehensive approaches to combatting age discrimination

In the three States where comprehensive anti-discrimination legislation has been adopted there are clear rules permitting (though not necessarily requiring) the adoption of positive action.

In Great Britain, measures aimed at meeting the needs, overcoming disadvantage, or enabling the equal participation of individuals sharing a protected characteristic are permitted (although not strictly mandated) under Section 158 of the Equality Act,

whilst Section 159 sets out specific rules relating to work recruitment or promotion. Under Section 104 of the act positive action is also permitted (short of shortlisting on a particular protected characteristic) in the process of selection of candidates for election.

Finland has adopted similar rules. The Non-Discrimination Act provides a legal basis for the adoption of equality measures, including positive action, which is expressly permitted under Section 9. For measures adopted pursuant to this provision to be legitimate, they must be proportionate, and aim to “promote *de facto* equality, or to prevent or remove the disadvantages attributable to discrimination”.²⁹¹

The Serbian equality law framework contains a number of provisions that permit the adoption of positive action measures. Whilst the framing of some of these provisions is problematic, and not fully consistent with international standards,²⁹² they nonetheless offer a means to challenge forms of structural discrimination and make effective progress towards equality. Article 21 of the Constitution, and Article 14 of the LPD each permit the adoption of measures designed to “achieve full equality” for individuals or groups in an “unequal position” in Serbian society. Similar provisions are contained in the LPDPD,²⁹³ and the Law on Gender Equality.

Age-specific equality legislation and patchwork protections

Provisions relating to the adoption of positive action in those countries with age-specific legislation and patchwork age discrimination protections vary in their quality. In many States, rules relating to the adoption of positive action are unqualified and drafted in broad terms.

Article 75 of the Constitution of Argentina empowers Congress to “promote positive measures guaranteeing true equal opportunities and treatment”. This may be interpreted as permitting (although not expressly mandating) the adoption of positive action. Unlike Federal anti-discrimination legislation, the Anti-Discrimination Law of Buenos Aires contains a specific positive action clause, which permits the adoption of measures directed to promote equality for groups that experience discrimination. Whilst this recognition is positive, the law does not expressly require the adoption of such measures, and the duty only applies to the State (rather than private duty-bearers).²⁹⁴ Under Article 4(b) of the Inter-American Convention on Protecting the Human Rights of Older Persons, Argentina is expressly required to adopt positive action measures relating to older people. The convention also sets out States’ specific obligations towards older people, some of which may include forms of positive action. However, beyond these measures, it is unclear whether Article 4(b) creates an enforceable right in Argentina: States possess discretion in the forms of positive action they choose to adopt. It is therefore unclear whether individuals may challenge a failure by the State to adopt specific measures.

The adoption of positive action is expressly required by the Constitution of Kenya. Under Article 27(6) “the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination”. Article 27(7) further provides that any measures adopted pursuant to this provision “shall adequately provide for any benefits to be based on genuine need”. The framing of these provisions – as a mandatory obligation – is positive. However, the duty only applies to the State, and the provision is unqualified. Under international human rights law, positive action measures should be discontinued once the purposes of equality have been achieved.²⁹⁵ Due to systemic ageism, older people have historically experienced disadvantage in Kenya. However, it is important that this provision is not interpreted as a requirement to demonstrate individual harm. Whilst positive action measures have a clear remedial role, such measures must also aim to “accelerat[e] *de facto* equality” for groups.²⁹⁶ This position is made clearer under the Employment Act, which permits (but does not expressly require) the adoption of positive action provided that measures are “consistent with the promotion of equality or the elimination of discrimination in the workplace”.²⁹⁷ Like the Constitution, however, this provision is also unqualified.

Article 24(1) of the Constitution of The Kyrgyz Republic permits the adoption of positive action. Accordingly, special measures adopted in accordance with the State’s international obligations, shall not constitute discrimination provided that measures are provided for by law, and aim to ensure equality of opportunity for groups exposed to discrimination. This article is broadly compliant with international human rights standards, despite some weaknesses.²⁹⁸ As discussed, a specific exception to the prohibition of discrimination, linked to the “special care” of “persons in need of increased social and legal protection” is established under Article 9 of the Labour Code. Whilst this article may – in principle – be read as permitting positive action, it lacks the procedural safeguards established under the Constitution, and there is a risk that it could be applied to justify the adoption of measures based on ageist assumptions relating to older age.

Article 46 of the Constitution of Paraguay provides “[t]he protections established concerning unjust inequalities will not be considered as discriminatory factors, but as egalitarian [factors]”. This provision could be read as permitting (although not expressly requiring) the adoption of **positive action** measures, but this is not made explicit. Some specific measures designed *ostensibly* for the benefit of older people, have been adopted in Paraguay, but these fall beyond the scope of discussion of the present report.

The National Human Rights Commission of Korea Act makes clear that targeted measures designed to address inequality will not constitute discrimination.²⁹⁹

To be legitimate, such measures must be ‘temporary’, consistent with best practice. Article 4-5(4) of the AEPA provides that “supportive measures (...) taken for maintaining and promoting the employment of a certain age group” shall not be deemed discrimination.³⁰⁰ This provision may also be read as permitting positive action. Unlike the NHRCK Act, however, Article 4-5(4) is unqualified, and it is unclear how much discretion is afforded to employers to design and implement measures pursuant to this provision. There is a risk, therefore, that policies based on ageist stereotypes may be adopted with the aim of protecting older people. Certain measures, including the development of vocational and skills-development training programmes, are clearly permitted.³⁰¹ Some specific measures relating to the employment of older people are set out under the AEPA, but the discussion of these provisions is beyond the scope of this report.³⁰²

In Tanzania, positive action measures are permitted but not mandated. Article 13(5) of the Constitution provides that “the word ‘discrimination’ shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society”. This provision could be read as permitting positive action, although its personal scope application is unclear. While it seems clear that disabilities in this context equates to disadvantages, a narrower reading could mean that the provision is restricted for the benefit of persons with disabilities. The Constitution does not establish any conditions for the operation of this provision, creating a risk that (if applied to age) it could be used to justify the adoption of discriminatory measures based on paternalistic assumptions relating to older age. Positive action is permitted under Section 6(a) of the Employment and Labour Relations Act, provided that such measures are “consistent with the promotion of equality or the elimination of discrimination in the workplace”. This provision is expanded upon in the Employment and Labour Relations Code of Good Practice, which allows “preference in selection [to] be given to suitably qualified candidates from previously disadvantaged groups”.³⁰³

There is no law in Jordan that expressly mandates, or permits, the adoption of positive action measures. Article 6(5) of the Constitution does provide that “the law shall protect (...) the old-aged”, which may be interpreted as a positive action guarantee. However, no rules are established for the operation of this provision, and there is a risk in practice that it could be applied to justify the adoption of discriminatory measures.

Similarly, in the Philippines, the Anti-Age Discrimination in Employment Law does not require, or expressly permit the adoption of positive action measures. This stands in contrast to other equality laws adopted by the State, including the Magna Carta on Persons with Disabilities, and the Magna Carta of Women. However, some specific measures for older people are set out in other laws and policies.³⁰⁴



GRAVIS

Eliminating discrimination and advancing equality

To meet their non-discrimination and equality obligations under international law, many States have enacted equality duties – either as part of comprehensive anti-discrimination law, or in discrete areas of life – that require public authorities and other duty-bearers such as employers and service providers to assess the impact of their policies, and mainstream the rights of discriminated groups in their work.

Equality impact assessment

Equality impact assessment (EIA) is an essential tool for States to meet their non-discrimination and equality obligations. It is only through assessing the equality impacts of their laws and policies that States can anticipate and eliminate their discriminatory effects, including those which are unintended or unforeseen, and thus meet their international law obligations to refrain from discriminating in law, policy and practice. EIA can also be a transformative tool in tackling stereotypes – and therefore a key instrument in advancing equality for older people – exposing age-based distinctions to additional scrutiny and ensuring that justifications for differential treatment are not “based on ageist assumptions”.³⁰⁵

Treaty bodies such as the CESCR Committee have called for the use of human rights impact assessments in various contexts,³⁰⁶ though the level of engagement with these aspects of the law remains limited. The CEDAW Committee has recommended that States adopt equality impact assessment and has recommended that they be applied on intersecting grounds, including age.³⁰⁷ Special Procedure mandate holders have also engaged with the issue.³⁰⁸

While EIA remains a relatively novel concept at the international level, and the treaty bodies have engaged with State obligations in this area in a limited way, it should be noted that “[i]t is only through assessing the equality impacts of their policy responses that States can ensure that their actions comply with their binding non-discrimination obligations under international law”.³⁰⁹ EIA must be aimed at identifying and eliminating the actual or potential discriminatory effects of laws and policies and ensuring that they respond to and accommodate the different needs of diverse groups with due consideration to intersectionality and that they do not create or exacerbate inequality. In completing an EIA, relevant duty-bearers should:

- Collect and consider data and research on the experiences and outcomes of groups exposed to discrimination;
- Consult all groups that may be disproportionately affected by a policy;
- Use the information gathered to decide whether there is, or is likely to be, a differential impact, whether direct or indirect, upon a protected group (or groups); if there is likely to be such an impact, consider whether the policy is justified;
- If the policy can be justified, consider and implement any measures which might mitigate the impact.

It is important to note that qualitative data through engagement with groups exposed to discrimination and experiencing inequality is extremely valuable and can be just as valuable where quantitative data is not available. In some cases, for instance, in relation to the coronavirus pandemic response, qualitative data can in fact be more valuable, as quantitative data will usually be available after the harm has been done.

Equality policies and strategies

In addition to EIA, States are required to adopt equality policies and strategies. This obligation is made clear on the face of several of the core UN human rights treaties and has been expanded upon by the treaty bodies in their general comments and recommendations. The obligation may also be derived from States' obligations to address stereotypes, prejudice, and stigma, and promote positive action, which can only be achieved when comprehensive programmes and implementation mechanisms discussed earlier in this report are put in place.

As part of their obligations under the CESC, States are required to “ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of Covenant rights”.³¹⁰ Such policies “should address all groups distinguished by the prohibited grounds”, including older people, and include the adoption of “temporary special measures in order to accelerate the achievement of equality”.³¹¹ As part of this obligation, “public and private institutions should be required to develop plans of action to address non-discrimination”.³¹² In addition to these processes, equality should also be mainstreamed in public decision making (something which may also be achieved through equality impact assessment), including budgetary processes.³¹³

In developing equality strategies and policies, the CESC has emphasised that “individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes”.³¹⁴ CRPD Article 4(1) makes clear that such strategies and policies must be developed in close consultation, and with the active involvement of groups exposed to discrimination. In its General Comment No. 6, the CRPD Committee expands this point, calling on States to ensure the engagement of “organisations which represent the vast diversity in society”, including those working with and on behalf of older people, alongside a wide range of interested stakeholders.³¹⁵

The development of policies should be data driven. In this connection, the CESC has noted that States “should regularly assess whether the measures chosen are effective in practice”.³¹⁶ Relevant indicators and benchmarks should be included, which should “be disaggregated by sex and other relevant grounds such as age, disability, nationality and urban/rural location, and cover all persons under the territorial jurisdiction of the State party or under its control”.³¹⁷ CRPD Article 31 requires States to “to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the (...) Convention”. This data should be disaggregated, including on the basis of age.³¹⁸ Where equality policies and strategies are introduced, it is important that they are effectively monitored, to ensure that the objectives of equality are being achieved.



Ben Small/HelpAge International

National legal practice

To meet their equality obligations, a number of States examined as part of this report have established statutory duties aimed at making progress towards equality for groups exposed to discrimination. These duties vary both in their content, material scope, and enforceability.

Comprehensive approaches to combatting age discrimination

Finland, Great Britain and Serbia have each enacted equality duties as part of their comprehensive anti-discrimination laws. Whilst these duties differ in significant respects, they offer a clear means for advancing equality for older people.

Finland's non-discrimination framework establishes preventative, institutional and mainstreaming equality duties.³¹⁹ Chapter 2 of the Non-Discrimination Act establishes the principal obligations of authorities, educators, and employers (defined under Section 4) to evaluate, develop plans and promote equality in their work. The Ministry of Justice has developed guidance and best practices on equality planning, which is maintained on its website.³²⁰ Mechanisms for the enforcement of these provisions are provided for under the law.³²¹ Equality impact assessment is not specifically required by the Non-Discrimination Act, although such assessment may be conducted in practice as part of measures developed to promote equality.

A duty of authorities to promote gender equality under the Act on the Equality between Women and Men, is drafted in more explicit terms, requiring authorities to “create and consolidate administrative and operating practices that ensure the advancement of equality between women and men in the preparatory work undertaken on different matters and in decision-making”.³²² It has been noted that this provision has provided a “legal basis for gender impact assessment implementation”.³²³ However, the law is more limited in its personal scope, and does not expressly require the impact of intersectional gender discrimination on older people to be taken into account.

In Great Britain, section 149 of the Equality Act provides that all public authorities (and those who exercise public functions)³²⁴ must, in the exercise of their functions, have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between people who share a relevant protected characteristic and people who do not share it. The obligation applies to all grounds protected under the act, including age. Principles for the operation of this public sector equality duty have been elaborated by the courts.³²⁵ In practice, to demonstrate that they have had ‘due regard’ to their duty, public authorities are expected to conduct equality impact assessments. The duty to undertake equality impact assessment is mandatory in Scotland for certain public bodies.³²⁶ Under Section 4 of the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (the ‘Regulations’), a public authority with more than 150 employees must publish information annually to demonstrate its compliance with the PSED. The published information must include that relating to people who share a relevant protected characteristic and who are affected by its policies and practices. Section 5 of the Regulations also provide that a public authority should set specific equality objectives at least every four years, in order to achieve the three aims as specified in section 149(1) of the act.

In Serbia, under the LPDPD, certain duty-bearers in different areas of life are required to ‘adopt measures’ designed to ensure the equal participation of persons with disabilities, although these measures aren’t generally specified, and the law does not expressly refer to older people. By contrast, the new Law on Gender Equality (LGE) details several specific measures that should be adopted to achieve gender equality. This includes measures aimed at improving rights protections for certain “vulnerable social groups”, including women who “find themselves in an unequal position” on account of their age. Examples of equality measures set out in

the law include, *inter alia*, the development of a national gender strategy and an implementing action plan; the development of work plans by public authorities and employers with over 50 staff to implement special measures for gender equality; the adoption of a gender risk management plan, and the mainstreaming of gender equality in the budgetary process. Unlike the LGE, the Law on the Prevention of Discrimination – which applies to a range of grounds, including age – does not specify the particular measures that must be adopted to ensure substantive equality. However, in 2021, a new equality duty was introduced into the law, which requires public authorities to conduct an equality impact assessment “when preparing a new regulation or public policy relevant to the exercise of the rights of socio-economically disadvantaged persons or groups of persons”.³²⁷ The assessment should include a description of the policy area, and the position of socio-economically disadvantaged groups; an assessment of the proportionality and necessity of suggested changes; and a full risk assessment.³²⁸ Whilst this provision does not expressly extend to older people, human rights bodies have expressed concern at the high levels of poverty affecting older persons within Serbia.³²⁹ As this provision has only recently come into effect, its impact on implementation remains to be seen. However, it is undoubtedly a positive development.

Age-specific equality legislation and patchwork protections

In those countries without comprehensive anti-discrimination legislation, mechanisms designed to promote equality are less concrete, and there are large variations between jurisdictions. None of these countries specifically require equality impact assessment. This is a significant shortcoming: as noted at the outset of this chapter, such assessment is essential if States and other duty-bearers are to meet their obligations to refrain from discriminating against older people.

Several articles of the Inter-American Convention on Protecting the Human Rights of Older Persons require States to develop policies and strategies aimed at promoting and protecting the rights of older people in different areas of life and rights. Moreover, as part of their broader policy development, States undertake to mainstream the rights of older people by “develop[ing] specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination”.³³⁰ States should ensure the active participation of older people and groups working with and on behalf of such people in the development of such policies.³³¹ In view of these requirements, a range of policies has been adopted in Argentina that relate to the rights of older people.³³² However, national legislation does not impose a specific legal obligation on private duty-bearers to adopt equality policies relating to older people.

In Jordan, the Law on the Rights of Persons with Disabilities provides a framework for the adoption of disability-specific policies and references the need to include persons with disabilities within policies and strategies designed for the welfare of the elderly. However, there is no general duty for public authorities or private bodies to develop age-specific plans. Jordan has, nonetheless, adopted a National Strategy on Older Persons (2018–2022), which is overseen by the National Council for Family Affairs.³³³ The strategy identifies addressing age discrimination amongst its policy objectives. It also identifies gaps in legislation and legal frameworks which impede the enjoyment of older people's rights, including the lack of comprehensive legislation for older people and failure to legislate for criminal offences against older people or to account for offences against older people within domestic violence policies.³³⁴ Although broad and cross-cutting, the strategy does not establish binding duties on State or other actors, nor does it create enforceable rights, meaning that its impact in improving rights protection and addressing discrimination is very limited. Similarly, access to remedies and general oversight and implementation of the policy are not addressed.



Malik Alymkulov/HelpAge International

Section 2 of the Philippines Anti-Age Discrimination in Employment Law notes the general policy of the State to promote equality in employment without discrimination on the basis of age. Specific obligations are imposed on the Department of Labor and Employment under Section 8 of the law to conduct studies on the employment of older people and to promote programmes aimed at enhancing “the knowledge and skills of every individual regardless of age”. However, the law does not impose a direct obligation on government or other (private) duty-bearers to adopt equality policies and strategies for older people. This stands in contrast to other legislation, such as the Magna Carta of Women, which contains discrete gender-mainstreaming obligations.³³⁵ As discussed further below, in 2019 the Philippines passed the National Commission of Senior Citizens Act. The act establishes an independent body charged, *inter alia*, with “formulating policies for the promotion and protection of the rights and well-being of senior citizens”. However, as this body has only recently been established, the results of its work have yet to be seen. Previous action plans adopted by the State on older people are now several years out of date.³³⁶

In 2011 the Kyrgyz Republic adopted the Law “On Senior Citizens in the Kyrgyz Republic”. This law provides the framework for the development of State policy in relation to ‘senior citizens’, who are defined as men aged 63 and over, and women aged 58 and over, who have reached retirement age.³³⁷ As noted above, the law does not create enforceable rights, but it does establish principles to guide State policy. Articles 4 and 5 of the law establish the main principles of State policy in this area, whilst Article 8 provides for the engagement and participation of older people in policy development. Article 10 of the law contains a broad non-discrimination guarantee. However, no enforcement mechanisms are established under the law, meaning that this provision is essentially aspirational. Outside of this broad framework document, Kyrgyz legislation does not impose a specific legal obligation on duty-bearers to adopt equality policies and strategies relating to older people, or to mainstream their rights.

In the Republic of Korea, Article 3 of the AEPA requires government to adopt a range of measures to eliminate discrimination and advance equality for older people in the area of employment. This includes a discrete duty to develop relevant policies on the employment of older people. This duty is set out in more detail under Article 4-3 of the act, which requires the Minister of Employment and Labour to formulate “a basic plan (...) every five years in consultation with the head of a relevant central agency”. The plan should include, *inter alia*, an overview of the current situation of older people, discussion of established schemes and policies, and an assessment of previous work conducted in this area.³³⁸ Once formulated, the plan must be submitted to the employment policy deliberative council, as well as the National Assembly, “without delay”.³³⁹

There is no general legal obligation to conduct equality impact assessment in the Republic of Korea. However, the State and local governments are required under Article 15 of the Framework Gender Equality Act to conduct gender impact assessment. The act also contains discrete gender-mainstreaming duties, which require the consideration of gender equality in budgeting processes, and the collection of statistics.³⁴⁰ Whilst progressive, these duties do not apply to other grounds of discrimination, such as age, limiting their application to older people, and older women.

In Kenya, Section 5(1) of the Employment Act requires certain listed public bodies to promote equality of opportunity and eliminate discrimination in employment. A similar obligation is imposed on employers under Section 5(2). The act does not, however, detail how these provisions are to be given effect, and Kenyan legislation as a whole does not impose a specific legal obligation on duty-bearers to adopt equality policies and strategies relating to older people, or to mainstream their rights. Similarly, the law does not require the adoption of equality impact assessment to identify and mitigate the impacts of (age) discriminatory laws and policies before they are adopted.

In Tanzania, there is no generally applicable legal obligation for duty-bearers to develop (age) equality policies and strategies. However, the Employment and Labour Relations Act does impose discrete equality obligations on employers. Under Section 7(1) of the act, “every employer shall ensure that he promotes an equal opportunity in employment and strives to eliminate discrimination in any employment policy or practice”. As part of this duty, employers are required to develop and register “a plan to promote equal opportunity and to eliminate discrimination in the workplace” with the Labour Commissioner.³⁴¹ The commissioner may require an employer to produce such a plan and ensure its registration.³⁴² There are no specific remedies provided for breach of this duty under the law. However, Section 7(8)(c) of the act provides that a Labour Court or arbitrator shall consider “any plan registered with the Labour Commissioner under this section”. This part of the act relates to the burden of proof (discussed further below). It appears, therefore, that non-compliance with an employers’ preventative equality planning obligations may help to evidence or support a claim of discrimination. The term “employment policy or practice” is defined under Section 7(9)(c) of the act to include “any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion transfer, demotion, termination of employment and disciplinary measures”.

Further guidance on employers’ equality planning duty is set out in Part III of the Employment and Labour Relations Code of Good Practice. As part of this Code, employers should establish a committee to oversee the implementation of the equality plan, promote it amongst employees, and ensure compliance with its requirements, including through making recommendations for change.³⁴³ However, the duty to ensure equal opportunity belongs primarily to the employer, who must “adopt, communicate, implement, monitor and periodically review policies to eliminate discrimination”.³⁴⁴

In Paraguay, while the State has adopted policies, plans, and programmes that are relevant to human rights protection for older people, the law as a whole does not impose a specific legal obligation on duty-bearers to adopt equality policies and strategies relating to older people, or to mainstream their rights. Similarly, the law does not require the adoption of equality impact assessment to identify and mitigate the impacts of (age) discriminatory laws and policies before they are adopted.



Ganesh Bista/Ageing Nepal

Advancing equality for older people – conclusions

A genuinely comprehensive and effective equality law framework will require and integrate positive obligations to advance equality, including in particular: measures to combat prejudice and stereotypes through education and awareness-raising; positive action measures to correct substantive inequalities; and equality impact assessment requirements and equality duties. In reality, few States have adopted the full suite of proactive measures to advance equality. Such good practice as exists is sporadic and fragmented – one State may have adopted best practice approaches to positive action, while another may have well-developed equality impact assessment mechanisms. This paucity of good practice affects all grounds of discrimination, including, but not only, age.

Globally, understanding of the nature, scope and extent of State obligations to address prejudice, stigma and stereotype is particularly limited and practice is in development. While this duty derives directly from States' commitment and obligation to eliminate all forms of discrimination, few States have taken effective measures in this area, and where steps have been taken, they are generally specific to one group or ground. While this problem exists in respect of prejudice and stereotype on all grounds, it is particularly acute in respect of ageism. This is both because ageism is endemic and in almost all societies is embedded in institutions, policies and laws, and because ageism is not widely or well recognized. Thus, while it is particularly important that States take proactive steps to challenge ageism in public discourse, they are less likely to do so. This is a problem which all States must address.

Positive action obligations are better understood than those associated with combatting prejudice and stigma, and States are more likely to have enacted positive action policies and programmes. However, as the review of the 12 States under consideration indicates, in many countries, positive action measures are permitted, rather than required, under national law, meaning that programmes are not developed or implemented consistently or comprehensively. As a result, even a State like India, with a relatively well developed positive action regime, does not have any legal obligation to take positive action measures to advance equality for older people. Given the focus of the research on States' legal frameworks, it is beyond the scope of this report to assess the range of policies which States have adopted which provide preferential treatment or benefits for older people – most of which are not provided for in anti-discrimination law. Nevertheless, there are grounds for concern that, due to the absence of a legal underpinning for these policies in anti-discrimination law, they may reflect ageist stereotypes and prejudices.

In the third area of positive obligations examined in the study – that of equality impact assessment requirements and equality duties – there is a clear distinction between those States with comprehensive equality laws and those without. While Finland, Great Britain and Serbia all have legal requirements on public decision makers to prevent discrimination and mainstream equality on the basis of age – among other characteristics – none of the other nine States have such duties. Thus, as in respect of the definition of the right to non-discrimination, in this key area of the legal framework, the benefits of a comprehensive approach over both age-specific laws and legal systems with a patchwork of protections are clear to see.



Chapter 5 endnotes

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269. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/39/50, 2018, para. 25.
270. 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. 38.
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274. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 8(b).
275. Committee on the Elimination of Discrimination against Women, General Recommendation No. 27, UN Doc. CEDAW/C/GC/27, 2010, para. 36.
276. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 39.
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278. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 38.
279. Committee on the Elimination of Racial Discrimination, General Recommendation No. 36, UN Doc. CERD/C/GC/36, 2020, para. 42.
280. Human Rights Committee, General Comment No. 18, 1989, para. 10.
281. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 9.
282. See Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, 2004, footnote 3.
283. Committee on the Elimination of Racial Discrimination, General Recommendation No. 36, UN Doc. CERD/C/GC/36, 2020, para. 47.
284. Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 47(b).
285. Committee on the Elimination of Discrimination against Women, General Recommendation No. 27, UN Doc. CEDAW/C/GC/27, 2010, para. 29.
286. See, for example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, 2004, para. 18.
287. See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 9.
288. See, for instance, Committee on the Elimination of Discrimination against Women, General Comment No. 27, UN Doc. CEDAW/C/GC/27, 2010, para. 29.
289. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 29.
290. *Ibid.*
291. *Ibid.*, Section 9.
292. See, for example, discussion of the 'special protection' provisions of the Serbian Constitution in Equal Rights Trust, *Equality in Practice: Implementing Serbia's Equality Laws*, 2019, pp.37–38.
293. Law on the Prevention of Discrimination against Persons with Disabilities, Article 8.
294. Law No. 5.261 in 2015 (the Buenos Aires Anti-Discrimination Law), Article 4.
295. See, for example, Convention on the Elimination of All Forms of Discrimination against Women, Article 4(1).
296. *Ibid.*
297. Employment Act, 2007, Section 5(4)(a).
298. In particular, positive action is not expressly mandated, and the Constitution does not require that such measures be time-limited and discontinued when their objectives have been met.
299. National Human Rights Commission of Korea Act, Article 2.
300. AEPA, Article 4-5(4).
301. *Ibid.*, Article 4.
302. See, in particular, AEPA, Articles 12-16. See also, broadly, the Welfare of Senior Citizens Act.
303. *Ibid.*, Section 3(5)(b).
304. See, in particular, the Expanded Senior Citizens Act of 2010. National court practice has established that some measures targeted at older people are permissible. In *Manila Memorial Park, Inc. v. Secretary of the Department of Social Welfare and Development*, the Supreme Court of the Philippines upheld the constitutionality of provisions of the Expanded Senior Citizens Act of 2003, which granted a 20% discount to older people in the area of taxation.
305. HelpAge International, Submission for the Consultation on Ageism and Age Discrimination by the Independent Expert on the enjoyment of all human rights by older persons, 2021.
306. See, for instance, CESCR, General Comment No. 24, UN Doc. E/C.12/GC/24, 2017, para. 13.
307. Committee on the Elimination of Discrimination against Women, Concluding Observations on the United Kingdom, UN Doc. CEDAW/C/GBR/CO/8, 2019, para. 16.
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311. *Ibid.*
312. *Ibid.*
313. *Ibid.*
314. *Ibid.*, para. 36.
315. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 33.
316. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 36.
317. Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 55.
318. *Ibid.*, para. 71, and 73(c).
319. See further, Equinet, *Making Europe More Equal: A Legal Duty*, 2016, available at: www.archive.equineteurope.org/IMG/pdf/positiveequality_duties-finalweb.pdf
320. See Ministry of Justice Website "equality.fi" Guides for Equality Planning, available at: <https://yhdenvertaisuus.fi/opaat-yhdenvertaisuussuunnitteluun>
321. See in particular, Sections 21(3) and 20(3).
322. Act on the Equality between Women and Men, Section 4.
323. European Institute for Gender Equality, Gender Impact Assessment: Finland, 2021, available at: <https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/finland>
324. All public authorities in England, Wales and Scotland are subject to the PSED in the Equality Act 2010. Public authorities in Northern Ireland are subject to a similar equality duty under section 75 of the Northern Ireland Act 1998.
325. See *R (Brown) v. Secretary of State for Work and Pensions*, [2008] EWHC 3158. Brown concerned the PSED contained in earlier legislation, s.49A of the Disability Discrimination Act 1995. The wording mirrors that integrated in s.149 of the Equality Act 2010.
326. See Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.
327. Law on the Prohibition of Discrimination, Article 14.
328. *Ibid.*
329. See Committee on Economic, Social and Cultural Rights, Concluding Observations: Serbia, UN Doc. E/C.12/SRB/CO/2, 2014, paras. 16 and 29, respectively.
330. Inter-American Convention on Protecting the Human Rights of Older Persons, Article 5.
331. *Ibid.*, Article 4(f).
332. At the time of writing, INADI, the National Institute Against Discrimination, Xenophobia and Racism, is in the process of developing a national programme against ageism and is seeking the views of civil society.
333. 'NCFA Modernising National Strategy for the Elderly, Jordan Times', www.jordantimes.com/news/local/ncfa-modernising-national-strategy-elderly accessed 4 September 2021.
334. 'National Council for Family Affairs – National Strategy for Older Persons (2018-2020)' <https://ncfa.org.jo/uploads/2020/08/83e585ba-830a-5f31197f0177.pdf>
335. Magna Carta of Women, Section 36.
336. See, in particular, the Philippine Plan of Action for Older Person (PPAOP) for 1999–2004; the Philippine Plan of Action for the Senior Citizens (PPASC) for 2006–2010 and the Philippine Plan of Action for Senior Citizens (2011–2016).
337. Law 'On Senior Citizens in the Kyrgyz Republic', Article 2.
338. *Ibid.*, Article 4-3(2).
339. *Ibid.*, Articles 4-4(3) and (4). See also, broadly, the Welfare of Senior Citizens Act.
340. Framework Gender Equality Act, Articles 16-17.
341. Employment and Labour Relations Act, Section 7(2).
342. *Ibid.*, Section 7(3).
343. Employment and Labour Relations Code of Good Practice, Section 30(8).
344. *Ibid.*, Section 32.

Chapter 6: Enforcement and implementation



Ben Small/HelpAge International

International law requires States not only to refrain from discrimination in their laws, policies and practices and to prohibit it through the adoption of anti-discrimination laws, but also to eliminate discrimination in practice.³⁴⁵ This in turn requires that States ensure that legal prohibitions on discrimination are properly implemented and enforced. States' implementation obligations are discussed in more detail in the preceding chapter, which examines equality duties and impact assessment, positive action measures and States' obligations to use education, media and other tools to challenge the stereotypes, prejudice and stigma which drive discrimination.

Effective enforcement of the right to non-discrimination requires States to ensure that where the provisions of anti-discrimination laws are violated, this has real consequences, both for the victim and the violator. Essentially, this requires the State to establish institutions, procedures and rules which enable individuals to secure *effective remedy*.³⁴⁶ Remedy in turn has three discrete components:

1. sanctions for those who have committed discrimination³⁴⁷ which are “effective, proportionate and dissuasive”,³⁴⁸
2. individual reparation, in the form of recognition, compensation and restitution;³⁴⁹ and
3. transformative remedies,³⁵⁰ which include both *institutional* measures – focused on correcting, deterring and preventing discrimination within institutions found liable for discrimination – and *societal* measures – focused on addressing the social causes of discrimination.³⁵¹

In order to establish an effective system of enforcement, States should take a complete range of legal, practical and institutional measures designed to ensure access to justice and to enable victims to secure remedy. While these measures must be provided for in anti-discrimination legislation, their functioning and operation in practice will – of necessity – engage other areas of law, such as civil procedure codes, as well as aspects of State spending and the establishment and operation of institutions. Nevertheless, international law sets down clear standards which States must observe if they are to meet their obligations to effectively enforce the right to non-discrimination.

Enforcement of anti-discrimination legislation

States have obligations under international law to ensure access to justice for victims of discrimination.³⁵² In order to achieve this, they should create a system of enforcement institutions, laws and procedures which are meaningfully and equally accessible and effective in practice. The Committee on the Elimination of Discrimination Against Women has identified six interrelated and essential components of access to justice: justiciability, availability, good-quality, accountability, accessibility, and the provision of remedy.³⁵³ The practice of the other United Nations Treaty Bodies illustrates endorsement of broadly similar principles, thus underlining their application to the protection of all grounds of discrimination, including age.

States must establish judicial or administrative mechanisms to ensure that all individuals are able to legally enforce their rights.³⁵⁴ In practice, States have discretion as to the form of such mechanisms; indeed regular courts, dedicated equality courts or tribunals, other specialist tribunals, ombudspersons, national equality bodies, and national human rights institutions have all – in one State or another, and to a greater or lesser extent – assumed responsibility for enforcement.³⁵⁵ Irrespective of their form, however, enforcement bodies must be affordable, adequately maintained and well funded.³⁵⁶ They should also be accountable and of good quality.³⁵⁷ Thus, the CEDAW Committee has noted that “all components of the system [should] adhere to international standards of competence [and] efficiency” and that they should be “contextualised, dynamic, participatory” and responsive to the needs of users.³⁵⁸ States should also ensure that independence and impartiality are guaranteed and maintained in the operation of enforcement bodies.³⁵⁹

In addition to ensuring that enforcement bodies are established and that they are properly funded and resourced, of good quality, independent, impartial and accountable, States must ensure that these bodies are accessible. Access has a number of different dimensions: financial and economic; linguistic and cultural; geographic; and physical.³⁶⁰ State obligations to ensure access – by removing financial, linguistic, physical and other barriers – correspond to the obligation to ensure non-discrimination in access to justice; indeed, the CRPD Committee has referred to some of these measures as “procedural accommodations”, a form of reasonable accommodation for which there is no possibility of justification.³⁶¹ A key element of ensuring access to justice is the provision of legal aid as required to ensure that lack of financial resources to cover the costs of legal representation, or indeed to cover court fees and other costs, does not constitute a barrier preventing access to justice.

Comprehensive approaches to combatting age discrimination

As would be expected, the three States with comprehensive anti-discrimination laws have strong procedural frameworks for the enforcement of rights. In two cases – Finland and Serbia – these frameworks give a central role to the national equality body (discussed in more detail below), while in the United Kingdom, the national equality body can support enforcement action, but does not receive complaints itself.



Fernand Mugisha/HelpAge International

In Finland, implementation of the Non-Discrimination Act is overseen by three supervisory bodies, whose primary responsibilities are set out under Chapter 4 of the act.³⁶² In areas other than employment, the Non-Discrimination Ombudsman can bring cases, with the consent of a victim, directly to the Non-Discrimination and Equality Tribunal, which is empowered to receive complaints.³⁶³ Individuals may also bring claims on their own behalf, or may permit a third party organisation, which ‘fosters equality’ to do so.³⁶⁴ The tribunal has the power to confirm reconciliation agreements lawfully reached between parties (which may include measures such as public apologies, compensation and guarantees of non-repetition), and may order non-repetition, and the discontinuation of discriminatory policies and practices, subject to the threat of a fine for non-compliance, although it possesses no general power to award compensation.³⁶⁵ The powers of the tribunal in this regard do not extend to employment, which falls within the remit of the occupational safety and health authorities.³⁶⁶ A person who has experienced discrimination or victimisation is entitled to apply to a district court for compensation, which should be awarded “equitably proportionate to the severity of the act”.³⁶⁷

In the United Kingdom, enforcement procedures are set out under Part 9 of the Equality Act. In most cases outside of employment, discrimination complaints may be brought to a County Court (or Sheriff in Scotland).³⁶⁸ In cases concerning employment, complaints may be brought to an employment tribunal. Time limits for bringing claims are established under the act. Before initiating proceedings before an employment tribunal, a complainant is first required to notify the Advisory, Conciliation and Arbitration Service (ACAS), to attempt to resolve this issue out of court through a procedure called ‘early conciliation’.³⁶⁹

In Serbia, enforcement of the anti-discrimination law framework is dealt with through a variety of mechanisms. Notably, the LPD establishes the position of the Commissioner for the Protection of Equality (Serbia's national equality body) who has the power to receive and review complaints and initiate legal proceedings pertaining to violations of the LPD,³⁷⁰ among other functions. Serbia's three equality laws each provide for misdemeanour proceedings to be commenced with respect to violations of certain provisions.³⁷¹ Civil law also provides for a wide range of remedies and sanctions for violations of the right to non-discrimination, including compensation and declaratory relief.³⁷²

Age-specific equality legislation and patchwork protections

There is significant variety in the procedures provided for the filing of discrimination claims in countries which do not have comprehensive anti-discrimination laws, reflecting the fact that protections in these States are spread across a range of legal instruments, often including constitutional provisions as well as protections in regular legislation.

In Argentina, where an individual has experienced discrimination in violation of their constitutional rights, or treaties ratified by the State, they may file an action of *amparo*, through which the judge in the case is empowered to declare the “norm upon which the harmful act or omission is founded unconstitutional”.³⁷³ The claim can be submitted by the person who has experienced discrimination, as well as the Defender of the People, or a relevant, registered association.³⁷⁴ The court does not have the power to award damages, although a separate civil claim may be filed in accordance with the rules of the Civil Code.

In India, due to the absence of anti-discrimination provisions in areas such as employment and healthcare, there are few direct avenues of redress for individuals who have experienced age discrimination. Claims relating to a violation of the constitutional equality provisions may be filed before a High Court or Supreme Court, following the writ petition procedure, established under Articles 32 and 226 of the Constitution. In practice, however, age discrimination cases are extremely rare,³⁷⁵ and constitutional enforcement mechanisms suffer from procedural defects that may undermine access to justice in practice.

In Kenya, non-discrimination provisions may be enforced via different avenues, depending on the nature of the violation. Article 22 of the Constitution provides that “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened”. This would include violations of the rights to equality and non-discrimination under Article 27. A range of groups, including people acting in the public interest, and associations “acting in the interest of one or more of its members” have standing to institute court proceedings.³⁷⁶ The remedial powers of the court are listed under Article 23(3). In addition to awarding compensation, the court is empowered to issue injunctions, order judicial review, and declare the invalidity of discriminatory legislation. A separate procedure is established for violations of the Employment Act. Remedies may differ depending on the nature of the violation.³⁷⁷ Under Section 88, a person “who commits an offence under [the] act or contravenes or fails to comply with any of the provisions of [the] act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both”. This section may apply to cases of discrimination brought under Section 5.³⁷⁸ The use of criminal sanctions in this area is problematic.

In the Kyrgyz Republic, the Constitutional Chamber of the Supreme Court is empowered to review national laws and strike-down legislation where it is inconsistent with the Constitution. Any individual who has experienced discrimination as a result of the application of national law, may submit a complaint directly to the court, requesting that the legislation be disapplied. However, the court does not have the power to hear individual discrimination complaints.³⁷⁹ Such cases may be heard by the civil courts, in accordance with the requirements of the Civil Code and Civil Procedure Code. Article 9 of the Labour Code provides that a person who considers that they have been discriminated against in employment has the right to bring a case to court with an application for the restoration of their rights as well as compensation for pecuniary and non-pecuniary damages.

Different mechanisms have been established for the enforcement of equality law in the Philippines. Avenues of enforcement, as well as available remedies, differ by ground, and area of life. Generally, as noted by the CRPD Committee in respect of persons with disabilities, there is a lack of effective complaints and redress mechanisms.³⁸⁰ This is true for older people, despite some positive recent developments. Violations of the Anti-Age Discrimination in Employment Law are punishable by criminal sanctions.³⁸¹ There are no civil sanctions established for a violation of the law, an approach which runs contrary to international best practice.

In the Republic of Korea, where an individual has experienced age discrimination, they may submit a complaint to the National Human Rights Commission.³⁸² The commission will investigate the complaint, and if they find that discrimination has occurred, will make a recommendation for actions to remedy the harm. These recommendations are non-binding, creating barriers to effective enforcement in certain areas of life, such as the provision of goods and services. To address this gap, the AEPA contains additional enforcement provisions, which apply in the area of employment. In the event of non-compliance with a recommendation of the commission, the Ministry of Employment and Labour may, within three months of accepting an application, issue a corrective order, requiring an employer to refrain from discrimination, prevent recurrence, provide restitution and other such measures required to rectify the discrimination.³⁸³ The employer is required to report against this order, and in the event of further non-compliance, may be fined up to 30 million KRW.³⁸⁴ A fine of up to 5 million KRW may be issued for discrimination against workers in respect of recruitment or employment in violation of Article 4-4.³⁸⁵

In Tanzania, a person whose constitutional rights to equality and non-discrimination have been violated or are “likely to be violated by any person” may apply to the High Court seeking redress.³⁸⁶ The court is empowered “to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties” established under the Constitution.³⁸⁷ Bills that have not yet been adopted may not be challenged.³⁸⁸ Separately, part VIII of the Employment and Labour Relations Act governs dispute resolution. Where an employee has experienced discrimination, they are empowered to submit a complaint to the Commission for Mediation and Arbitration (the CMA). If the dispute is not resolved, the case can proceed to arbitration, or adjudication by

the Labour Court. In cases concerning dismissal, the arbitrator or Labour Court has powers to make an order for compensation equivalent to at least twelve months pay, or order an employee’s reinstatement, with full pay for the period of the termination.³⁸⁹ Section 102 of the act provides that a “District Court and a Resident Magistrate’s Court have jurisdiction to impose a penalty for an offence under this act”. Violations of the right to non-discrimination may result in a fine of up to five million shillings.

One of the most significant shortcomings of Paraguay’s legal framework is the absence of effective enforcement and implementation mechanisms. Neither the Constitution, nor Law No. 1885, establishes a clear process through which violations of the rights to equality and non-discrimination can be redressed. Similarly, the Labour Code does not establish a procedure for challenging acts of discrimination, although specific rules are established for violations of other labour rights (for instance, in the case of unfair dismissal), which may be applicable in some cases. In principle, a person who has experienced discrimination in violation of Article 9 of the law may file a claim under the Civil Code and request economic compensation for moral damages.

In Jordan, where protection from age discrimination is limited to protection against automatic termination of contract on reaching the age of retirement, Article 137 of the law provides that disputes shall be heard before the Magistrates Court. Civil remedy, which may include compensation, and an order of reinstatement, may be awarded in cases concerning unlawful dismissal. Employers who breach the provisions of the law may also be fined. Employees may submit a complaint to the Ministry of Labour, which is empowered to investigate and issue fines. In the absence of a right to non-discrimination on the basis of age in the Labour Law, however, this complaints mechanism is limited in scope.



Evidence and proof

International law requires the adaptation of rules of evidence and proof in discrimination cases, in order to ensure the effective enforcement of the right to non-discrimination.

In particular, international law requires that States' legal frameworks provide for the 'shift' or 'transfer' of the burden of proof in discrimination cases, from the claimant to the respondent. This is an adaptation to the standard rules of evidence in other areas of law, in recognition of the challenges of proving discrimination in cases where the evidence necessary to make a case is often in the possession of the discriminating party, which is frequently the case. As the Committee on Economic, Social and Cultural Rights has noted, therefore: "[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 authorities, or the other respondent, respectively".³⁹⁰

International law does not provide explicit standards on the treatment of different forms of evidence, and indeed approaches to the admissibility of evidence vary significantly between different national legal systems. Nevertheless, in order to comply with their obligations to ensure the enjoyment of the right to non-discrimination in practice, such rules must not obstruct access to justice for survivors of discrimination and must not conflict with the principle that the right to non-discrimination must be made practical and effective. As explored in the Practical Guide, courts in Europe have made use of a wide range of sources, including but not limited to, statistical evidence, evidence from testing, and reports of human rights organisations, UN special procedures and the periodic reports of UN treaty bodies.

Comprehensive approaches to combatting age discrimination

All three of the States under review which have comprehensive legal frameworks on equality and non-discrimination provide for the transfer of the burden of proof. In Finland, The burden of proof is regulated under Section 28 of the Non-Discrimination Act, which states that the victim of discrimination or victimisation must, before the court or other authority, present an account of the facts on which the claim is based. If a *prima facie* case of discrimination has been shown the burden of proof shifts onto the other party who must show that the prohibition of discrimination was not breached. This procedure is applied in investigations conducted by the Ombudsman, but – consistent with best practice – does not apply in criminal discrimination proceedings, which would raise issues relating to the presumption of innocence.³⁹¹ In Serbia, Article 45 of the LPD provides for a shift in the burden of proof, while the same provision is made in Section 136 of the Equality Act in Great Britain.

Age-specific equality legislation and patchwork protections

In States with either age-specific equality laws or patchwork protections, provisions in this area are inconsistent. In a number of cases, laws make no provision for the transfer of the burden, while in others, provision is made only in certain areas of life, or only in the case of certain procedural mechanisms. In none of the States under review is provision made for the transfer of the burden of proof in all discrimination cases.

In India, Jordan, the Kyrgyz Republic, Paraguay and the Philippines, there is no provision requiring a transfer of the burden of proof in civil discrimination cases. The same is true at the federal level in Argentina, where no procedure is established for the transfer of the burden of proof in discrimination cases under the Constitution. However, the Buenos Aires Anti-Discrimination Law provides that once a *prima facie* case of discrimination has been established, the defendant must prove that discrimination did not occur.³⁹²

In Kenya, the Constitution is silent on the question of the transfer of the burden of proof. Section 5(7) of the Employment Act places the burden of proving that discrimination did not take place upon the employer, but this is highly problematic, given that the act provides for criminal sanction in discrimination cases. Whilst a shift in the burden of proof is necessary and appropriate in civil proceedings, in criminal cases it may conflict with the presumption of innocence.³⁹³ In Tanzania, consistent with best practice, once a *prima facie* case of age discrimination has been established in employment proceedings, the burden of proof shifts to the employer, who must demonstrate that their action was not discriminatory, or fell within an exception to the general prohibition of discrimination.³⁹⁴ Chapter IV, Part 1 of the Evidence Act provides that the burden of proving facts in an ordinary civil case falls on the party making the claim, except where an exception is established by law. It may therefore be assumed that in cases of discrimination brought under Article 13 of the Constitution the burden of proof lies on the party alleging that discrimination has occurred. This may result in a denial of justice in individual cases.

In the Republic of Korea, neither the AEPA nor the NHRCK Act contains provisions regulating the transfer of the burden of proof in cases where the right to non-discrimination is violated. However, investigation into a complaint of discrimination is carried out by the National Human Rights Commission, which possesses broad investigatory powers, and may require the submission of evidence.³⁹⁵ Obstruction of the work of the commissioner or their staff 'by any deceit' is punishable by imprisonment and a fine of not more than 30 million KRW.³⁹⁶ In respect of the criminal penalty provisions of the AEPA, a shift in the burden of proof would be inappropriate, and possibly conflict with the assumption of innocence, and the right to a fair trial.



Equality bodies

Equality bodies are public authorities established to support the enforcement and implementation of anti-discrimination law. These bodies share an essential function in promoting the right to non-discrimination and protecting individuals from harm. In many jurisdictions, equality bodies also play an important role in addressing structural inequalities: supporting the adoption of positive action measures and the implementation of statutory equality duties. In addition, as noted above, equality bodies can also perform an important function in the enforcement of anti-discrimination laws, either through the exercise of quasi-judicial functions, receiving and hearing complaints, or through taking or assisting in litigation before the regular courts.

The need for equality bodies thus emanates directly from States' obligations to respect, protect, and fulfil the rights to equality and non-discrimination.³⁹⁷ However, with one exception, none of the core United Nations human rights instruments include an explicit obligation to establish independent equality bodies, and the term 'equality body' is used infrequently at the international level. Nevertheless, in the interpretation of their respective conventions, the treaty bodies have referred variously to the need for 'commissions', 'independent monitoring institutions', 'appropriate bodies', and 'independent mechanisms', thus demonstrating a specific obligation to establish equality bodies.³⁹⁸ In their recent concluding observations, the Human Rights Committee and the CESCR Committee have each recommended the establishment of independent mechanisms and institutions designed to address forms of discrimination;³⁹⁹ and have commented on the core requirements of such bodies where they have been established.⁴⁰⁰

While there is broad consensus that States are required to establish specialised equality bodies and that certain institutional requirements must be met to safeguard their independence and ensure their efficacy, there is no clear consensus at the international level as to the required functions and powers of such institutions.

However, guidance produced by the European Commission on Racism and Intolerance – which represents best practice in this area – establishes three principal functions that an equality body may support. This includes:

1. a promotion and prevention function;
2. a support and litigation function; and
3. a decision-making function.⁴⁰¹

Comprehensive approaches to combatting age discrimination

Each of the three States with comprehensive anti-discrimination law frameworks has a specialised, independent equality body.

The Equality and Human Rights Commission is Great Britain's national equality body⁴⁰² and it is also the State's National Human Rights Institution. The commission has key promotion and prevention duties: providing advice and support to the public, giving guidance to employers and educators about their obligations and good practice advice, encouraging public authorities to promote equality of opportunity and address inequalities, and seeking to ensure that equality considerations are part of policy decision-making. The enforcement powers of the commission are set out under Part 1 of the Equality Act of 2006. The commission is empowered to investigate suspected violations of equality law (Sections 20 and 31); issue notices of unlawful acts and require the adoption of action plans to address the breach (Section 21, 22 and 32); enter into agreements with relevant duty-bearers to comply with the requirements of the act; and bring a complaint to a court where the above requirements are not met. In practice, the commission's enforcement powers are used sparingly, and it does not offer individual advice, which is provided by the independent Equality Advisory and Support Service. The commission possesses broad support and litigation functions: it may provide legal assistance to individuals whose rights to non-discrimination have been violated (Section 28); launch proceedings in its own name (Section 30); and intervene in strategic cases (Section 30).

In Serbia, a Commissioner for the Protection of Equality is established under the LPD. The competencies of the commissioner are set out under Article 33 of the law, which include promotion, prevention, support and litigation functions. The term of the Commissioner for the Protection of Equality ended on 27 May 2020,⁴⁰³ and was not renewed for several months, leaving an unprecedented gap in protection, at a time when the need for effective institutions was of especial importance, in light of the COVID-19 pandemic. As Kosana Beker – the former assistant to the Commissioner – explained, “we were seven months without protection (...) you could go to court, but you know you need money for the court (...) the law cannot be effective if you don't have institutions”.⁴⁰⁴ This issue has been partly addressed through the recent reforms to the LPD, which now provide for an extension of the term of the previous commissioner to cover the period between appointments. Nonetheless, this situation highlights a broader issue in the implementation of equality legislation in Serbia, which may serve to limit the effective enjoyment of rights by older people.

As discussed above, in Finland, the Non-Discrimination Act establishes the Non-Discrimination Ombudsman, which has broad promotion and prevention functions, and is empowered to support victims to bring discrimination complaints and take action to reconcile matters relating to compliance with the act.⁴⁰⁵

Age-specific equality legislation and patchwork protections

In States without comprehensive anti-discrimination laws, there are three broad approaches to the establishment of equality bodies: two States have established a specialised equality body, in line with international best practice; one has established a specific body focused on the rights of older people; in the remaining States, no equality body has been established, but national human rights institutions exist which may discharge some of the relevant functions.

Consistent with international law and best practice, Kenya has established an independent equality body: the National Gender and Equality Commission. Despite its name, the Commission has a multi-ground mandate, which includes responsibility for age discrimination. The functions of the commission are set out under national legislation.⁴⁰⁶ These include broad equality promotion and prevention responsibilities. The commission is also empowered to receive individual complaints. Whilst the commission has broad investigatory powers, which include *inter alia* the ability to issue summonses and compel the production of documents, it may only issue non-binding recommendations. If, following mediation, a recommendation is not followed, the commission may submit a report to Parliament.⁴⁰⁷

Argentina has established an independent equality body – the National Institute Against Discrimination, Xenophobia and Racism (INADI). The principal powers

and functions of INADI are set out under Chapter II of Law 24.515 of 1995. These include broad promotion and protection responsibilities. Since 2018, INADI has published multiple reports examining discrimination against older people in Argentina.⁴⁰⁸ INADI may appear as a friend to the court and provide specialised advice on matters of discrimination.⁴⁰⁹ It is also empowered to receive complaints from citizens and offer advice. However, it does not have any strict enforcement powers, limiting its effectiveness in practice.

In the Philippines, the National Commission of Senior Citizens was established in 2019 as a specific equality body for older people. In addition to a policy development function, the commission is made responsible for the “full implementation of laws, policies, and programmes of the government pertaining to senior citizens”.⁴¹⁰ The Implementing Rules and Regulations to the Act expand upon the commission’s responsibilities. Under Rule 5, the commission is empowered to “act on the complaints of senior citizens by conducting investigations, case build-up, and if possible, recommend the filing of administrative, civil or criminal complaints against any individual, establishment, business entity, institution or agency”, to a relevant body or bodies. To enforce relevant laws and policies relating to older people, the regulations provide that the commission “may issue compliance orders”.⁴¹¹ This is a welcome development, although it is unclear whether such orders are legally binding, and due to the recent adoption of the implementing regulations, there has been little significant practice to date. The National Commission was established alongside the Commission on Human Rights (CHR), the national human rights institution of the Philippines. Its functions are set out under Article 13, Section 18 of Constitution, and include broad responsibilities to protect and promote human rights. The commission has no inherent enforcement powers,⁴¹² although it may investigate alleged human rights violations, issue (non-binding) recommendations, initiate litigation, and refer cases to other enforcement bodies established under national law.

There is no national equality body in India, although a National Human Rights Commission has been established, alongside State human rights commissions which operate in different regions. The functions of the commission are set out under Section 12 of the Protection of Human Rights Act of 1993. The commission has broad promotion and protection functions and may support litigation by “inverven[ing] in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court”.⁴¹³ Individual complaints of human rights violations may also be submitted to the commission, which is invested with wide investigatory powers.⁴¹⁴ However, the enforcement powers of the commission are limited to initiating legal proceedings, and seeking relevant orders and writs from the Supreme Court and High Courts.⁴¹⁵ Whilst the commission can make recommendations, it is not empowered to issue binding judgments, limiting the effectiveness of this mechanism of redress.

Like India, Tanzania has not established a specialised equality body, although a national human rights institution (NHRI) – the Commission for Human Rights and Good Governance – is established under the Constitution. The commission has been awarded ‘A’ status as an NHRI by the United Nations. Its powers are set out under national legislation and include broad promotion and protection responsibilities.⁴¹⁶ The commission is also empowered to receive and investigate complaints of human rights violations (which may include violations of the rights to equality and non-discrimination) upon its own motion or following a complaint by an individual or interested third party.⁴¹⁷ In exercising this function, the commission possesses broad investigatory powers and may compel the production of documents.⁴¹⁸ After investigating, the commission may issue relevant recommendations and, in the event of non-compliance, may institute legal proceedings to seek a remedy.

Kyrgyzstan has a National Human Rights Institution: the Ombudsperson (Akyikatchy) of the Kyrgyz Republic, which was established in 2002 and has a constitutionally recognised role in upholding human rights. It does not have a specialised equality body. The ombudsperson has broad promotion and prevention functions, which are detailed under Articles 3 and 8 of the Law on the Ombudsperson. In 2017, the ombudsperson issued a study on Stereotypes and Discrimination Affecting Older Persons in Kyrgyzstan. The study explores a range of topics, including *inter alia*, awareness of age discrimination in different areas of life (including the workplace, healthcare, the private sector, and within the family); the effect of stereotypes on the enjoyment of rights by older people; and the system of social care for older people; before issuing relevant recommendations.⁴¹⁹

Paraguay does not have a statutory equality body although a ‘Defender of the People’ is established pursuant to Article 279 of the Constitution. The Defender of the People’s Office is organised structurally into different departments that are each responsible for addressing specific human rights issues. Amongst these departments is the Department for Older Persons, which is responsible for assisting, guiding, accompanying and intervening *ex officio* in complaints made by older people. However, the Defender of the People has no strict enforcement powers, limiting its effectiveness. Moreover, the institution has only been accredited with ‘B’ status by the United Nations Global Alliance for National Human Rights Institutions, meaning that it does not fully comply with the Paris Principles on independence.⁴²⁰

As discussed above, while the Republic of Korea does not have a specialised equality body, in 2001, the State adopted the National Human Rights Commission of Korea (NHRCK) Act, which established a national human rights institution mandated to promote and protect the fundamental human rights set out in the Constitution.

Age is listed as a ground of discrimination under Article 2(4) of the act, which applies in broad areas of life, including education, employment, and the provision of goods and services.⁴²¹ However the Commission’s enforcement powers are limited, creating barriers to justice for older people.

Jordan does not have a dedicated equality body, although a Higher Council for the Rights of Persons with Disabilities was established under the Law on the Rights of Persons with Disabilities, and the State’s national human rights institution – the National Centre for Human Rights (NCHR) – is broadly mandated to receive complaints relating to breaches of civil, political, economic, social and cultural rights. In response to a 2015 request from the UN Independent Expert on the Rights of Older Persons for information on best practices, the NCHR stated that it had established a specialist sub-unit in 2007 to implement human rights for vulnerable groups, which include older people.⁴²² In particular, the NCHR identified the following best practices relevant to older people:

1. Receiving complaints and settling them either directly through the centre or through referring to the concerned parties;
2. Monitoring the human rights situation of older people and verifying its compliance with international standards, which includes implementing announced visits to elderly care homes;
3. Actively participating in formulating the Jordanian National Strategy for Older Persons; and
4. Issuing regular and periodic reports on the condition of the elderly in the Kingdom.⁴²³



Fedaa Qatshshah/HelpAge International

Enforcement and implementation – conclusions

For any anti-discrimination law to be effective, victims of discrimination must be able to enforce their rights and secure remedy – in the form not only of individual compensation and restitution, but also sanction for those responsible and institutional and societal remedies necessary to prevent repetition. An effective system of enforcement requires the State to provide a procedure through which complaints can be handled, and for this procedure to be independent, of good quality and accessible. In the case of discrimination claims, the nature of the acts also requires adaptation to the standard rules of proof and evidence, including in particular the transfer of the burden of proof. Without this provision, only a small proportion of discrimination cases will ever result in a finding of discrimination.

As in many of the other areas examined in this research, enforcement provisions are significantly better in the three States with comprehensive anti-discrimination laws. While each has shortcomings in practice, the laws

of these States all provide clear and accessible procedures for victims to bring claims and all enable the transfer of the burden of proof in discrimination claims. By contrast, none of the other States under review provides for the transfer of the burden of proof in all discrimination claims, creating a significant barrier for victims seeking justice. The procedures in place to file discrimination claims vary significantly between these nine countries. However, in the absence of comprehensive anti-discrimination laws, there is a multiplicity of processes in place in each country, and in a number of cases, there is no possibility to enforce rights – particularly those guaranteed in constitutional provisions.

Finally, this research examined the practice of States in establishing and maintaining equality bodies – specialised, independent institutions established to support the enforcement and implementation of anti-discrimination law. Again, Finland, Great Britain and Serbia all reflect best practice, having established national equality bodies. Kenya and Argentina have also established such bodies, while the Philippines has established an age-specific body.



Chapter 6 endnotes

345. See, for instance, International Covenant on Civil and Political Rights, Article 2; International Covenant on Economic, Social and Cultural Rights, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 2; Convention on the Elimination of All Forms of Discrimination against Women, Article 2; Convention on the Rights of Persons with Disabilities, Article 4; Convention on the Rights of the Child, Article 2.
346. International Covenant on Civil and Political Rights, Art 2(3); Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, para. 15.
347. See, for example: Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, paras. 16 and 18; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (CEDAW/C/GC/28), 2010, paras. 17 and 33; Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 31(f).
348. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 31(f).
349. Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, para. 16.
350. See, for further discussion: Iordache, Romanita and Ionescu, Iustina, “Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Antidiscrimination Law”, *European Anti-Discrimination Law Review*, November 2014, Issue 19.
351. See, for example: Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, para. 17.
352. See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 31(b), and 73(h); Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, para. 1; Committee on Economic, Social and Cultural Rights, Concluding Observations on Nepal (E/C.12/NPL/CO/3), 2014, para. 11(f); Human Rights Committee, Concluding Observations on Slovakia (CCPR/C/SVK/CO/4), 2016, para. 11; and Committee on the Elimination of Racial Discrimination, Concluding Observations on Poland (CERD/C/POL/CO/22-24), 2019, para. 8(b).
353. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, para. 14.
354. *Ibid.*, Para 14(a). See also, International Covenant on Civil and Political Rights, Article 2(3)(b); International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention on the Elimination of All Forms of Discrimination against Women Article 2(c); Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 73(h); Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, para. 15; Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para 40.
355. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 40.
356. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, para. 14(b).
357. See Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, paras. 14(d)–(e), and 18–20.
358. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, paras. (14(d), and 14(f).
359. Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 2004, para. 15.
360. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, para. 17.
361. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 25(d): “Procedural accommodations’ in the context of access to justice should not be confused with reasonable accommodation; while the latter is limited by the concept of disproportionality, procedural accommodations are not.”
362. Non-Discrimination Act, Section 18.
363. *Ibid.*, Non-Discrimination Act, Section 21(2).
364. *Ibid.*, Section 21(2).
365. *Ibid.*, Sections 20 and 21. For a more detailed description of this process, see the Report of the Non-Discrimination Ombudsman to Parliament, 2018, pp.15–19, available at: <https://rm.coe.int/fin-the-report-of-the-non-discrimination-ombudsman-to-the-parliament/16808b7cd2>
366. The powers of the Occupational Safety and Health Authorities are detailed under Section 22.
367. *Ibid.*, Sections 23–26.
368. Equality Act, Part 9, Chapter 2.
369. Employment Tribunals Act, Section 18(1)(e).
370. Law on the Prohibition of Discrimination, Article 33.
371. Law on the Prohibition on Discrimination, Articles 50-60; Law on the Prevention of Discrimination against Persons with Disabilities, Articles 46-52; Law on Gender Equality, Articles 67-70.
372. For further information see Equal Rights Trust, *Equality in Practice: Implementing Serbia’s Equality Laws*, 2019, pp.93–94, available at: www.equalrightstrust.org/ertdocumentbank/Serbia%20report_EN.pdf
373. Constitution of Argentina, Article 43.
374. *Ibid.*, Article 43.
375. See further, Age Discrimination Info, *India*, 2018, available at: www.agediscrimination.info/international-age-discrimination/india
376. Constitution of Kenya, Article 22(2).
377. See further discussion in Age Discrimination Info, *Kenya*, 2019, available at: www.agediscrimination.info/international-age-discrimination/kenya
378. *Ibid.*
379. For instance, those involving a dispute between an employer and employee.
380. Committee on the Rights of Persons with Disabilities, Concluding Observations: The Philippines, UN Doc. CRPD/C/PHL/CO/1, 2018, paras. 10–11.
381. These may include a fine of between 50,000 and 500,000 pesos, and imprisonment of between three months and two years. See Anti-Age Discrimination in Employment Law, Section 7.
382. AEPA, Article 4-6(1); NHRCK Act, Article 30(1).
383. AEPA, Articles 4-7(3), 5-7(1), and Article 4-7(2).
384. *Ibid.*, Article 24(1).
385. *Ibid.*, Article 23-3(2).
386. See Constitution of the Republic of Tanzania, Article 30(3).
387. The Basic Rights and Duties Enforcement Act, Section 13(1).
388. *Ibid.*, Section 8(3).
389. Employment and Labour Relations Act, Section 40(1).
390. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 40.
391. *Ibid.*, Section 28. See also Report of the Non-Discrimination Ombudsman to Parliament, 2018, above, p.16.
392. See the Buenos Aires Anti-Discrimination Law, Article 13.
393. See further discussion on this point in the Equal Rights Trust, *In the Spirit of Harambe: Addressing Discrimination and Inequality in Kenya*, 2012, pp.231–232, available at: www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf
394. *Ibid.*, Section 7(8).
395. National Human Rights Commission of Korea Act, Article 36.
396. *Ibid.*, Article 56(3).
397. For further discussion of these obligations, see Chapter 2.

398. See, Committee on the Elimination of Racial Discrimination, General Recommendation No. 17, 1993, para. 1; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (CEDAW/C/GC/28), 2010, para. 28; Convention on the Rights of Persons with Disabilities, Article 33(2); Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 40.
399. 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”; whilst 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 to persons with disabilities. See, respectively, Committee on Economic, Social and Cultural Rights, Concluding Observations on Ukraine (E/C.12/UKR/CO/7), 2020, para. 15; Committee on Economic, Social and Cultural Rights, Concluding Observations on Belgium (E/C.12/BEL/CO/5), 2020, paras. 18–19; Human Rights Committee, Concluding Observations on Tunisia (CCPR/C/TUN/CO/6), 2020, paras. 17–18; Human Rights Committee, Concluding Observations on Greece (CCPR/C/GRC/CO/2), 2015, para. 10.
400. See, for instance, Committee on Economic, Social and Cultural Rights, Concluding Observations on Bulgaria (E/C.12/BGR/CO/6), 2019, para. 5; Human Rights Committee, Concluding Observations on Moldova (CCPR/C/MDA/CO/3), 2016, paras. 7–8.
401. Council of Europe, European Commission on Racism and Intolerance, “ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level”, 2017, para. 4. See also, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/71/301), 2016, paras. 10–20; and European Commission, “Commission Recommendation on Standards for Equality Bodies”, 2018, Recommendation 1.1.2.
402. Northern Ireland has its own equality body – the Equality Commission for Northern Ireland. Both bodies derive their powers and duties by statute, are independent from government, and play a crucial role in safeguarding equality rights and challenging discrimination.
403. European Commission, Commission Staff Working Document: Serbia 2020 Report, 2020, p.36, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/serbia_report_2020.pdf
404. Equal Rights Trust, Interview with Kosana Bekker, Former Assistant to the Commissioner for the Protection of Equality in Serbia (2010–2016), London, 23 February 2021.
405. *Ibid.*, Section 19. See also, the Non-Discrimination Ombudsman Act (1326/2014).
406. National Gender and Equality Commission Act, 2011, Section 8.
407. *Ibid.*, Sections 27, 28, 29, 41, and 42.
408. See in particular, INADI, *La discriminación hacia las personas adultas mayores*, 2021, available at: www.argentina.gob.ar/sites/default/files/2021/08/la-discriminacion-hacia-las-personas-adultas-mayores-1.pdf; INADI, *Discriminación Por Edad, Vejez, Estereotipos Y Prejuicios*, 2018, available at: www.conabip.gob.ar/sites/default/files/Discriminacion-por-Edad-Vejez-Estereotipos-y-Prejuicios%20PARA%20CLASE%201.pdf
409. Law 24.515 of 1995, Chapter II.
410. National Commission of Senior Citizens Act, Section 7(c).
411. Implementing Rules and Regulations of Republic Act No. 11350, 2021, available at: <https://mirror.officialgazette.gov.ph/2021/09/27/implementing-rules-and-regulations-of-republic-act-no-11350-otherwise-known-as-the-national-commission-of-senior-citizens-act/>
412. Supreme Court of the Philippines, *EPZA vs. CHRP*, G.R. No. 101476, 1992.
413. Protection of Human Rights Act, 1993, Section 12(b).
414. *Ibid.*, Sections 12(a) and 13–14.
415. *Ibid.*, Section 18.
416. Commission for Human Rights and Good Governance Act, Section 6(1).
417. *Ibid.*, Section 15(1).
418. *Ibid.*, Section 25.
419. Ombudsman of the Kyrgyz Republic, *Stereotypes and Discrimination against Elderly People*, 2017, available at: <https://ombudsman.kg/images/files/news/2018/specdokladi/pogilie.pdf>
420. See further, Global Alliance for National Human Rights Institutions, *Accreditation Status as of 3 August 2021*, available at: <https://ganhri.org/wp-content/uploads/2021/08/StatusAccreditationChartNHRIs.pdf>
421. National Human Rights Commission of Korea Act, Article 2(4).
422. ‘Questionnaire of the Independent Expert on the Enjoyment of All Human Rights by Older Persons on Best Practices in the Implementation of Existing Law Related to the Promotion and Protection of the Rights of Older Persons, NCHR Response, 2015’ www.ohchr.org/Documents/Issues/OlderPersons/Practices/NHRIs/Jordan%20NHRI.docx
423. *Ibid.*

Chapter 7: Summary and recommendations



Malik Alymkulov/HelpAge International

This comparative analysis of the law governing age discrimination in 12 countries – ranging from Argentina to the Republic of Korea and from Finland to Tanzania – demonstrates that we remain a long way from a world in which older people enjoy their rights without discrimination. While the diverse range of countries under review – and in particular the significant differences in the levels of development of their anti-discrimination law frameworks – means that there are large variations in State practice, even in countries with the most well-developed systems of anti-discrimination laws, older people do not enjoy comprehensive and effective protection from discrimination.

This said, the preceding chapters do identify clearly the best and most effective approaches to tackling discrimination against – and promoting equality of participation by – older people. In all three of the areas considered in detail – the prohibition of non-discrimination, the promotion of equality and the enforcement and implementation of the rights framework – **comprehensive anti-discrimination laws** provide the most expansive and effective protection. In Finland, Great Britain and Serbia, laws which recognise age as one of a number of grounds requiring protection properly

define and prohibit the different forms of discrimination and apply in all areas of life regulated by law. These systems also provide the procedural measures necessary to ensure enforcement of the right, including in respect of evidence and proof. In the majority of cases, these laws also provide the best framework and foundation for States to adopt the full range of positive, proactive measures necessary to challenge ageism and to address the substantive inequalities facing older people. Nevertheless, even in these systems, the influence of ageist stereotypes is clear: in Great Britain, for example, differential treatment which would be considered direct discrimination on any other ground can be the subject of legal justification.

The pervasive problem of ageism – in particular as unconscious and systemic bias – is a key factor limiting the efficacy of **age-specific equality laws** in the countries under review. Laws in both the Philippines and the Republic of Korea legitimise mandatory retirement ages, and permit direct differential treatment on the basis of age for reasons ostensibly related to economic competitiveness and ‘intergenerational fairness’. The law in the Kyrgyz Republic fails to provide enforceable rights, instead establishing a framework for the adoption of policies in the interests of older people – opening up the possibility for paternalistic interpretations.

Many of these laws are also severely limited in the scope and content of the protection provided: in both the Philippines and the Republic of Korea, protection is only provided from certain forms of discrimination and only in the area of employment. The age-specific equality laws reviewed for this study generally fail to recognise, define and prohibit multiple and intersectional discrimination – a crucial omission given the particular vulnerabilities of groups such as older women. These laws also, for the most part, fail to provide effective procedural guarantees to enable victims of discrimination to vindicate their rights and receive remedy.

In States with what we have termed **patchwork protections**, the problems identified in comprehensive and age-specific systems are all present but are exacerbated by other shortcomings. In most of these States, the primary protection is provided through a constitutional non-discrimination provision. As a result, these systems largely fail to define and prohibit the different forms of discrimination and the possibilities for individuals to bring claims of discrimination are limited. Beyond the constitutional protection – while there is variation between the countries in question – these States generally provide a right to non-discrimination on the basis of age only in some areas of life.

Thus, despite their shortcomings, comprehensive approaches provide the most complete and effective prohibition of discrimination against older people and the best framework for the adoption of progressive and positive measures. Yet the fact that even these laws reflect and reinforce ageist stereotypes – in particular in the areas of exception and justification and in respect of positive and proactive measures – demonstrates clearly the need for a systemic shift at the international level. Such an approach is necessary not only to catalyse the development of national legal protections in States where these are absent or limited, but also to challenge and correct approaches in developed anti-discrimination law systems where ageist bias is ‘built in’ to a system of protections designed and intended to ensure equality for all.



Ben Small/HelpAge International

These findings lead to three clear recommendations:

1.

At the international level, States must cooperate to develop and adopt a **specific, binding instrument on the rights of older people**. The rights to equality and to non-discrimination on the basis of age should be at the heart of this instrument, which should also establish proactive obligations on States to tackle ageism in all its forms and to identify and remove barriers to equal participation for older people in all areas of life.

2.

Within the United Nations system, immediate steps should be taken to issue **clear, comprehensive and authoritative guidance** on the correct interpretation and effective protection of the right to non-discrimination on the basis of age as protected *inter alia* under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

3.

At the national level, States should develop and enact **comprehensive anti-discrimination laws**, prohibiting all forms of discrimination on the basis of age and all other grounds recognised by international law and in all areas of life regulated by law. Such laws should establish clear procedures and make the necessary adaptations to the rules on evidence and proof to enable victims of discrimination to access justice and secure effective remedy. They should also both require and provide for the full range of positive action and other proactive measures required to give effect to the rights to equality and non-discrimination for older people and other groups exposed to discrimination.



Find out more:

www.helpage.org/AgeEquality

HelpAge International is a global network of organisations promoting the right of all older people to lead dignified, healthy and secure lives.

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Design by TRUE www.truedesign.co.uk
Front cover photo: Katie Barraclough/HelpAge International

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ISBN 978-1-910743-83-6