



Advancing equality for older people

Summary



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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 has a threefold result; 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. 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.

Approach, methodology and structure

This report compares and critically examines the national legal frameworks on equality and non-discrimination in 12 jurisdictions, from a range of global regions, analysing them for consistency with international legal standards and drawing comparisons between the practice in these diverse countries.

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. These countries are:

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

Research for the report was undertaken in several 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 the global 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.

Chapter abstracts

The global report is structured into seven chapters:

Chapter 1: Protecting the rights of older people explores developments in the protection of the rights of older people at the international level.

Chapter 2: The right to equality and non-discrimination sets out the international human rights law framework on equality and non-discrimination as it applies to all recognised grounds, including age.

Chapter 3: National law approaches introduces the countries that are the subject of the 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. The next three chapters examine these national legal frameworks, critically assessing them against international standards in three different dimensions.

Chapter 4: The prohibition of age discrimination sets out international standards on the right to non-discrimination and examines the extent to which the laws in each State meet these standards.

Chapter 5: Advancing equality for older people assesses States' approaches to meeting their obligations to advance equality for older people, analysing whether – and to what extent – national laws require and provide for 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.

Chapter 6: Enforcement and implementation examines measures of enforcement and implementation, investigating whether States have the necessary procedures, frameworks and institutions for victims of discrimination to vindicate their rights.

Chapter 7: Summary and recommendations presents the report's main findings and recommendations, which are addressed to the international community, state actors and civil society.

Chapter 1: Protecting the rights of older people



Fabeha Monir/Age International



Age discrimination in context

Throughout the pandemic, older people have been negatively portrayed “as uniformly frail and vulnerable”.¹ 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.²

Older people are all too frequently stereotyped as “burdens to societies”³ or as the “recipients of expensive social benefits and services”.⁴ 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 perspective⁵ – 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.⁶ 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”.⁷ 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”.⁸ 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”.⁹

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 persons.¹⁰ 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.¹¹ 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 persons.¹²

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 guarantees 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

International law requires states to eliminate all forms of discrimination. 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”.

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 – in particular the fact that age is not *explicitly* listed as a ground of discrimination in 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. 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.¹³ Specific concepts, such as ageism, have not been expressly recognised or elaborated.¹⁴ 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.¹⁵ 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.¹⁶

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, 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.

To address these gaps, a ‘two-track approach’ is needed.¹⁷

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 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.

Secondly, there is a need for **the adoption of a new UN convention on the rights of older people**. Ageism is widespread in societies. 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, such as the Convention on the Rights of Persons with Disabilities.¹⁸ 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.

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. Discrimination is prohibited on the basis of particular ‘grounds’.¹⁹ With some exceptions,²⁰ international human rights treaties do not include ‘age’ as an explicitly listed ground of discrimination. As noted above, however, age is recognised as a protected characteristic under international law. 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’.²¹

Interpreting Articles 2(1) and 26 of the ICCPR, 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”.²² Similarly, the Committee on Economic, Social and Cultural Rights (the CESCR Committee) in its General Comment No. 20 on Non-Discrimination, lists age as a protected characteristic falling within the scope of ‘other status’ established under Article 2(2) of the ICESCR.²³

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)²⁴ and each has recognised age as a ground of discrimination as part of this broader prohibition.²⁵

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. In practice, however, the omission of age from the grounds listed in the international human rights instruments, has had important implications. The Office of the UN High Commissioner for Human Rights (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”.²⁶ 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.

Chapter 3: National law approaches



Ida Shiang/HelpAge USA

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. Notably, each State considered in the study is a party to the ICCPR and the ICESCR. The bodies responsible for interpreting and monitoring compliance with these Covenants have stated unequivocally that ‘other status’ includes ‘age’. Many States are also party to regional human rights instruments which supplement protections provided at the international level.

The 12 States examined as part of this report have each adopted different approaches to the elimination of age discrimination. 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 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 are countries where protections against age discrimination are spread across a **patchwork of different laws and policies**, which offer varying degrees of protection (and in some cases, very little or no protection at all). Thus the States under consideration can be divided into three broad categories:

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

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. These laws 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 provisions in other laws, and a constitutional equality guarantee.²⁷
- In **Great Britain**, the primary anti-discrimination law is the Equality Act of 2010 which prohibits discrimination on the basis of age and eight other ‘protected characteristics’.²⁸
- 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.²⁹

Age-specific legislation

Argentina, the Kyrgyz Republic, Paraguay, the Philippines, and the Republic of Korea have all adopted age-specific equality laws, which typically sit alongside constitutional equality guarantees, and non-discrimination provisions in other areas of law. These 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 persons 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 persons to non-discrimination in the exercise of public or private functions. However, there are no specific mechanisms established to enforce these guarantees. While the Constitution also prohibits discrimination, age is not listed as a protected characteristic.
- In 2011, the **Kyrgyz Republic** adopted the Law on Senior Citizens in the Kyrgyz Republic. The law operates primarily as a framework, establishing rules for the development of policies and strategies relating to older people. 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.

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

- The main anti-discrimination law for older people in the **Philippines** is the Anti-Age Discrimination in Employment Act. The Act sits alongside gender and disability specific equality legislation,³⁰ singular anti-discrimination provisions that prohibit discrimination on different grounds in different legal fields,³¹ and other laws that provide specific rights guarantees for older people.³² 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”.
- The **Republic of Korea** has adopted the Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for Older People³³ among a number of specific equality laws for other groups. These laws sit alongside a constitutional provision which prohibits “discrimination in political, economic, societal or cultural life on account of sex, religion or social status”.³⁴ Age is not expressly listed here, but the term ‘social status’ is interpreted to encompass protection on this ground. Age is also listed as a ground of discrimination in the National Human Rights Commission of Korea (NHRCK) Act.³⁵

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 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.³⁶ The State’s Federal Law No. 23.592 contains a broad prohibition of discrimination, although age is not expressly listed as a protected ground. This law supplements constitutional equality guarantees;³⁷ provincial-level anti-discrimination legislation;³⁸ and discrete non-discrimination provisions in particular legal fields, such as employment.³⁹

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.

- 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.⁴⁰ The courts have applied and interpreted this provision, but beyond this, few substantive protections against discrimination on the basis of age are provided.
- 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.⁴¹ Outside of this guarantee, Jordan has no legal provisions prohibiting discrimination.
- 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.

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.⁴² The discussion of these sanctions therefore falls outside of the scope of the present report.

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 – the constitutional provision in Kenya, for example – offer significantly more protection against age discrimination than others.



HelpAge International

Chapter 4: The prohibition of age discrimination



Juan Pablo Zorro/HelpAge International



While there has been limited substantive engagement with the topic of age discrimination at the international level, there is a clear international consensus on the content of the right to non-discrimination, a right which applies equally to all grounds of discrimination, age included.

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.

Personal and material scope

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”.⁴³ Thus, States should prohibit discrimination on the basis of age in all areas of life regulated by law.

The three countries under examination with comprehensive anti-discrimination law frameworks – Finland, Great Britain and Serbia – all explicitly prohibit discrimination on the basis of age in all areas of life regulated by law.

The scope of anti-discrimination law in the other countries considered varies significantly. A majority of these 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 – not the least of which are the challenges in bringing enforcement action under many Constitutions. Argentina’s Constitution offers *de facto* the greatest degree of protection against discrimination through the direct incorporation of international human rights treaties,⁴⁴ and the provision for individuals to challenge these through a special constitutional procedure. 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.⁴⁵

However, of the two, only Kenya's Constitution expressly lists age as a protected characteristic; India's constitutional protection arises under an equality provision which does not list specified grounds. In the Kyrgyz Republic, age discrimination is prohibited under Article 24 of the Constitution, but the scope and enforceability of the protection is limited. None of the Constitutions of Paraguay, the Philippines, the Republic of Korea, Tanzania, or Jordan provide explicit protection from discrimination on the basis of age, though some include grounds which are sufficiently broad that they could encompass age as a protected characteristic.

In those countries with age-specific equality laws, the material scope of protection is varied. As noted, in the Kyrgyz Republic and Paraguay, while laws have a broad material scope, they lack enforcement mechanisms, rendering them largely rhetorical in nature. Conversely, in the Republic and Korea and the Philippines, age-specific equality laws provide enforceable rights, but only in the area of employment. Again, Argentina provides the highest standard of protection, as a function of the fact that the Constitution gives direct effect to the Inter-American Convention on the Protection of Human Rights of Older Persons.

Outside of these laws – and in countries which lack either comprehensive or specific equality legislation – the right to non-discrimination on the basis of age is enforceable only in certain, limited areas of life. In Tanzania, for example, age discrimination is prohibited in employment and labour relations,⁴⁶ but not in other areas of life.

In addition to prohibiting age discrimination in all areas of life regulated by law, States should ensure that discrimination is prohibited where it arises on the basis of perception or association. All three of the States with comprehensive laws provide this guarantee, as does Argentina, whereas none of the Indian, Kyrgyz, Paraguayan, Tanzanian, or Jordanian legal systems recognises these concepts. Protections from discrimination on the basis of association or perception in the remaining three countries are limited to grounds other than age. International law also requires States to provide protection from multiple discrimination, but of the countries under review, only Serbia provides explicit protection from this form of discrimination.

Prohibited conduct

States are required to ensure that all forms of discrimination are recognised and prohibited under their domestic law. To meet this requirement, States should recognise, define and prohibit at least four 'main forms' of discrimination:

1. direct discrimination;
2. indirect discrimination;
3. denial of reasonable accommodation; and
4. harassment.⁴⁷

In addition, States should prohibit both segregation and victimisation.

By a clear margin, the legislative frameworks of those States that have adopted a 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. The laws in Finland and Great Britain prohibit direct and indirect discrimination, harassment and failure to make reasonable accommodation, though this latter applies only to the ground of disability. Serbia's law is the most comprehensive, defining and prohibiting all forms of discrimination recognised under international law.

As in other areas, the recognition of forms of prohibited conduct in those countries that have adopted age-specific equality legislation, and in those with patchwork discrimination protections, varies significantly. In the majority of cases, national laws do not explicitly define any of the forms of prohibited conduct, 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. Moreover, in a number of countries, different forms of discrimination are prohibited but only in laws which apply to grounds other than age.

The position in countries with age-specific equality laws is mixed. In Argentina, through the direct incorporation of international 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. Nevertheless, it should be noted that without a clear definition of these forms of conduct under national law, both rights-holders and duty-bearers may be unclear of their legal rights and obligations. In the Philippines, the Anti-Age Discrimination in Employment Law does not define forms of prohibited conduct and it is unclear whether forms of discrimination other than direct discrimination are prohibited. Conversely, the Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for Older People (AEPA) in the Republic of Korea prohibits both direct and indirect discrimination, as well as victimisation.

In most States with patchwork provisions, different forms of prohibited conduct are not defined or explicitly prohibited. Kenya's Constitution defines and prohibits direct and indirect discrimination by State and non-State actors,⁴⁸ but other forms of discrimination are not listed. India's Constitution does not define forms of prohibited conduct, but the Supreme Court has interpreted it as prohibiting indirect discrimination,⁴⁹ alongside direct discrimination. In Tanzania, the Constitution does not define forms of prohibited conduct, but the Employment and Labour Relations Act prohibits direct and indirect discrimination and harassment on grounds which include age.⁵⁰ In the Kyrgyz Republic, the only protections applicable to age discrimination do not define forms of prohibited conduct and the extent to which these concepts are covered by the constitutional equality guarantee or Labour Code protections is unclear.

In both Paraguay and Jordan, laws governing the right to non-discrimination do not distinguish or define different forms of prohibited conduct.

Justifications and exceptions

Not every differentiation will result in a finding of discrimination. 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.⁵¹ In their practice, these bodies have distilled this test into three central components: to avoid a finding of discrimination, measures adopted must:

1. pursue a legitimate aim;
2. be necessary, and;
3. proportionate to that aim.

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.

This three-part test 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. 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.⁵²



Paul Grogan/Centre for Ageing Better

Such cases underscore the need for a specific international instrument on the rights of older people in order to increase the understanding of ageism and to ensure that stereotypes based on age do not lead to incorrect findings that discriminatory conduct is justified.

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, while creating a *de facto* hierarchy of grounds in which age is given – or perceived to have – a lower status.

In Great Britain, for example, direct discrimination can *only* be justified if it is on the ground of age.⁵³ 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 the 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. Also, 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.⁵⁴ 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,⁵⁵ thus contravening international standards, which require that stereotypes and prejudices should not form part of the assessment of justification.

Similar exceptions apply in Finland, where section 13 of the Non-Discrimination Act provides that “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”. Again, this approach is inconsistent with international standards.

Rules relating to justification differ in each of those countries that have adopted age-specific equality legislation and patchwork discrimination protections. At one extreme, in Jordan, due to an absence of discrimination norms, there is no specific justification test set out in legislation. In Argentina, by contrast, the general rules of international law should apply.

In States such as Tanzania and the Kyrgyz Republic where discrimination on the basis of age (among other grounds) is provided for in labour law, legislation provides an exception for cases of “genuine occupational requirement” – that is, where possession of a particular protected characteristic is essential for the performance of a specific job, such as a requirement that ministers in a particular religious body are adherents of that faith. As in States with comprehensive systems, however, there is evidence of age being distinguished from other grounds of discrimination: in the Kyrgyz Republic, for example, section 9 of the Labour Code provides that differential treatment may also be permitted when “conditioned by the special care of the state for persons in need of increased social and legal protection”. This exception is highly problematic: the Supreme Court has upheld age-based distinctions such as those requiring the mandatory retirement of certain classes of worker, as legitimate, on the basis of this provision.

Exceptions to the prohibition of age discrimination in the area of employment are even found in States which have adopted age-specific equality laws, such as the Philippines and the Republic of Korea. In the Republic of Korea, Article 4-5 of the Age Discrimination in Employment and Employment Promotion for Older People Act 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. The act also sets a mandatory retirement age of 60 years or older,⁵⁶ despite the fact that the UN Independent Expert on the enjoyment of all human rights by older persons – among others – has called for the abolition of mandatory retirement, which is built upon ageist assumptions relating to older age.⁵⁷

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.

In 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 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 at 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.

Chapter 5: Advancing equality for older people



Fedaa Qatatsah/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. 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.⁵⁸ 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.⁵⁹ This extends to age as much as any other ground.

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 each State should meet its 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. These bodies have identified three principal practical measures that States must adopt to challenge discriminatory stereotypes and prejudice, though this is an illustrative, rather than exhaustive, list:

1. Awareness-raising measures;
2. Educational measures;
3. Training measures.

In many cases, training, educational, and awareness-raising measures will be set out in government policies and programmes, rather than in law. As a result, it is beyond the scope of the research for 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.

Positive action

It is well established under international law that States should take targeted, preferential measures – sometimes referred to as ‘special measures’ or ‘affirmative action’ – to address the consequences of historic disadvantage or eliminate substantive inequalities affecting particular groups.⁶⁰ As positive action involves some degree of preferential treatment on the basis of a ground (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:

1. serve the legitimate aim of advancing equality;
2. be time limited and subject to review; and
3. be proportionate.

National legal practice on positive action varies between jurisdictions. In many States, specific measures that are set out in a range of different laws and policies have been designed for the benefit of older people. The discussion of the full range of such measures – many of which do not derive from and are not integrated into the anti-discrimination framework – falls beyond the scope of this report. Instead, we focus on the legislative framework establishing rules for the operation of these measures.

In both Great Britain and Finland, comprehensive anti-discrimination laws permit, but do not require, positive action measures. 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,⁶¹ they nonetheless offer a means to challenge forms of structural discrimination and make effective progress towards equality.

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, creating a risk that programmes will reflect ageist stereotypes and paternalistic assumptions.

In both Kenya and Argentina, laws require the State to adopt positive action 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”. The framing of these provisions – as a mandatory obligation – is positive, though the duty only applies to the State. Article 75(23) of the Constitution of Argentina empowers Congress to “promote positive measures guaranteeing true equal opportunities and treatment” while 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 persons. Nevertheless, it is unclear whether either of these provisions are enforceable before Argentine courts.

In a number of States, positive action measures are permitted, but not required. In the Republic of Korea, the National Human Rights Commission of Korea Act makes clear that targeted measures designed to address inequality will not constitute discrimination.⁶²

Article 4-5(4) of the Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for Older People provides that “supportive measures (...) taken for maintaining and promoting the employment of a certain age group” shall not be deemed discrimination.⁶³ Article 24(1) of the Constitution of The Kyrgyz Republic permits the adoption of positive action, while Article 9 of the Labour Code provides a specific exception to the prohibition of discrimination linked to the “special care” of “persons in need of increased social and legal protection”. Whilst this article can be read as permitting positive action, there is a risk that it could be applied to justify the adoption of measures based on ageist assumptions relating to older age. Similarly, in Tanzania, where positive action measures are permitted but not mandated,⁶⁴ the Constitution does not establish any conditions for the operation of this provision, creating a risk that it could be used to justify the adoption of discriminatory measures based on paternalistic assumptions relating to older age.

A number of States under review make no provision for positive action on the basis of age. In India, whilst several articles of the Constitution permit the State to make ‘special provision’ for particular groups, older people are not expressly listed within these provisions.⁶⁵ In the Philippines, while positive action is provided for under legislation prohibiting discrimination on the basis of disability and gender, the Anti-Age Discrimination in Employment Law does not require, or expressly permit, the adoption of positive action measures. There is no law in Jordan that expressly mandates, or permits, the adoption of positive action measures.

Measures to advance equality

To meet their non-discrimination and equality obligations under international law, many States have enacted equality duties – either as part of a 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.

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 each offer a clear means for advancing equality for older people. Finland’s non-discrimination framework establishes preventative, institutional and mainstreaming equality duties.⁶⁶ In Great Britain, section 149 of the Equality Act provides that all public authorities (and those who exercise public functions) 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 persons who share a relevant protected

characteristic and persons who do not share it. The obligation applies to all grounds protected under the act, including age. In Serbia, a new equality duty was introduced in 2021 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”.⁶⁷

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 establish enforceable equality duties and none require equality impact assessment – a significant shortcoming. Instead, many of the States have adopted strategies or policies which, while welcome in setting out priorities and objectives, are largely aspirational, rather than tangible and effective. The Republic of Korea provides probably the strongest framework, though even this lacks enforcement mechanisms: Article 3 of the Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for Older People requires the 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”. 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.⁶⁸ The law does not create enforceable rights, but instead establishes 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, though as noted above, there is no possibility for older people to enforce these provisions.

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 lack 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 embedded in institutions, policies and laws in almost all societies, 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 combating 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 of 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 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.⁶⁹ This in turn requires that States ensure that legal prohibitions on discrimination are properly implemented and enforced.

Enforcement of anti-discrimination legislation

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.⁷⁰ States have obligations under international law to ensure access to justice for victims of discrimination.⁷¹ 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.⁷² 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.⁷³

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 a national equality body – a dedicated independent institution established to support the implementation of the rights to equality and non-discrimination. In Serbia, for example, the Commissioner for the Protection of Equality has the power to receive and review complaints and initiate legal proceedings. In the United Kingdom, the national equality body can support enforcement action, but does not receive complaints in itself, which are instead initiated before the courts.

In a number of States which do not have comprehensive anti-discrimination laws, the primary avenue open to victims of discrimination are constitutional, though the effectiveness of these procedures varies significantly. In India, 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, but in practice, age discrimination cases are extremely rare,⁷⁴ and constitutional enforcement mechanisms suffer from procedural defects.

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. Also, individuals who have experienced discrimination as a result of the application of national law may submit a complaint directly to the court, requesting that the legislation be withdrawn. However, the court does not have the power to hear individual discrimination complaints.⁷⁵ Conversely, in Kenya, the Constitution provides a clear procedure for individuals to challenge any act of discrimination and receive a remedy. Article 22 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” while Article 23 sets out clear remedial powers for the court. 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”.⁷⁶

In both the Philippines and the Republic of Korea, age-specific equality laws in the area of employment establish specific enforcement procedures. In the Philippines, violations of the Anti-Age Discrimination in Employment Law are punishable only by criminal sanctions, not by civil sanctions. This approach runs contrary to international best practice.⁷⁷ In contrast, in the Republic of Korea, the law contains specific civil enforcement provisions for the National Human Rights Commission, which is empowered to receive complaints. 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.⁷⁸

Evidence and proof

International law requires the adaptation of rules of evidence and proof in discrimination cases, 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. As the Committee on Economic, Social and Cultural Rights has stated: “[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”.⁷⁹ The provision for the transfer of the burden of proof is essential for the proper enforcement of an anti-discrimination law – without such provision, individuals will frequently be unable to prove that they have been subjected to discrimination.



Fernand Mugisha/HelpAge International

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 States with either age specific equality laws or patchwork protections, provisions in this area are inconsistent. In India, Jordan 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 and under the relevant anti-discrimination laws in the Republic of Korea. 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. In Tanzania, there are no specific rules relating to the burden of proof under the Constitution, but under labour law, provision is made for the transfer of the burden of proof in discrimination cases.

Equality bodies

Equality bodies are public authorities established to support the enforcement and implementation of anti-discrimination laws. 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, equality bodies can perform an important function in the enforcement of anti-discrimination laws. Thus, the need for equality bodies emanates directly from States' obligations to respect, protect, and fulfil the rights to equality and non-discrimination.⁸⁰

Each of the three States with comprehensive anti-discrimination law frameworks has a specialised, independent equality body, each of which has an expansive range of functions and powers. For example, in Great Britain, the Equality and Human Rights Commission has key promotion and prevention duties, ranging from the provision of advice and support to the public through to developing guidance for employers and educators about their obligations. It is also empowered to investigate suspected violations of equality law and take a variety of actions on its findings, including issuing notices of unlawful acts and requiring the adoption of action plans to address the breach. While the Equality and Human Rights Commission does not have quasi-judicial functions – instead having powers to support litigation – the equality bodies in both Finland⁸¹ and Serbia⁸² possess enforcement powers, alongside promotion and prevention powers.

In States without comprehensive anti-discrimination laws, there are three broad approaches to the establishment of equality bodies: two States – Kenya and Argentina – have established a specialised equality body, in line with international best practice.⁸³ One State – the Philippines – established a specific body focused on the rights of older people: the National Commission of Senior Citizens, is responsible for the “full implementation of laws, policies, and programs of the government pertaining to senior citizens”.⁸⁴ In the remaining six States, no equality body has been established, but national human rights institutions exist which may discharge some of the relevant functions.

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, 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 the 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 are 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, the 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 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, and 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 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 of 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.

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’. Age-specific laws in Paraguay and the Kyrgyz Republic fail 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. These laws are also limited in the scope and content of the protection provided and 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.

Thus, despite their shortcomings, comprehensive approaches provide the most complete and effective framework to combat discrimination and promote equality for older people. 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.

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.



GRAVIS

Endnotes

Chapter 1

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13. 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.
14. 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.
15. Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, para. 43.
16. The lack of clear guidance in this area was identified as an obstacle to the enjoyment of human rights by older persons by national law experts in Jordan and the Republic of Korea consulted as part of this report.
17. 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.
18. Human Rights of Older Persons, 20th Informal ASEM Seminar on Human Rights, 2021, p.50.

Chapter 2

19. 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". International Covenant on Civil and Political Rights, Articles 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2(2).
20. 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.
21. The recognition of age as a protected characteristic is discussed in more detail below.
22. Human Rights Committee, *Love et al. v. Australia*, Communication No. 983/2001, 2003, para. 8.2.
23. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 29.
24. These concepts are discussed in Chapter 4 of this report.
25. 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.
26. 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.

Chapter 3

27. 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 Non-Discrimination Act as the primary piece of equality legislation. Criminal sanctions fall beyond the scope of this study.
28. Equality Act 2010.
29. 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 (LPDPPD), '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.
30. See, in particular, the Magna Carta of Women, and the Magna Carta for Disabled Persons.
31. 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.
32. 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.
33. Act on Prohibition of Age Discrimination in Employment and Employment Promotion for Older People, Article 4-4.
34. Constitution of the Republic of Korea, Article 11.
35. National Human Rights Commission of Korea Act, Article 2(4).
36. There are, nonetheless, caveats to this general rule, which are discussed later in this publication.
37. Article 16 of the Constitution provides for equality before the law.
38. See in particular, Law No. 5.261 in 2015 (the Buenos Aires Anti-Discrimination Law).
39. 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.
40. Constitution of India, Article 14.
41. 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.
42. 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(II)(A).

Chapter 4

43. 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.
44. See the discussion in Chapter 3.
45. Constitution of India, Articles 14-16; Constitution of Kenya, Article 27.
46. See Employment and Labour Relations Act, Section 7.
47. Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN doc. CRPD/C/GC/6, para 18.
48. Constitution of Kenya, Articles 27(4) and (5).
49. Supreme Court of India, *Nitisha v. Union Of India*, 25 March 2021.
50. 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.
51. 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.
52. HRC, *Solis v. Peru*, Comm. 1016/2001, U.N. Doc. A/61/40, 2006.
53. Equality Act 2010, Section 197.
54. See *Seldon v. Clarkson Wright and Jakes (and Secretary of State for Business Innovation and Skills, and Age UK – Intervenor)* [2012] UKSC 16.
55. 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.
56. AEPA, Article 19(1).
57. 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

58. See, for example, Committee on Economic, Social and Cultural Rights, Concluding Observations on Mauritius, UN Doc. E/C.12/MUS/CO/5, 2019, para. 40(c).
59. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 8(b).
60. See, for example, Convention on the Elimination of All Forms of Discrimination against Women, Article 4; International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(4); Convention on the Rights of Persons with Disabilities, Article 5(4). See also, Human Rights Committee, General Comment No. 18, 1989, para. 10; Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 9.
61. 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.
62. National Human Rights Commission of Korea Act, Article 2.
63. AEPA, Article 4-5(4).
64. 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".
65. See, in particular, Constitution of India, Articles 15 and 16.
66. See further, Equinet, *Making Europe More Equal: A Legal Duty*, 2016, available at: www.archive.equineteurope.org/IMG/pdf/positiveequality_duties-finalweb.pdf
67. Law on the Prohibition of Discrimination, Article 14.
68. Law 'On Senior Citizens in the Kyrgyz Republic', Article 2.

Chapter 6

69. 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.
70. 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.
71. 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).
72. *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.
73. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 (CEDAW/C/GC/33), 2015, para. 17.
74. See further, Age Discrimination Info, *India*, 2018, available at: www.agediscrimination.info/international-age-discrimination/india
75. For instance, those involving a dispute between an employer and employee.
76. Constitution of Argentina, Article 43.
77. 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.
78. AEPA, Articles 4-7(3), 5-7(1), and Article 4-7(2).
79. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 40.
80. For further discussion of these obligations, see Chapter 2.
81. The Non-Discrimination Ombudsman.
82. The Commissioner for the Protection of Equality.
83. The National Gender and Equality Commission and the National Institute Against Discrimination, Xenophobia and Racism, respectively.
84. National Commission of Senior Citizens Act, Section 7(c).



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