

Great Britain

National legal study on ageism and age discrimination

This study has been produced in connection with HelpAge International's global report, *Advancing equality for older people* →



Under international human rights law, States agree to combat discrimination and make progress towards equality. This requires the adoption of comprehensive anti-discrimination legislation, which prohibits all forms of discrimination in all areas of life on an open-ended and extensive list of grounds, including age.¹ The law should establish the framework for promoting equality for older people, and put in place the necessary enforcement and implementation mechanisms needed to ensure access to justice and remedy for victims.

The legislative framework in Great Britain (England, Scotland and Wales) is broadly compliant with these requirements, although there remains some room for improvement. A different equality law framework is in operation in Northern Ireland, which is discussed briefly. It should, however, be noted that human rights obligations derived from international treaties apply to the UK, as the ratifying state.

Equality and non-discrimination obligations

Treaty ratification	Ratified	Individual complaints
ICCPR	✓	✗
ICESCR	✓	✗
ICERD	✓	✗
CEDAW	✓	✓
CRPD	✓	✓
CRC	✓	✗
CAT	✓	✗
ICMW	✗	✗
CPED	✗	✗

The United Kingdom has accepted non-discrimination obligations through the ratification of international human rights treaties. The State is party to the International Covenant on Civil and Political Rights (ICCPR), which contains a free-standing right to non-discrimination, and prohibits discrimination in respect of all Covenant rights.² The UK is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as each of the 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). Individuals who have experienced age discrimination are empowered to bring complaints directly to the CEDAW and ICERD Committees after exhausting domestic remedies. Additionally, the UK is a party to relevant regional human rights instruments. The UK is party to the European Convention on Human Rights, although it has not ratified Protocol 12 to the Convention, which provides an autonomous right to non-discrimination. The UK is party to the 1961 European Social Charter. However, it has yet to ratify its amending protocol and the revised charter. Following its formal withdrawal from the EU in January 2020, the Charter of Fundamental Rights and Equality Directives are no longer directly applicable in the UK.

The prohibition of age discrimination

Personal scope	
Has the State adopted comprehensive legislation?	✓
Does the law expressly prohibit age discrimination?	✓
Is the list of grounds open-ended and non-exhaustive?	✗



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The primary piece of anti-discrimination legislation in the UK is the Equality Act of 2010. The Act prohibits discrimination on the basis of age and eight other ‘protected characteristics’.³ Applying EU caselaw, national courts have found that the Act protects against discrimination based on the **association** of an individual with a person or group sharing a protected characteristic. The courts have also made clear that discrimination based on a **perception** relating to age, whether accurate or otherwise, is prohibited.⁴ The **personal scope** of the Act is, however, limited: the Act contains a closed list of grounds, contrary to best practice. Moreover, Section 14 of the Act, which prohibits ‘combined discrimination’, has not been brought into force. Consequently, protections against **multiple discrimination** are weak.

Personal scope	
Is multiple discrimination prohibited?	?
Is discrimination based on association prohibited?	✓
Is discrimination based on perception prohibited?	✓

The Equality Act explicitly defines direct discrimination, indirect discrimination, harassment, and victimisation as forms of **prohibited conduct**. Denial of reasonable accommodation is also prohibited; however, the personal scope of protection is confined to the grounds of disability.⁵

Prohibited conduct	
Direct discrimination	✓
Indirect discrimination	✓
Harassment	✓
Denial of reasonable accommodation	?

The Equality Act has a broad **material scope**, creating obligations for both public and private bodies in different areas of life. However, the Act does not apply to Northern Ireland, which is governed by separate regulations.⁶ 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,⁷ and UN treaty bodies have urged the UK to ensure equal legal protection across the whole territory of the United Kingdom.⁸

Direct discrimination under the Act can *only* be **justified** if it is on the grounds of age. At face value this questions the level of protection afforded to older people when compared to other groups. The test for justification is stated in exactly the same terms as for indirect discrimination. However, 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 those 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 justify differential treatment.⁹ 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.¹⁰ It is very important, therefore, that arguments made to support the legitimacy of such aims are carefully scrutinised and well-evidenced.

Once a legitimate aim has been evidenced, it must still be shown that measures adopted are proportionate.¹¹ For example, in a recent case before an employment tribunal (ET), 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 are able to make a successful application for an extension. Such extensions however 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 ET however considered that in order to be proportionate to the clear and extensive direct discrimination, the EJRA needed to be 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.¹²

Equality duties and other equality measures

Alongside eliminating discrimination, States are required to advance equality for members of discriminated groups, including older people. 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. To meet their non-discrimination and equality obligations under international law, many states have enacted 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 discriminated groups in their work.

Positive Action 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.

The Equality Act does not explicitly require the adoption of **equality policies and strategies**. However, under Section 149 all public authorities (and those who exercise public functions)¹³ 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. Principles for the operation of this public sector equality duty have been elaborated by the courts.¹⁴ 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.¹⁵ 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 public sector equality duty (PSED). The published information must include those relating to people who share a relevant protected characteristic and who are affected by its policies and practices. Section 5 of the Regulations also provides 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.

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 amelioration 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 slightly 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.

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).¹⁶ 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'.¹⁷

Section 136 of the Act provides for a shift in the **burden of proof** in discrimination cases once a *prima facie* case of discrimination has been established. This is an important procedural guarantee as the person, public body or private entity alleged to have discriminated against the claimant is often more powerful, both in terms of resources and access to information. For example, proving that dismissal was discriminatory will require access to documentation held by the employer and for the employer to justify its decision. Without a shift in the burden of proof, the employee will unlikely have access to the evidence necessary to proceed, undermining access to justice.

The Equality and Human Rights Commission is Great Britain's national **equality body** and has been awarded an 'A' status as a National Human Rights Institution by the United Nations.¹⁸ 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).

Gaps and opportunities

The anti-discrimination framework in Great Britain (England, Scotland and Wales) is comprehensive, clearly articulated, and largely in line with international standards. The principal piece of anti-discrimination legislation (the Equality Act 2010) expressly prohibits all forms of discrimination, applies evenly across different areas of life, and provides for a shifting of the burden of proof in compliance with best practice. The establishment within the Act of a public sector equality duty (PSED), and the mandating of equality impact assessment as a means for public authorities to demonstrate their compliance (or lack thereof) with the duty, goes further than many laws. Some shortcomings remain related to, for example, the limited personal scope of the Act, and the weak protection against multiple discrimination. As noted above, a different equality law

framework is in operation in Northern Ireland, which has a more limited material scope, and falls short of the requirements of international law. Both the Equality and Human Rights Commission of Great Britain and the Equality Commission for Northern Ireland fulfil a vital function in overseeing the anti-discrimination framework in their jurisdictions.

Despite these positive practices, a number of procedural barriers (including funding cuts to legal aid and the introduction of tribunal fees) undermine the effectiveness of protections. Research commissioned by the Equality and Human Rights Commission into the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) on access to justice found that it had "negatively affected people's access to justice and their ability to reach a satisfactory resolution to their legal problems".¹⁹ In research published in 2019, the Commission found that the introduction of fees in the system of employment tribunals in 2013 led to a drop of 70% in the number of claims.²⁰ More recently, the government's proposed reform to the Human Rights Act seeks to introduce a number of highly problematic changes which would make it harder for individuals to enforce their rights and seek redress. To ensure the full and effective enjoyment of the right to non-discrimination for older people and for all rights-holders, the State must ensure equal and effective access to the anti-discrimination framework.

Endnotes

1. For a discussion of the human rights framework on age discrimination see HelpAge International, *Advancing equality for older people*, 2022, available at: www.helpage.org/AgeEquality
2. International Covenant on Civil and Political Rights, Articles 26 and 2(1).
3. Equality Act 2010, Part 2, Chapter 1.
4. See *Chief Constable of Norfolk v. Coffrey* [2019] EWCA Civ 1061.
5. See Equality Act, Sections 20 and 21. See also, for discrimination relating to disability, Section 15.
6. See in particular Employment Equality (Age) Regulations (Northern Ireland) 2006.
7. 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.
8. 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.
9. See *Seldon v. Clarkson Wright and Jakes (and Secretary of State for Business Innovation and Skills, and Age UK – Intervenor)* [2012] UKSC 16.
10. 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.
11. Equality Act, Sections 13(2), 19(2)(d), and Schedule 9 (on occupational requirements and specific age exceptions).

12. *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
13. 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.
14. 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.
15. See Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.
16. Equality Act, Part 9, Chapter 2.
17. Employment Tribunals Act, Section 18(1)(e).
18. 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.
19. Equality and Human Rights Commission, *The impact of LASPO on routes to justice*, 2018, available at: www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf, p.52.
20. Equality and Human Rights Commission, *Access to legal aid for discrimination cases*, 2019, available at: www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf, p.5.

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