

India

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 Indian legislative framework falls below these standards in several respects.

Equality and non-discrimination obligations

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

India 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

India 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). India does not permit individuals to bring complaints directly to any of the UN treaty bodies after exhausting domestic remedies. India is not a party to any regional human rights treaty.

The prohibition of age discrimination

Personal scope	
Has the State adopted comprehensive legislation?	✗
Has the State adopted age-specific equality legislation?	✗
Does the law expressly prohibit age discrimination?	?

India has not adopted comprehensive anti-discrimination law or age-specific equality legislation. Whilst some laws and policies have been adopted that are designed *ostensibly* for the benefit of older people,³ none of these explicitly prohibit age discrimination, and some fail to adopt a human-rights based approach to older age. As a result, protections against discrimination are patchwork. The principal source of anti-discrimination law is the Constitution. Article 15(1) prohibits discrimination by the State on the grounds of religion, race, caste, sex, and place of birth. Article 16 prohibits discrimination in public employment. Discrimination by other duty-bearers is also prohibited in access to certain goods and services.⁴



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These provisions differ in their **material scope**,⁵ and notably, they do not expressly recognise age as a protected characteristic. However, Article 14 of the Constitution contains a broader equality guarantee. Under that provision, the “State shall not deny to any person equality before the law or the equal protection of the laws”. In some contexts, national courts have interpreted this article as providing protection against age discrimination.⁶ Nonetheless, age-based distinctions are common in India, and – as noted below – in many cases they have been accepted as a legitimate basis for differentiation.⁷

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

None of the above provisions provide express protection against **multiple discrimination**, or discrimination based on **perception**, or **association**. With some limited exceptions, the recognition of these concepts is also absent in other equality legislation, and India has been criticised by UN treaty bodies in this regard.⁸ The HIV and AIDS (Prevention and Control) Act of 2017 offers some protection against discrimination based on association, prohibiting discrimination in employment against people living with HIV, as well as people who are currently, or have previously, “lived, resided or cohabited” with such people. The Rights of Persons with Disabilities Act of 2016 contains a specific provision relating to women and children with disabilities. However, the law does not expressly recognise the concept of intersectional discrimination, and its application to older people is therefore unclear. There have, however, been some positive developments in this area at the judicial level. In a 2021 judgment concerning gender-based violence, the Supreme Court of India examined the concept of intersectionality.⁹ This judgment raises the prospect that discrimination claims based on multiple grounds may be successful in future cases. However, this is an emerging practice, and historically the court’s treatment of arguments raising intersectional age discrimination issues has been extremely poor.¹⁰

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

The Constitution of India does not expressly define forms of prohibited conduct, although it is clear that the ban encompasses **direct discrimination**. In recent cases, the Supreme Court of India has also recognised the concept of **indirect discrimination**, although it has described jurisprudence in this area as being “at a nascent stage” of development.¹¹ Sexual harassment is prohibited under the Sexual Harassment of Women at Workplace Act of 2013. However, the Act only affords protection to women and its material scope is limited to the area of employment. Indian legislation does not expressly recognise **ground-based harassment** as a form of prohibited conduct, contrary to best practice. **Denial of reasonable accommodation** is listed as a form of disability discrimination under the Rights of Persons with Disabilities Act, and the Act makes clear that “all forms of discrimination” are covered.¹² However, other forms of discrimination are not expressly listed, and in the absence of a clear ban on intersectional discrimination, the law is of limited relevance to older people, including those that experience disadvantage on the basis of their age and disability.

Indian legislation does not establish specific rules relating to **justification** in discrimination cases,¹³ although the non-discrimination articles of the Constitution do permit the State to make “special provision” for certain categories of person, which may *de facto* permit differential treatment in certain circumstances.¹⁴ In its case law on Article 14 of the Constitution, the Supreme Court of India has found that differences in treatment may be justified in particular contexts. The Court has distinguished illegitimate “class legislation” from permissible “reasonable classification”.¹⁵ In order to demonstrate that a classification is reasonable, it “must be founded on an intelligible differentia which distinguishes those that are grouped together from others” and “the differentia must have a rational relation to the object sought to be achieved by the act”.¹⁶ It must also be shown that the distinction is not arbitrary.¹⁷

In practice, national legislation continues to discriminate against older people, particularly in the area of employment through the maintenance of mandatory retirement provisions.¹⁸ The United Nations Independent Expert on the enjoyment of all human rights by older persons has called for the abolition of mandatory retirement, which is built upon ageist assumptions relating to older age.¹⁹

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 service providers to assess the impact of their policies and mainstream the rights of groups exposed to discrimination in their work.

Indian legislation does not expressly mandate the adoption of **positive action** measures. 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.²⁰ As noted above, the Maintenance and Welfare of Parents and Senior Citizens Act of 2007 does set out some specific entitlements for older people. However, an analysis of these provisions falls beyond the scope of the present study.²¹

The Government of India has formulated specific policies relating to older people. Principal amongst these is the National Policy on Senior Citizens, which was adopted in 2011. The policy sets out the objectives of the State in different areas of life, such as housing, employment and education. However, beyond a single reference to the experiences of older women, the policy does not reference discrimination, and Indian law does not mandate the adoption of **equality policies or strategies** relating to older people. Similarly, there is no requirement under national legislation that public or private duty-bearers conduct **equality impact assessment**.

Enforcement and implementation

To ensure access to justice for victims of discrimination, a wide range of measures are required. This includes the establishment and adequate resourcing of institutions empowered to enforce the legal framework; the amendment of national rules governing evidence and proof in discrimination cases; and the provision of legal aid and assistance, alongside procedural accommodation and accessibility measures, to remove financial and physical justice barriers. While States may adopt 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.

Due to the absence of anti-discrimination provisions in areas such as employment and healthcare, there are few direct avenues of redress for individuals who have experienced age discrimination in India. Claims relating to a violation of the constitutional equality provisions, discussed above, may be filed before a High Court or Supreme Court, following the writ petition procedure established under Articles 32 and 226 of the Constitution. In practice, however, age discrimination cases are extremely rare,²² and constitutional enforcement mechanisms suffer from procedural defects that may undermine access to justice in practice. In particular, there is no provision requiring a **transfer of the burden of proof** in civil discrimination cases. This runs contrary to the requirements of international human rights law and best practice: without such a procedure, it may be very difficult for victims of discrimination to provide evidence for their claims.

There is no national **equality body** in India, although a National Human Rights Commission has been established, alongside state human rights commissions which operate in different regions. The functions of the commission are set out under Section 12 of the Protection of Human Rights Act of 1993. The commission has broad promotion and protection functions and may support litigation by “inverven[ing] in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court”.²³ Individual complaints of human rights violations may also be submitted to the Commission, which is invested with wide investigatory powers.²⁴ However, the enforcement powers of the Commission are limited to initiating legal proceedings, and seeking relevant orders and writs from the Supreme Court and High Courts.²⁵ Whilst the Commission can make recommendations, it is not empowered to issue binding judgments, limiting the effectiveness of this mechanism of redress.

Gaps and opportunities

The Indian legal framework offers little protection against age discrimination, particularly in the private sector. Whilst age has been recognised as a protected characteristic under Article 14 of the Constitution in a small number of cases, constitutional equality guarantees vary in their personal and material scope, limiting the areas of life in which the prohibition applies. National legislation does not adequately distinguish different forms of discrimination, and notwithstanding some recent judicial practice, it is unclear if intersectional age discrimination is covered by the ban. Positive action measures for older people are not mandated, and national law fails to establish an effective framework for advancing equality for older people.

To address these gaps, comprehensive anti-discrimination legislation is needed.²⁶ Important work has been done by civil society in recent years to develop the contents of a draft law and to promote its adoption. In 2017, a comprehensive anti-discrimination bill was submitted to the Indian Parliament by Dr. Shashi Tharoor. Although the bill lapsed, work has continued, and in January 2020 a new version was released for consultation by the Centre for Law and Policy Research.²⁷

As it is currently presented, the bill would define different forms of prohibited conduct, clearly demarcate the roles and responsibilities of public and private duty-bearers, and establish broad equality duties. The bill would also see the establishment of an independent equality commission with a wide mandate and functions. The bill presents a novel opportunity to improve legal protections against age discrimination in India. To realise this opportunity, the collaboration of a broad range of stakeholders is required. Groups working with and on behalf of older people have an essential role to play in this process.

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. See, in particular, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
4. Constitution of India, Article 15(2). The Supreme Court of India has interpreted this provision as entailing non-discrimination obligations for the private sector. See *Indian Medical Association v. Union Of India & Ors*, 12 May 2011.
5. *Ibid.*
6. See, for example, Delhi High Court, *Commissioner, MCD v. Shashi and Others*, 7 September 2009.
7. Indeed, in the case cited directly above, the Court found that restricting applications for a job as a teacher to people between the ages of 18 and 30 was legitimate.
8. See, for instance, Committee on the Rights of Persons with Disabilities, *Concluding Observations: India*, UN Doc. CRPD/C/IND/CO/1, 2019, para. 12(c).
9. See Supreme Court of India, *Patan Jamal Vali v. The State of Andhra Pradesh*, 27 April 2021, para. 36.
10. See, for instance, the 1981 case of *Air India v. Nergesh Mirza*, in which the Court held that the setting of differential retirement ages for male and female air hostesses served a legitimate aim. In its General Recommendations, the CEDAW Committee has noted that different mandatory retirement ages for women when compared to men gives rise to “discrimination on the basis of age and sex”. See Committee on the Elimination of Discrimination against Women, General Recommendation No. 27, UN Doc. CEDAW/C/GC/27, 2010, paras. 17 and 20.
11. Supreme Court of India, *Nitisha v. Union Of India*, 25 March 2021.
12. Rights of Persons with Disabilities Act, 2016, Section 2(h).
13. A notable exception is Section 3(3) of the Rights of Persons with Disabilities Act of 2016, which permits differentiation on the basis of disability when it can be shown that an “impugned act or omission is a proportionate means of achieving a legitimate aim”.
14. Constitution of India, Articles 15 and 16.
15. Supreme Court of India, *The State Of West Bengal v. Anwar All Sarkarhabib*, 11 January 1952.
16. *Ibid.*
17. Supreme Court of India, *Maneka Gandhi v. Union Of India*, 25 January 1978.
18. See further, Age Discrimination Info, *India*, 2018, available at: www.agediscrimination.info/international-age-discrimination/india
19. 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.
20. See, in particular, Constitution of India, Articles 15 and 16.
21. For further discussion of the Act, see HelpAge India, available at: Preliminary Study on Effectiveness of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, 2017, www.helpageindia.org/wp-content/uploads/2018/01/Preliminary-Study-Effectiveness-Maintenance.pdf
22. See further, Age Discrimination Info, *India*, 2018, available at: www.agediscrimination.info/international-age-discrimination/india
23. Protection of Human Rights Act, 1993, Section 12(b).
24. *Ibid.*, Sections 12(a) and 13–14.
25. *Ibid.*, Section 18.
26. See, for example, the findings of the Committee on the Elimination of Discrimination against Women in its Concluding Observations on India, UN Doc. CEDAW/C/IND/CO/4-5, 2014, paras. 8–9.
27. Centre for Law & Policy Research, *The Equality Bill, 2020*, available at: <https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2020-17-Jan-2020-1.pdf>

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