

Argentina

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.

Through the incorporation of international human rights instruments into the national legal system, Argentina's legal framework meets some of these requirements, but there remain areas where improvement is required if the State is to fully discharge its equality and non-discrimination obligations.

Equality and non-discrimination obligations

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

Argentina 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 Argentina 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 each of these bodies after exhausting domestic remedies. Additionally, Argentina is a party to relevant regional human rights instruments. The State has ratified the American Convention on Human Rights and the Inter-American Convention Against All Forms of Discrimination and Intolerance, which contain important non-discrimination guarantees. Argentina has also ratified the Inter-American Convention on Protecting the Human Rights of Older Persons, which provides a framework for the protection of older persons' rights.

The prohibition of age discrimination

Personal scope	
Has the State adopted comprehensive legislation?	✗
Has the State adopted age-specific equality legislation?	✓
Does this law create an enforceable right to non-discrimination?	✓



EQUAL RIGHTS TRUST

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Argentina has a developed, but complex, anti-discrimination law framework, consisting of constitutional equality guarantees; national-level legislation that prohibits discrimination in broad areas of life; provincial legislation that expands upon these protections; and age-specific legislation, in the form of international human rights agreements, which may be enforced directly in domestic courts.³ These laws sit alongside discrete non-discrimination provisions in particular legal fields, such as employment, and criminal code sanctions, which fall beyond the scope of this study.⁴

In 1988, Argentina adopted Federal Law No. 23.592. Article 1 of the law contains a general prohibition of discrimination, which has a broad **material scope**. Accordingly, “any person”, who “in any way impairs the full exercise on an equal footing to the fundamental rights and guarantees recognised in the National Constitution, shall be obliged, at the request of the injured party, to render the discriminatory act without effect or cease to perform it and repair the moral and material damage caused”. This provision is apparently open-ended. However, the same article provides that “particular consideration shall be given to discriminatory acts or omissions founded on motives such as race, religion, nationality, ideology, political or trade union opinion, sex, wealth, social status or physical characteristics”. Age is not expressly included within this list, although the term ‘physical characteristics’, may encompass protection on this ground. The reference to discriminatory ‘motives’ is potentially problematic: international law recognises that discrimination may be committed intentionally or unintentionally, and there is no distinction drawn between those acts which are intentional in nature and those that lack a discriminatory intent. Moreover, unlike laws adopted at the provincial level, the act does not provide for the adoption of specific equality measures or establish detailed rules for the enforcement of the anti-discrimination framework.⁵

In addition to this law, Article 16 of the Constitution provides for equality before the law. Whilst this provision does not explicitly prohibit age-discrimination, Article 75(22) of the Constitution of Argentina provides that treaties ratified by the State shall take precedence over national legislation. Specific instruments, including the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women “stand on the same level as the Constitution” within the domestic legal order.⁶ Other human rights treaties that are approved by Congress with a two-thirds majority vote shall also enjoy constitutional status. The Convention on the Rights of Persons with Disabilities now enjoys constitutional hierarchy having been adopted under this procedure.⁷

In 2017, Argentina adopted Law No. 27.360. This law incorporates the Inter-American Convention on the Protection of Human Rights of Older Persons into the domestic legal order. In so doing, it provides valuable additional protections for older persons subjected to discrimination and associated human rights abuses. Whilst the convention does not yet enjoy constitutional hierarchy, it does take precedence over ordinary laws and policies, and establishes an enforceable right to non-discrimination. Debates are currently taking place in the national congress to raise the status of the convention to the same level as other international instruments ratified by the State.⁸

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

National legislation does not expressly define the concepts of **multiple and intersectional discrimination**, discrimination based on **association**, or discrimination based on **perception**. However, each of these concepts has been recognised by international and regional human rights bodies and so – in principle – falls within the scope of protection of Argentinian law. Multiple discrimination is explicitly prohibited under Article 2 of the Inter-American Convention on Protecting the Human Rights of Older Persons. Discrimination on the basis of (older) age and one or more additional grounds (such as disability, or gender) is, therefore, clearly encompassed within the ban.

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

As above, whilst national law does not expressly define different forms of prohibited conduct, through the direct incorporation of international and regional human rights instruments in the national legal system, **direct discrimination, indirect discrimination, harassment, and denial of reasonable accommodation**, are each – in principle – prohibited in Argentina. However, it should be noted that the understanding of these concepts has developed over time through treaty body practice. Without a clear definition of these forms of

conduct under national legislation, older people, and duty-bearers may be unclear of their legal rights and obligations, creating barriers to justice in practice.

There are no specific rules regulating **justifications and exceptions** in Argentina. Accordingly, the rules of international law should apply. In this connection, the UN treaty bodies have emphasised that a differentiation (on the basis of age or any other ground) may only be justified when it pursues a legitimate aim and is necessary and proportionate to that aim. Stereotypes (relating to age or other grounds) cannot be used to justify an otherwise discriminatory policy or practice.⁹

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.

Article 75 of the Constitution empowers Congress to “promote positive measures guaranteeing true equal opportunities and treatment”. This may be interpreted as permitting (although not expressly mandating) the adoption of **positive action** measures. Unlike Federal anti-discrimination legislation, the Anti-discrimination law of Buenos Aires contains a specific positive action clause, which permits the adoption of measures directed to promote equality for groups that experience discrimination. Whilst this recognition is positive, the law does not expressly require the adoption of such measures, and the duty only applies to the State (rather than private duty bearers).¹⁰ 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. The convention also sets out the States’ specific obligations towards older persons, some of which may include forms of positive action. However, beyond these measures, it is unclear whether Article 4(b) creates an enforceable right in Argentina: States possess discretion in the forms of positive action they choose to adopt. It is therefore unclear whether individuals may challenge a failure by the State to adopt specific measures, creating a gap in legal protection.

Several articles of the Inter-American Convention on Protecting the Human Rights of Older Persons require States to develop **policies and strategies** aimed at promoting and protecting the rights of older persons

in different areas of life and rights. Moreover, as part of their broader policy development, States undertake to mainstream the rights of older persons by “develop[ing] specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination”.¹¹ States should ensure the active participation of older persons and groups working with and on behalf of such persons in the development of such policies.¹² In view of these requirements, a range of policies have been adopted in Argentina that relate to the rights of older persons.¹³ However, national legislation does not impose a specific legal obligation on private duty-bearers to adopt equality policies relating to older persons. Similarly, the law does not require the adoption of **equality impact assessment** to identify and mitigate the impacts of (age) discriminatory laws and policies before they are adopted.

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.

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*, and the judge in the case is empowered to declare the “norm upon which the harmful act or omission is founded unconstitutional”.¹⁴ The claim can be submitted by the person who has experienced discrimination, as well as the Defender of the People, or a relevant, registered association.¹⁵ The Court does not have the power to award damages, although a separate civil claim may be filed in accordance with the rules of the Civil Code. There is no procedure established for the **transfer of the burden of proof** in discrimination cases under the Constitution. However, Argentina has a federal legal system and both the federal government and the provinces (including the Autonomous City of Buenos Aires) are responsible for the administration of justice within their own jurisdiction.¹⁶ Whilst provincial governments are bound by the requirements of the Constitution, international treaties, and relevant national legislation (including the Civil Code, Criminal Code, and Labour Code),¹⁷ they may develop their own procedural rules.¹⁸ In this connection, Law No. 5.261 of 2015 (the Buenos Aires Anti-Discrimination Law) provides that once a *prima facie* case of discrimination has been established, the defendant must prove that discrimination did not occur.¹⁹ Consistent with best practice, this procedure does not apply in criminal cases.

Argentina has established an independent **equality body** – the National Institute Against Discrimination, Xenophobia and Racism (INADI). The principal powers and functions of INADI are set out under Chapter II of Law 24.515 of 1995. These include broad promotion and protection responsibilities. Since 2018, INADI has published multiple reports examining discrimination against older people in Argentina.²⁰ INADI may appear as a friend to the Court and provide specialised advice on matters of discrimination. It is also empowered to receive complaints from citizens and offer advice. However, it does not have any strict enforcement powers, limiting its effectiveness in practice.

Gaps and opportunities

The Argentinian anti-discrimination framework is developed yet complex. As stated above, it is comprised of constitutional equality guarantees; national-level legislation that prohibits discrimination in broad areas of life; provincial legislation that expands upon these protections; and age-specific legislation, in the form of international human rights agreements, which may be enforced directly in domestic courts. The incorporation of international human rights treaties into Argentinian law significantly strengthens the framework of protection for older people: whereas national law does not expressly define multiple and intersectional discrimination, discrimination based on association or discrimination based on perception, and forms of prohibited conduct,

these concepts have been elaborated by international and regional human rights bodies. While these concepts should, in principle, fall within the scope of protection of Argentinian law, concern has been expressed that the lack of domestic visibility of the Inter-American Convention on Protecting the Human Rights of Older Persons as well as other regional and international instruments impedes their enforcement in practice. These concepts must be made visible in order that older persons can effectively exercise their rights and duty-bearers can discharge their obligations.

Civil society has played an important role in the process of strengthening Argentina's equality framework. Civil society actors were a driving force in the development and enactment of the provincial Buenos Aires Anti-Discrimination Law and helped to bring its content more closely in alignment with best practice standards.²¹ Positively, the Buenos Aires Law contains a specific clause relevant to positive action, and – consistent with best practice – provides for a transfer of the burden of proof where a prima facie case of discrimination has been established, except for in criminal cases. Civil society actors, particularly LGBTQI+ organisations, are once again mobilising in favour of the adoption of national comprehensive anti-discrimination legislation.²² Groups working with and on behalf of older people have an essential role to play in this collaborative effort. To fulfil its non-discrimination obligations, the State should heed the calls of civil society and ensure the enactment of comprehensive national anti-discrimination legislation.

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. This study focuses, in particular, on those laws that are applicable across the whole territory of Argentina.

4. For instance, Section 17 of Law 20.744 on Employment Contract, which prohibits discrimination against workers, *inter alia*, on the basis of their age. The use of criminal law to combat discrimination raises unique issues relating to the burden of proof and the presumption of innocence. As such, these are not discussed further here. For further information on discrimination in employment, see Age Discrimination Info, *Argentina*, 2018.

5. See, in particular, Law No. 5.261 of 2015 (the Buenos Aires Anti-Discrimination Law), and its discussion in Equal Rights Trust, *Together for Equality*, 2021, pp.41–42.

6. Constitution of Argentina, Article 75(22).

7. See Argentina, Law No. 27.044.

8. The first stage in this process, which requires a vote by the Senate, has already been passed.

9. See Note 1.

10. Law No. 5.261 in 2015 (the Buenos Aires Anti-Discrimination Law), Article 4.

11. Inter-American Convention on Protecting the Human Rights of Older Persons, Article 5.

12. *Ibid.*, Article 4(f).

13. At the time of writing, INADI, the National Institute Against Discrimination, Xenophobia and Racism, is in the process of developing a national programme against ageism, and is seeking the views of civil society.

14. Constitution of Argentina, Article 43.

15. *Ibid.*, Article 43.

16. *Ibid.*, Articles 5 and 123.

17. *Ibid.*, Articles 31 and 75(12).

18. See, for instance, Law of Amparo of the Autonomous City of Buenos Aires.

19. See the Buenos Aires Anti-Discrimination Law, Article 13.

20. See in particular, INADI, *La discriminación hacia las personas adultas mayores*, 2021, available at: www.argentina.gob.ar/sites/default/files/2021/08/la-discriminacion-hacia-las-personas-adultas-mayores_1.pdf; INADI, *Discriminación Por Edad, Vejez, Estereotipos Y Prejuicios*, 2018, available at: www.conabip.gob.ar/sites/default/files/Discriminacion-por-Edad-Vejez-Estereotipos-y-Prejuicios%20PARA%20CLASE%201.pdf

21. Equal Rights Trust, *Together for Equality*, 2021, pp.41–42.

22. Equal Rights Trust, *Together for Equality*, 2021, pp.41–42.

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