



EQUAL RIGHTS TRUST

**Equal Rights Trust
Written Submission to the Committee on the Rights of Persons with Disabilities in respect
of draft General Comment 6 on non-discrimination (Article 5)**

November 2017

Statement of Interest

1. The Equal Rights Trust (the Trust)¹ is grateful for the opportunity to make this submission to the Committee on the Rights of Persons with Disabilities (the Committee) in respect of Draft General Comment 6 on Article 5 of the Convention on the Rights of Persons with Disabilities (the Convention). This submission builds upon the Trust's written submission on the Outline of Draft General Comment 6 of July 2017 and our participation in the Day of General Discussion August 2017.
2. The Equal Rights Trust exists to combat all forms of discrimination and to promote equality as a fundamental right and principle of social justice. The Trust is the only international organisation to focus exclusively on the right to equality and to approach equality from a unified human rights framework. The unified human rights framework on equality forms the basis of the Trust's submission.
3. The unified human rights framework on equality is elaborated in the Declaration of Principles on Equality (the Declaration) which sets out international best practice standards on the right to equality.² The Declaration was drafted and adopted by 128 prominent equality and human rights experts from more than 40 different countries, in a process facilitated by the Equal Rights Trust in 2008. Since the adoption of the Declaration, the Trust has worked with local partners in more than 40 countries around the world to develop and promote best practice standards on the right to equality. Our work involves supporting civil society organisations, lawyers and others to secure the enactment and implementation of comprehensive anti-discrimination legislation, through advocacy, litigation, building capacity and research and documentation.
4. As noted in our previous engagements with this process, in the view of the Trust, Draft General Comment 6 provides an important opportunity for the Committee to clarify the understanding and content of the rights to equality and non-discrimination under international human rights law. Thus, we hope that the General Comment will be of benefit both to those seeking to understand the correct interpretation of the Convention, and to those seeking to understand the correct interpretation of the rights to equality and non-discrimination.

¹ For more information about the Equal Rights Trust and our work, please visit:
<http://www.equalrightstrust.org/>.

² Equal Rights Trust, *Declaration of Principles on Equality*, 2008, available at:
<http://www.equalrightstrust.org/content/declaration-principles-equality>.

5. In this submission, we welcome Draft General Comment 6 (the Draft)³ as establishing a strong and clear interpretative guide on the application of the rights to equality and non-discrimination. We welcome the fact that the draft reflects very many of the recommendations made in our submission on the outline of Draft General Comment 6 in July 2017 and reiterated during the day of general discussion. However, we note a number of areas of concern and areas where we believe that the Draft General Comment could be made clearer, and provide recommendations on how these concerns could be addressed. We focus in particular in three key areas:
 - a. The need to clarify, in the discussion of Article 5(1), that the right to equality entails equal participation in all areas of civil, political, economic, social and cultural rights
 - b. The need to clarify, in discussion of Article 5(4), that positive action is necessary to ensure the full enjoyment of the right to equality, and that states have an obligation to take positive action measures in cases where substantive inequalities are identified;
 - c. The need to ensure clarity and consistency, in discussion of the scope and content of the right to non-discrimination in Article 5(2) and the legislative and enforcement obligations of the state arising under Article 5 as a whole.
6. We highlight these issues and make recommendations to the Committee in the hope of contributing to the important work of the Committee in its final stages of the developing this General Comment.

Positive Elements

7. The Trust welcomes the Committee's Draft of General Comment 6 and congratulates the Committee for developing a strong statement elaborating on the content of the rights to equality and non-discrimination in the Convention. In the Trust's view, while there remain some important areas needing clarification and improvement, the Draft as it stands represents potentially the most progressive interpretation of the rights to equality and non-discrimination at the international level to date. Thus, as we had hoped, the General Comment appears set to establish a new standard on equality and non-discrimination which will not only improve the interpretation of Article 5 of the Convention but also of the non-discrimination provisions in the whole body of UN human rights instruments.
8. We take the opportunity below to highlight a selection of particularly welcome elements of the Draft General Comment, and to urge the Committee to retain these positive elements, without further amendment. It should be noted however that these are only highlights and that – in areas where we do not recommend further amendments in our discussions below on “Areas for Improvement” – we welcome and endorse the Committee's position in the Draft General Comment, and urge its retention without amendment.

Paragraphs 8 and 10: Inclusive Equality

³ Committee on the Rights of Persons with Disabilities, *General Comment on Equality and Non-discrimination (Article 5)*, First draft as at 31 August 2017, 31 August 2017, available at: <http://www.ohchr.org/documents/HRBodies/CRPD/GCART5.docx>.

9. In our submission on the Outline, we urged the Committee to elaborate on the right to equality which is provided in the Convention, and in particular on the commitment in the Preamble to “full and effective participation in society on an equal basis with others”. We warmly welcome the Committee’s discussion of the understanding to equality which informed the development of the Convention, and which underpins it. We note the Committee’s clarification, in paragraph 8, that “[e]quality and non-discrimination are at the heart of the Convention and run like a golden thread through all its substantive articles via the phrase “on an equal basis with others””. We welcome in particular the Committee’s discussion of “inclusive equality” and its clarification that this model does not relate specifically to disability. As noted below, we urge the Committee to take its discussion of inclusive equality further, clarifying that this approach gives right to equality of participation, in its discussion of Article 5(1).

Paragraph 13: Legal Character of Non-Discrimination

10. In our submission on the Outline, the Trust urged the Committee that non-discrimination is a foundational principle in international human rights law, it is also a right. We called on the Committee to reiterate that non-discrimination is both a free-standing right and guaranteed in respect of the enjoyment of other rights. Finally, we called on the Committee to restate that non-discrimination is an immediate obligation. We welcome the fact that in paragraph 13, the Committee has clarified the position on all of these issues.

Paragraph 20: Forms of Discrimination

11. In our previous submission, we noted that international best practice, as set out in the Declaration and clarified *inter alia* by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20 on non-discrimination, includes the following forms of discrimination: direct discrimination, indirect discrimination, harassment and denial of reasonable accommodation.⁴ Therefore, we welcome the Committee’s inclusion of these four forms of discrimination in the General Comment, and the use of definitions which are consistent with those in the Declaration of Principles on Equality. We welcome in particular the inclusion of harassment amongst the listed forms of discrimination, given the omission of this form of discrimination from the Outline.
12. We further welcome the fact that the Committee has excluded discussion of “distinction, exclusion or restriction” and “systemic and structural discrimination” under the sub-heading on forms of discrimination. As indicated in our earlier submission, international best practice dictates that there are four recognised forms of discrimination, and we were concerned that the inclusion of additional terms alongside these recognised forms risked confusion, imprecision and contradiction.

Paragraphs 24-28: Reasonable Accommodation

13. As the Convention itself indicates, reasonable accommodation is integral to the fulfilment of the rights to equality and non-discrimination. Nevertheless, there remains lack of clarity amongst duty-bearers as to the nature of the obligation and what in fact constitutes reasonable accommodation. We therefore welcome the fact that the Committee has responded to our concerns by elaborating upon the meaning of reasonable

⁴ See above, note 2, Principle 5 and Principle 13; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Paras 7, 10 and 28.

accommodation in paragraphs 24 to 28, providing both rights-holders and duty-bearers with clarity as to what may constitute reasonable accommodation. We welcome in particular the explicit reiteration of the Committee's position that cost is rarely the sole factor to consider when evaluating disproportionate or undue burden.

Paragraphs 22 & 41: Grounds of Discrimination and Intersectionality

14. In our submission on the Outline for the General Comment, the Trust urged the Committee to clarify that Article 5(2) necessitates protection from intersectional discrimination arising on the basis of all grounds which can intersect with disability. We therefore welcome the Committee's inclusion of the same extensive list of characteristics as is used in the Declaration, in its discussion on this point at paragraph 22.
15. We further welcome the Committee's clarification (in paragraph 41) of the fact that Articles 6 and 7 of the Convention, dealing with intersectional discrimination affecting women and children with disabilities respectively, are "illustrative, rather than exhaustive".

Areas of Concern

Paragraphs 10 & 18: Equal Participation

16. In our submission on the Outline, we noted that while both the Preamble and Article 1 of the Convention refer to the Convention's aim of achieving "full and effective participation in society on an equal basis with others", the words "equal participation" are not included in Article 5. We urged the Committee to rectify this omission, and to clarify that Article 5 encompasses a right to equal participation. In so doing, the Committee could clarify that the Convention provides a right to equality defined, as in the Declaration, as a right "to participate on an equal basis with others in any area of economic, social, political, cultural or civil life".⁵
17. As noted above, the Trust welcomes the Committee's repeated reference to, and emphasis on, the fact that the Convention entails the adoption of an inclusive or transformative equality approach. We welcome in particular the statement in Paragraph 10, that "[t]he Convention is based on this new model of equality, which is also known as transformative of inclusive equality". We consider that this interpretation is a clear manifestation of the commitment to "full and effective participation in society on an equal basis with others" as provided in the Preamble. Indeed, as the Committee notes in citing the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, "[t]he principle of equal rights implies (...) that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation".⁶
18. However, while we welcome this commitment to an inclusive approach to equality, we are concerned that the Committee has not made reference to the right to "equal participation" in its discussion of the normative content of Article 5(1). In light of the strong commitment to an inclusive approach to equality evidenced in the introductory paragraphs of the General Comment, we are disappointed that the Committee has not taken the opportunity to underline clearly that Article 5(1) entails a right to equal

⁵ See above, note 2, Principle 1.

⁶ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, General Assembly resolution 48/96 of 20 December 1993, Paras 24 to 27.

participation. We are concerned that, in the absence this clarification, the Committee's elaboration of the inclusive approach to equality in the earlier paragraphs of the Draft General Comment risks being merely rhetorical, rather than substantive.

19. We urge the Committee to expand on its discussion of the term "equal benefit of the law" in paragraph 18, stating explicitly that Article 5(1) gives rise to a right "to participate on an equal basis with others in any area of economic, social, political, cultural or civil life".

Paragraphs 10, 19 & 29-31: Positive Action

20. In our previous submission, the Trust noted that positive action is an essential element of the right to equality, and that states are obligated to implement positive action measures where substantive inequalities are identified. We noted that Article 5(4) of the Convention refers to only "specific measures", which are defined not as an essential and necessary element of the equality guarantee, but rather as an exception to the right to non-discrimination. We encouraged the Committee to state clearly that Article 5(4) of the Convention should be read as necessitating positive action measures in order to tackle substantive inequality, in line with the definition of the right to equality as discussed above.
21. As such, we welcome the Committee's acknowledgement, in Paragraph 10 of the Draft, that "[i]n order to change discriminatory structures and systems, positive measures are necessary". We further welcome the Committee's reflection, in Paragraph 19, that the phrase "on equal basis with others" in Article 5(2) "requires that States parties take positive action to achieve *de facto* equality for persons with disabilities to ensure that they can actually enjoy all human rights and fundamental freedoms".
22. However, we note with concern the fact that in Paragraph 30, the Draft General Comment states that "specific measures are generally not mandatory and it is up to the State party to decide whether, when and how to adopt and implement specific measures", and that the same position is reiterated in paragraph 37. Evidently, there is an inherent contradiction between these two positions, one noting the necessity of positive measures to achieve equality, and the other indicating that such measures are not mandatory.
23. Beyond creating confusion, this contradiction risks misleading states and others who rely upon the Convention, who could consider that positive action is not necessary or obligatory in cases where substantive inequalities exist. Such an interpretation would undermine the coherence of the Convention, and the inclusive approach to equality which the Committee has rightly identified as underpinning it. Positive action measures are not merely permitted as exceptions to the prohibition on discrimination – they are necessitated by the right to equality. As the Committee itself has noted, "specific measures" are "linked to the inclusive model of equality insofar as they seek to correct or compensate for a past or present discrimination or to overcome structural or systemic discrimination".⁷ Moreover, as noted in our previous submission, the Declaration of Principles on Equality clearly sets out that "[t]o be effective, the right to equality requires positive action".⁸
24. We urge the Committee in the strongest terms to remove the references in paragraphs 30 and 37 to specific measures not being mandatory, and to set out clearly, in paragraph 30,

⁷ See above, note 3, Para 29.

⁸ See above, note 2, Principle 3.

that Article 5(4) entails an obligation to take positive measures to accelerate or achieve *de facto* equality, and thereby guarantee full and effective participation of persons with disability in society on an equal basis with others.

Paragraph 20: Forms of Discrimination

25. As noted above, the Trust welcomes the Committee's decision to include the four forms of discrimination recognised in established international law – direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation – and to provide definitions of these forms which are in line with the Declaration and General Comment 20 of the CESCR. Nevertheless, we would urge the Committee to consider clarifying these definitions, in three particular respects, in order to avoid creating confusion among states and others who will rely on the General Comment:
- a. The Declaration of Principles on Equality, at Principle 5, notes that “[a]n act of discrimination may be committed intentionally or unintentionally”.⁹ This is an important and necessary clarification, given that all forms of discrimination – including direct discrimination – can occur in cases where the discriminator is not aware of, or does not intend, the discriminatory impact of their decision, or indeed in cases where the discriminator considers that they are acting in the best interests of the discriminated party. We urge the Committee to state clearly that the motive or intention of the discriminating party are not relevant to a determination of whether discrimination has occurred.
 - b. As paragraph 20(d) notes, harassment, as a form of discrimination, entails unwanted conduct related to a prohibited ground which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The creation of a particular environment is critical to evaluating whether harassment has occurred, and is connected with the material scope of the right to non-discrimination. The material scope of the right has been defined in the Declaration of Principles on Equality as “all areas of activity regulated by law”¹⁰ and by the Human Rights Committee as “any field regulated and protected by public authorities”.¹¹ Therefore, we recommend that the Committee clarify that, as with the other forms of discrimination, harassment can only occur in an area of activity regulated by law; we recommend that the Committee to consider clarifying the example it provides, accordingly.
 - c. Paragraph 20(e) lists intersectional discrimination as a form of discrimination. As noted in both this and our previous submission, the Trust welcomes the Convention's focus on intersectionality, and we fully endorse the Committee's strong position on this issue. However, we consider that listing “intersectional discrimination” as a form of discrimination risks creating confusion. As the text of paragraph (e) itself recognises, intersectional discrimination is not a discrete form of discrimination in itself, but rather a particular manifestation of one of the aforementioned four forms of discrimination (direct, indirect, harassment, denial of reasonable accommodation) on two or more grounds. As such, we recommend that the Committee remove this paragraph treating intersectional discrimination as a

⁹ See above, note 2, Principle 5.

¹⁰ See above, note 2, Principle 8.

¹¹ Human Rights Committee, General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.9, 1989, Para 12.

distinct form of discrimination, and instead situate the same text in the part of the General Comment dealing with personal scope and grounds of discrimination.

Paragraphs 23 and 33: Legislation on Discrimination

26. The Trust welcomes the Committee's references, in paragraph 33 and elsewhere, to the need for states to enact legislation to prohibit and provide protection from discrimination, and provide a framework for the promotion of equality. We urge the Committee to go further in this respect, taking the opportunity to strengthen its position on this point, by ensuring consistent repetition of this point in the relevant places.
27. We recommend that the Committee include an explicit clarification, in its discussion of the obligation to provide "equal and effective legal protection against discrimination" in paragraph 23, that this gives rise to an obligation to enact specific and comprehensive anti-discrimination legislation.
28. Furthermore, in its discussion of the obligation of adopt anti-discrimination legislation, in paragraph 33, we recommend that the Committee elaborate clearly on the scope and content of such legislation.
29. We urge the Committee to amend paragraph 33 as necessary to clarify that in order to be comprehensive, such anti-discrimination law should (a) prohibit and define all forms discrimination elaborated in paragraph 22, (b) on the basis of all grounds set out in paragraph 22, and on the intersection of all of these grounds, (c) in all areas of life regulated by law, and (d) should provide all of the procedural safeguards set out in paragraphs 35 and 36.

Paragraphs 35 and 36: Enforcement of the Right to Non-Discrimination

30. We welcome the Committee's elaboration of the enforcement obligations which arise in the context of Article 5, and consider that paragraphs 35 and 36 provide a clear statement of these obligations. Nevertheless, we are of the view that states and others interpreting the Convention could benefit from additional detail on the content of these obligations, particularly in respect of the rules of evidence and proof, discussed in paragraph 36(d) and remedies and sanctions, discussed in paragraph 36(e).
31. We recommend that the Committee incorporate into paragraph 36(d) clear guidance for states on the nature of the "Specific rules relating to evidence and proof" which are required to give effect to the obligations under Article 5, as is currently provided in paragraph 76(h).
32. We recommend that the Committee provide additional guidance, in paragraph 36(e), as to what constitute sanctions and remedies which are "effective, proportionate and dissuasive", emphasising in particular that remedies should provide compensation for both material and non-material damages, and should provide for the restoration of opportunities denied through discrimination.

Paragraphs 63-64: Discriminatory Torture and Ill-treatment

33. In our submission on the Outline of the General Comment, the Trust noted that discriminatory torture and ill-treatment is a pressing issue that requires more attention than it has received to date. We therefore encouraged the Committee to elaborate upon

the relationship between Articles 5 and 15 of the Convention, and to set out guidance for states on eliminating discriminatory torture and ill-treatment. As such, we welcome the Committee's reference to discriminatory torture or cruel, inhuman or degrading treatment or punishment alongside its discussion of the institutionalisation, in paragraphs 63 and 64.

34. However, we believe that the Committee has a particular opportunity, in this General Comment, to elaborate further on the phenomenon of discriminatory torture and ill-treatment. In this respect, we refer the Committee to our discussion of the phenomenon and its consequences for persons with disabilities in a shadow report on Jordan submitted to the CRPD Committee for its 17th Session¹² and our recent report *Shouting Through the Walls: Discriminatory Torture and Ill-treatment, Case Studies from Jordan*.¹³
35. We recommend that the Committee incorporate a new paragraph 65, dedicated to discussion of the connections between Articles 5 and 15, and an elaboration of the phenomenon of discriminatory torture and ill-treatment.

Conclusion

36. The Equal Rights Trust is grateful for this opportunity to provide information to assist the Committee as it continues the process of drafting General Comment 6 on non-discrimination. We remain of the view that the Committee has an excellent opportunity, in this General Comment, to clarify the scope and content of the rights to equality and non-discrimination in the Convention and, in so doing, to inform the interpretation of these rights in international human rights law more broadly.
37. We welcome the Committee's recognition of the importance of the rights to equality and non-discrimination as a "golden thread" in the Convention, and its elaboration on the inclusive model of equality. We welcome the incorporation of our recommendations from our previous submission of July 2017 on the scope and content of the rights to equality and non-discrimination. We consider that the Draft as it stands represents a significant positive development in the law in this area.
38. However, we urge the Committee to consider our recommendations above, in order to further strengthen the General Comment and to provide a guide for states and others who use the Convention which is consistent with international best practice standards. In particular, we urge the Committee to elaborate upon and clarify the right to equality as a right to equal participation and upon the connected obligation to take positive action measures. Furthermore, we urge the Committee to take our recommendations in respect of its discussion of the forms of discrimination and the legislative and enforcement obligations of states, in order to ensure consistency within the General Comment and with the General Comments of other Treaty Bodies, and to minimise the scope for confusion.

¹² Equal Rights Trust, *Submission to the 17th Session of the Committee on the Rights of Persons with Disabilities in relation to the first periodic report of Jordan*, March 2017. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fOR%2f26859&Lang=en

¹³ Equal Rights Trust in partnership with Mizan for Law, *Shouting Through the Walls: Discriminatory Torture and Ill-treatment, Case Studies from Jordan*, March 2017. Available at: http://www.equalrightstrust.org/ertdocumentbank/Jordan%20report_ENG_0.pdf

39. We hope that these additional comments will prove useful for the Committee as it undertakes further review and consideration. We remain available at the Committee's request, for further information or assistance.