



#NOCOVIDISCRIMINATION TRAINING MANUAL

The Equal Rights Trust is an independent international organisation whose mission is to eliminate all forms of discrimination and ensure everyone can participate in life on an equal basis. We work in partnership with equality defenders – civil society organisations, lawyers, government representatives and others committed to using law to create an equal world – providing them with the technical, strategic, and practical support they need to secure the adoption and implementation of comprehensive equality laws.

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Acronyms and Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

The COVID-19 pandemic has transformed our world. As of June 2020, the number of recorded cases has surpassed eight million, while families and friends are mourning the loss of more than 430,000 people.¹ With the stated intention of controlling the spread of the virus and protecting lives, States have implemented unprecedented restrictions on movement both within and between countries (“lockdowns”) or adopted other emergency measures, such as closing schools and businesses, with significant and wide-ranging impacts on societies and economies.

As these measures have taken effect, it has become clear that, while the virus is indiscriminate, the impacts of state responses are not. In May 2020, the Equal Rights Trust brought together an unprecedented coalition of leading global equality organisations to issue a joint Call to Action to express our shared grave concern that States were failing to meet their binding legal obligations to ensure non-discrimination in the enjoyment of human rights for all in their response to the pandemic. We noted that “there is clear and growing evidence that state responses in delivery of healthcare, in the implementation of lockdown and other emergency measures and in policies designed to mitigate economic impacts are having disproportionate and discriminatory impacts”.² These effects are being experienced by all groups exposed to discrimination, including, but not limited to, older persons, children, persons with disabilities, women, ethnic and religious minorities and indigenous peoples, LGBTI persons, persons living with HIV and AIDS, and migrants, refugees and stateless persons. They are impacting upon the enjoyment of rights ranging from freedom of movement to access to education and from access to information to an adequate standard of living, together, of course, with the rights to life and to health. Moreover, as states emerge from lockdown or move into the next phase of their response, it is clear that new patterns of discrimination will emerge.

These discriminatory impacts are occurring despite the fact that almost every State in the world has accepted international legal obligations to ensure the equal enjoyment of human rights, without discrimination. At a bare minimum, these obligations require that the State – whether through law, policy or practice – does not discriminate in its actions. They also create a duty to provide effective protection from all forms of discrimination by private actors and to make reasonable accommodation when required. These obligations apply to all: citizen and non-citizen, irrespective of their identity, status or beliefs. They apply in respect of all civil, political, economic, social and cultural rights. Crucially, while international law recognises that in states of emergency, States can limit the enjoyment of certain human rights, their obligations to ensure non-discrimination remain – emergency measures must not discriminate either in their purpose or their effects.

Following the Call to Action, the Equal Rights Trust launched its #NoCOVIDiscrimination Initiative on 4 June 2020 to help equality defenders in their essential work to identify, document and challenge the discriminatory responses to the COVID-19 pandemic. Under this initiative, we are committed to providing training and legal, technical and strategic support to equality defenders around the world. This training manual complements our free online webinars being delivered in English and other languages, including Russian and Spanish, throughout the summer of 2020.

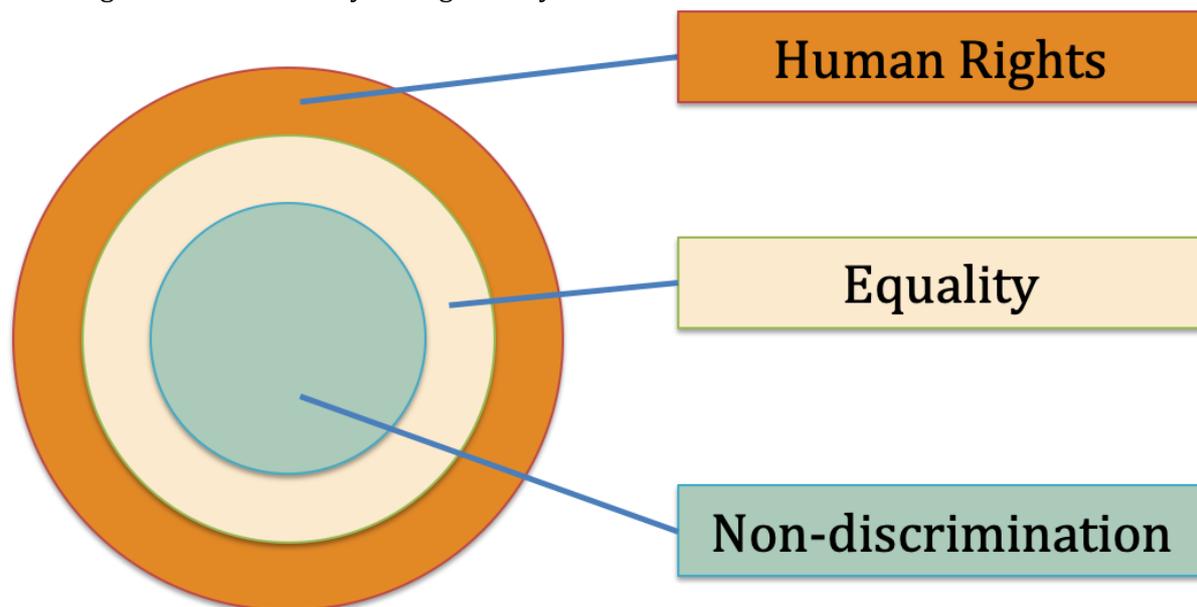
To submit a request for support or to find out more, email:
covidresponse@equalrightstrust.org

¹ See, World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard*, visited 23 June 2020, available at: <https://covid19.who.int>.

² Equal Rights Trust and others, “Call to Action: Addressing discrimination and inequality in the global response to COVID-19”, May 2020, available at: <https://www.equalrightstrust.org/sites/default/files/images/COVIDResponse.pdf>.

1) International standards on the rights to equality and non-discrimination

The rights to equality and non-discrimination are the foundations of international human rights law. Article 1 of the Universal Declaration of Human Rights (UDHR) proclaims that all human beings are “born free and equal in dignity and rights”, while Article 2 states that everyone is entitled to human rights and freedoms “without distinction of any kind”.³ The principle of equality is inseparable from the principle of human dignity and is an entitlement of every person. Respect for human rights and the principles of equality and non-discrimination are interdependent and underpin the UDHR and all international human rights treaties. Equality and non-discrimination are inherent to the very idea of human rights. What are human rights if not all humans can enjoy those rights? Otherwise they are rights only for some but not for others.



Almost every State in the world has accepted non-discrimination obligations through ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In total, 173 States have ratified the ICCPR.⁴ Under Article 2(1) ICCPR, they are required to “respect and to ensure” the civil and political rights provided therein “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 provides a free-standing right to non-discrimination stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³ Universal Declaration on Human Rights, G.A. Res. 217 A (III), 1948, Articles 1 and 2, available at: <https://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>.

⁴ Office of the UN High Commissioner for Human Rights (OHCHR), *Status of Ratification Interactive Dashboard*, visited 23 June 2020, available at: <https://indicators.ohchr.org>.

The UN Human Rights Committee (HRC), the body interpreting the ICCPR, has noted in its General Comment 18 that Article 26 of the ICCPR “prohibits discrimination in law or in fact in any field” and is therefore not limited to those rights which are provided for in the Covenant.⁵

As of June 2020, the ICESCR has 171 State parties.⁶ Article 2(2) requires them to guarantee that all of the economic, social and cultural rights which it provides will be exercised “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The Committee on Economic, Social and Cultural Rights (CESCR), the body interpreting the ICESCR, has clarified in its General Comment 20 that the list of grounds of discrimination provided in the ICESCR, and by implication therefore in the ICCPR, is illustrative and that, irrespective of their omission from the original text of the Covenant, States are obligated to ensure non-discrimination on grounds such as disability, age, gender identity and sexual orientation.⁷

While many States have also accepted obligations to guarantee the rights to equality and non-discrimination under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Rights of Persons with Disabilities (CRPD), we focus on the ICCPR and the ICESCR as they have, through their number of ratifications, received almost universal recognition.

In General Comment No.15, the HRC has stated that the rights in the ICCPR “apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”.⁸ The CESCR has also noted in General Comment 20 that non-discrimination is “an immediate and cross-cutting obligation” which requires states to ensure that their “constitution, laws and policy documents do not discriminate”, to refrain from discriminatory actions and to “take concrete, deliberate and targeted measures” to eliminate discrimination, in particular through the adoption of legislation.⁹ The HRC has further stated in General Comment 29 that one of the conditions for limiting the enjoyment of human rights in times of emergency is that measures taken do not discriminate.¹⁰

⁵ Human Rights Committee (HRC), *General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 1989 (HRC, *General Comment No. 18*), Para 12.

⁶ OHCHR, *Status of Ratification Interactive Dashboard*, visited 23 June 2020, available at: <https://indicators.ohchr.org>.

⁷ Committee on Economic, Social and Cultural Rights (CESCR), *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 (CESCR, *General Comment No. 20*), Paras 15, 27, 28, 29 and 32 respectively.

⁸ HRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, UN Doc. HRI/GEN/1/Rev.6, 1986, p. 140.

⁹ CESCR, *General Comment No. 20*, Paras 7, 8(a), 36 and 37.

¹⁰ HRC, *General Comment No. 29: States of emergency (art. 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, Para 8.

2) Substantive elements of the right to non-discrimination

In outlining the substantive elements of the right to non-discrimination, this section relies on the unified human rights framework on equality expressed in the *Declaration of Principles on Equality* (“the Declaration”).¹¹ The Declaration was drafted and signed in 2008 by 128 human rights and equality experts from over 40 different nations and reflects a professional consensus on the interpretation of the legal framework governing the right to equality drawing on concepts and law developed in international, regional and national contexts. The Declaration has been endorsed or cited at a judicial or legislative level in a number of jurisdictions. In November 2011, the Parliamentary Assembly of the Council of Europe adopted a Recommendation calling on Member States to implement the Declaration in their domestic law and policies.¹² The Declaration’s conceptual framework has also been reflected in interpretive statements on the right to non-discrimination by UN Treaty Bodies, including the CESCR in its General Comment 20, the Committee for the Elimination of Discrimination Against Women in its General Recommendation 28,¹³ and most recently the Committee on the Rights of Persons with Disabilities in its General Comment 6.¹⁴

2.1) Personal scope of the right to non-discrimination

Principle 5: Definition of Discrimination

Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds...

The text of the ICCPR (Articles 2(1) and 26) and the ICESCR (Article 2(2)), expressly protects a limited number of grounds.¹⁵ Both covenants however list the protected grounds as part of an open list, i.e. instead of a specific, closed list of prohibited grounds, their respective articles provide that discrimination is also prohibited on any “other status”, thus allowing for the prohibition of discrimination on grounds not specifically mentioned in the instruments. The bodies interpreting these instruments – the HRC and the CESCR – have, over the years, identified other characteristics which are protected under the heading “other status” as the protection of human rights evolved and after identifying further groups which were exposed to discrimination. As noted in section 1 of these materials, in its General Comment 20, the CESCR highlighted that the list of grounds of discrimination provided in the ICESCR (and by implication in the ICCPR) is illustrative and that, irrespective of their omission from the original text of the Covenant, States are obligated to ensure non-discrimination on grounds such as disability, age, gender identity and

¹¹ *Declaration of Principles on Equality*, Equal Rights Trust, London, 2008, available at <https://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf> (*Declaration of Principles on Equality*).

¹² Parliamentary Assembly of the Council of Europe, *The Declaration of Principles on Equality and activities of the Council of Europe*, Recommendation 1986 (2011), 25 November 2011.

¹³ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 28: The Core Obligations of States parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010.

¹⁴ Committee on the Rights of Persons with Disabilities, *General Comment No. 6: Equality and Non-Discrimination*, UN Doc. CRPD/C/GC/6, 2018.

¹⁵ These grounds, in turn, come from those explicitly referred to in Article 2 UDHR.

sexual orientation.¹⁶ The HRC has also stated that the prohibition of discrimination in Article 26 of the ICCPR includes discrimination based on sexual orientation.¹⁷ The list of grounds has been further elaborated by the CEDAW, the ICERD and the CRPD, as well as other international and regional instruments.

<i>Characteristic</i>	<i>Prohibited under</i>
Race	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR and Article 1(1) ICERD
Colour	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR and Article 1(1) ICERD
Ethnicity	Article 1(1) ICERD
Descent	Article 1(1) ICERD
Sex	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR, and Article 1 CEDAW
Pregnancy	Under Article 11(2) CEDAW, States must take steps to protect pregnant women from discrimination. This includes prohibiting dismissal on the grounds of pregnancy and providing special protection to women during pregnancy in types of work proved to be harmful to them. Under Article 12(2) States must ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
Maternity	Under Article 11(2) CEDAW, States must take steps to protect women from discrimination on grounds of maternity. This includes prohibiting dismissal on grounds of maternity leave and introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.
Civil, Family or Carer Status	Marital status is a prohibited ground Articles 1 and 11(2)(a) CEDAW. In addition, the HRC has stated that the prohibition on discrimination in Article 26 ICCPR includes differentiation between married and unmarried couples. ¹⁸ Similarly, the CESCR has stated that marital and family status are prohibited grounds falling within “other status” in Article 2(2) ICESCR. ¹⁹ The HRC has regarded status as either a natural child or foster child as a protected ground under “other status” in Articles 2(1) and 26 ICCPR, insofar as it has agreed to compare the two with the aim of establishing whether Article 26 has been violated. ²⁰
Language	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR
Religion or Belief	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR
Political or Other Opinion	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR
Birth	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR

¹⁶ CESCR, *General Comment No. 20*, Paras 15, 27, 28, 29 and 32 respectively.

¹⁷ See, for instance, HRC, *Young v Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 2003 (HRC, *Young v Australia*, 2003).

¹⁸ HRC, *Danning v the Netherlands*, Communication No. 180/1984, UN Doc. CCPR/C/OP/2, p. 205, 1990; HRC, *Sprenger v the Netherlands*, Communication No. 395/1990, UN Doc. CCPR/C/44/D/395/1990, 1992.

¹⁹ CESCR, *General Comment No. 20*, Para 31.

²⁰ HRC, *Oulajin and Kaiss v the Netherlands*, Communications Nos. 406/1990 and 426/1990, UN Doc. CCPR/C/46/D/406/1990 and 426/1990, 1992.

National or Social Origin	Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR
Nationality	The HRC has stated that the prohibition on discrimination in Article 26 ICCPR includes differentiation between nationals and non-nationals. ²¹ Similarly, the CESCR has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²²
Economic Status	The CESCR has stated that the ground of “economic situation” falls under “other status” in Article 2(2) ICESCR. ²³
Association with a National Minority	Under the European Convention on Human Rights (ECHR), discrimination on grounds of association with a national minority is prohibited under Articles 14 and Article 1 of Protocol 12 ECHR.
Sexual Orientation	The HRC has stated that the prohibition of discrimination in Article 26 ICCPR includes discrimination based on sexual orientation. ²⁴ Similarly, the CESCR has stated that sexual orientation is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²⁵
Gender Identity	The CESCR has stated that gender identity is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²⁶
Age	The CESCR has stated that age is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²⁷
Disability	Article 4 CRPD; the CESCR has also stated that disability is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²⁸
Health Status	The CESCR has stated that health status is a prohibited ground falling within “other status” in Article 2(2) ICESCR. ²⁹
Genetic or Other Predisposition to Illness	Article 11 of the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine prohibits discrimination on grounds of a person’s genetic heritage.

Although as noted the ICCPR and ICESCR include “other status” as a protected ground, they do not specify what the criteria are for further grounds to be considered as protected under this heading. The approach of the Declaration reflects that of the principal anti-discrimination legislation in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act,³⁰ which provides both a list of explicitly prohibited grounds and a condition that further

²¹ See, for instance, HRC, *Gueye v France*, Application No. 1961/1983, UN Doc. CCPR/C/35/D/196/1985, 1989; HRC, *Adam v Czech Republic*, Application No. 586/1994, UN Doc. CCPR/C/57/D/586/1994, 1996; and HRC, *Karakurt v Austria*, Application No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, 2002.

²² CESCR, *General Comment No. 20*, Para 30.

²³ *Ibid.*, Para 35.

²⁴ See, for instance, HRC, *Young v Australia*, 2003.

²⁵ CESCR, *General Comment No. 20*, Para 32.

²⁶ *Ibid.*

²⁷ *Ibid.*, Para 29.

²⁸ *Ibid.*, Para 28.

²⁹ *Ibid.*, Para 33.

³⁰ Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, 2000. This legislation itself drew inspiration from the decision of the South African Constitutional Court in *Hoffman v South*

grounds are to be prohibited if one of three criteria is met. The Declaration, reflecting international law,³¹ also refers to discrimination by association and discrimination by perception.

Principle 5: Definition of Discrimination

...Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

Moreover, the Declaration recognises that discrimination can occur on the basis of more than one ground and that therefore laws and policies must provide effective protection against multiple discrimination.³² This is reflected in international law; the CESCR has stated in General Comment 20 that:

Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.³³

The CESCR, in the same General Comment, has stated that multiple discrimination may be considered as a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.³⁴ The CRPD also recognises multiple discrimination in its Preamble at paragraph (p) and at Article 6(1). The Committee on the Elimination of Racial Discrimination has referred in its General Recommendations to the intersection between discrimination on grounds of race and gender³⁵ and to intersectionality more generally.³⁶ The Committee on the Elimination of Discrimination against Women has also referred in its General Recommendations to multiple discrimination where gender is one of the intersecting grounds:

African Airways (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), where it was held that the constitutional prohibition on discrimination in Section 9 extended to discrimination on grounds of HIV status, despite the fact that HIV status was not one of the explicitly listed prohibited grounds. See, in particular, Paras 28 and 29.

³¹ CESCR has said: “Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group)” (CESCR, *General Comment 20*, Para 16).

³² *Declaration of Principles on Equality*, Principle 12.

³³ CESCR, *General Comment No. 20*, Para 17.

³⁴ *Ibid.*, Para 27.

³⁵ Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 25: Gender Related Dimensions of Racial Discrimination*, UN Doc. A/55/18, annex V at p. 152, 2000. See also CERD, *General Recommendation No. 27: Discrimination against Roma*, UN Doc. A/55/18, annex V at p. 154, 2000, Para 6, where the Committee examined the link between discrimination on grounds of race and gender in respect of Roma people specifically.

³⁶ CERD, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc. CERD/C/GC/32, 2009, Para 7.

*Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.*³⁷

2.2) Forms of prohibited conduct

DIRECT DISCRIMINATION

Principle 5: Definition of Discrimination

... Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.

The ICCPR does not use the terms “direct” and “indirect”, however the HRC, in interpreting Articles 2(1) and 26, has stated in General Comment 18 that:

*[T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground (...) and which has the **purpose** or **effect** of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*³⁸

While the terms “purpose” and “effect”, are not equivalent to direct and indirect discrimination, the scope of prohibited behaviours covered by the definition referring to “purpose or effect” is coextensive with a prohibition of both direct and indirect discrimination. The CESCR has elaborated on the prohibition of discrimination in Article 2(2) ICESCR in its General Comment 20:

[D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights...

***Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground (...) Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).*³⁹

³⁷ CEDAW Committee, *General Recommendation No. 25: On article 4, paragraph 1, on temporary special measures*, UN Doc. HRI/GEN/1/Rev.7 at p. 282, 2004, Para 12.

³⁸ HRC, *General Comment No. 18*, Para 7.

³⁹ CESCR, *General Comment No. 20*, Paras 7 and 10.

Principle 5 of the Declaration further highlights that an act of discrimination may be committed intentionally or unintentionally. The motive or intention is irrelevant and rather the link is one of causation: the reason why the person or group of persons has been treated less favourably or subjected to a detriment. The prohibited ground need only be part of the “reason” of the less favourable treatment; there may be innocent reasons too. The test will be met if the protected characteristic was an important factor or had a significant influence on the outcome. For example, if a landlord refused to rent to Black housing applicant partly because she was Black and partly because she had a poor credit rating, that would still be direct discrimination on the basis of race.

EXAMPLE

Amnesty International v Ahmed:⁴⁰ the human rights NGO Amnesty International was found to have unlawfully directly discriminated by a tribunal in England and Wales, even though its motives were apparently benign. Amnesty decided not to promote a worker of Sudanese origin to the position of researcher for Sudan because of the serious political and ethnic tensions between the North and South of that country at the time. It felt that she would not be seen as impartial because of her ethnic origin, which would compromise Amnesty’s reputation for neutrality and also endanger her own safety when traveling there. The Employment Appeal Tribunal confirmed however that the only question was whether the ground of Amnesty’s decision not to appoint the worker was her ethnic origin. Once it was established that that was the case, that was the end of the matter.

INDIRECT DISCRIMINATION

Principle 5: Definition of Discrimination

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

As discussed above, the ICCPR does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. Instead, the HRC, when interpreting Articles 2(1) and 26, has used the terms “purpose” and “effect” which, while they are not equivalent to direct and indirect discrimination respectively, cover the same range of prohibited conducts.⁴¹ The CESCR, in interpreting the prohibition against discrimination in Article 2(2) of the ICESCR, has stated:

Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.⁴²

The first element of the definition is the policy criterion or practice (PCP). This can be written or unwritten, formal or informal. In the context of responses to the COVID-19 pandemic, policies adopted by States, including governing freedom of movement, closure and/or access to public spaces, provision of State assistance and benefits, etc. count as a PCP. The PCP *would* put persons

⁴⁰ *Amnesty International v Ahmed* [2009] UKEAT/0447/08; [2009] IRLR 884.

⁴¹ HRC, *General Comment No. 18*, Para 7.

⁴² CESCR, *General Comment No. 20*, Para 10.

having a status or characteristic associated with one or more prohibited grounds at a *particular disadvantage* compared with other persons. The “particular disadvantage” may be obvious, or based on common knowledge, or in some cases may require statistical evidence or expertise. In some instances, it may be easy to identify that a particular disadvantage exists as a result of the existence of another person who is in the same situation but who does not have the same characteristic, e.g. race, and as a result does not suffer the particular disadvantage. However, in other cases, such a person may not exist. In such cases, international best practice demands that a “hypothetical comparator” is considered instead. In effect what this means is that we ask whether a hypothetical person who does not share the protected characteristic and is in the same situation would suffer the same disadvantage. It is important to note the word “would” – one can challenge the PCP before it has been applied!

EXAMPLE

In June 2020 a government has required State schools to reopen and all teachers to return to work without personal protective equipment. Statistical evidence demonstrates that Black people are much more likely to be infected by COVID-19. This group also has a higher mortality rate. The policy applies to all teachers equally, but Black teachers challenge it because it puts them at a particular disadvantage. Unless this policy can be justified (see further below), it will amount to indirect discrimination.

HARASSMENT

Principle 5: Definition of Discrimination

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The CESCR has stated in its General Comment 20 that discrimination under Article 2(2) of the ICESCR includes harassment.⁴³ The Declaration takes its definition of harassment directly from European Union law which provides that harassment shall be deemed to be a form of discrimination “when unwanted conduct related to [a prohibited ground] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”⁴⁴ It is important to note that harassment need not be related to a person’s own protected characteristic.

EXAMPLE

Offensive remarks are made at a workplace about Muslims being responsible for the spread of COVID-19. There are no Muslim workers in the room, but a non-Muslim worker finds the remarks offensive. As employment falls under the material scope of

⁴³ *Ibid.*, Para 7.

⁴⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(3); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(3); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 4(3); Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, Articles 2(2)(a) and 4.

the right to non-discrimination (see further below), this conduct could amount to harassment.⁴⁵

FAILURE TO MAKE REASONABLE ACCOMMODATION

Principle 13: Accommodating Difference

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.

Reflecting an emerging international consensus, in the Declaration the concept of reasonable accommodation is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life. Thus, in the context of this training manual, it is accepted that the duty of reasonable accommodation can arise in respect of any ground.

While the ICCPR and ICESCR do not refer to discrimination on grounds of disability, or to reasonable accommodation, the CESCR has stated that disability is a prohibited ground under “other status” in Article 2(2) ICESCR (and by implication in the ICCPR),⁴⁶ and in its General Comment 20 has stated:

The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.⁴⁷

The CRPD states in Article 5(3) that “[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.” The CRPD defines “reasonable accommodation” in Article 2 as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

⁴⁵ It is beyond the scope of this training manual to discuss in any detail the lawfulness of limitations to the right to freedom of expression in areas outside the material scope of the right to non-discrimination.

⁴⁶ CESCR, *General Comment No. 20*, Para 28.

⁴⁷ CESCR, *General Comment No. 20*, Para 28, repeating, in part, CESCR, *General Comment No. 5: Persons with disabilities*, UN Doc E/1995/22 at 19, 1995, Para 15.

While the CRPD does not state what measures would amount to a “disproportionate or undue burden”, the UN handbook, “From Exclusion to Equality: Realizing the rights of persons with disabilities” identifies the following factors as common to national legislation in various states in determining whether a measure so amounts: ⁴⁸

- The practicability of the changes required;
- The cost involved;
- The nature, size and resources of the entity involved;
- The availability of other financial support, occupational health and safety implications; and
- The impact on the operations of the entity.

2.3) Material scope of the right to non-discrimination

The HRC has noted in its General Comment 18 that Article 26 of the ICCPR “prohibits discrimination in law or in fact in any field regulated and protected by public authorities” and is therefore not limited to those rights which are provided for in the Covenant.⁴⁹ The HRC has also held that to fulfil their non-discrimination obligations under the ICCPR, States are required to adopt comprehensive anti-discrimination legislation.⁵⁰ Similarly, the CESCR has stated in its General Comment 20 that:

Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.⁵¹

And that:

Adoption of legislation to address discrimination is indispensable in complying with [Article 2(2) ICESCR]. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.⁵²

Non-discrimination obligations primarily fall to States – the right to non-discrimination creates a duty on States to respect, protect and fulfil non-discrimination for people within their territory. This gives rise to a range of specific duties including:

⁴⁸ UN, *From Exclusion to Equality: Realizing the rights of persons with disabilities*, 2007, pp. 62-63, available at: <https://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>.

⁴⁹ HRC, *General Comment No. 18*, Para 12.

⁵⁰ See, for instance, HRC, *Concluding Observations: Iceland*, UN Doc. CCPR/C/ISL/CO/5, 31 August 2012, Para 6.

⁵¹ CESCR, *General Comment No. 20*, Para 11.

⁵² *Ibid.*, Para 37.

- Ensuring laws and policy do not discriminate
- Ensuring state actors do not discriminate
- Enacting legislation to provide protection from discrimination in areas of life excluding the personal (private) sphere
- Enforcing and implementing anti-discrimination legislation
- Providing effective protection from violence based on discrimination, hate speech, etc.

To meet its obligation, States must enact comprehensive anti-discrimination law which prohibits discrimination in all areas of life regulated by law. This means that the State must ensure that other actors are also prevented from discriminating, including anyone carrying a public function, employers and providers of goods and services such as healthcare, education, social activities, etc. This therefore requires that both public and private organisations operating in areas of life regulated by law must not discriminate.

The UN Guiding Principles on Business and Human Rights highlight that the failure to enforce existing laws on non-discrimination that directly or indirectly regulate business respect for human rights is often a significant legal gap in State Practice.⁵³

States' non-discrimination obligations commonly require them to prohibit discrimination in the following areas:

- Activities of the State and the exercise of public functions
- Employment (including access, pay, promotions, conditions)
- Education
- Social security (including pensions and housing)
- Provision of goods and services (including public services, such as health)
- Clubs and associations

2.4) Justification

The HRC and the CESCR adopt the same test for determining whether discrimination is justified, irrespective of whether the discrimination is direct or indirect: the differential treatment must be **reasonable and objective**. The HRC has stated that:

[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁵⁴

The CESCR has similarly adopted this “reasonable and objective test”, but has elaborated on its practical meaning:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification

⁵³ UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, p. 5, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁵⁴ HRC, *General Comment No. 18*, Para 13.

*unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.*⁵⁵

The justification test can therefore be broken down to the following questions:

- A. Is there a legitimate purpose for the less favourable treatment?
- B. Are the means to achieve that purpose necessary? (Nothing else can achieve it, and no less restrictive approach can be applied)
- C. Are the means proportional? (They do not cause harm so big as to outweigh the purpose of the less favourable treatment)

Most cases of direct discrimination do not pass A. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria. Indirect discrimination may be permitted only if it is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Harassment cannot be justified.

In relation to failure to make reasonable accommodation, there is no separate consideration of justification – consideration of whether something is “reasonable” forms part of the assessment of whether there is prohibited conduct.

⁵⁵ CESCR, *General Comment No. 20*, Para 13.

3) Discriminatory impacts of state responses to the COVID-19 pandemic: an emerging picture

Discrimination, both direct and indirect, is at the heart of the human rights crisis engendered by state responses to the pandemic. While the full range of discriminatory impacts of state responses is not yet clear – and some apparent patterns of discrimination have yet to be verified – there is already compelling evidence of discrimination affecting various groups’ enjoyment of their human rights in different areas of life. These patterns extend across characteristics, and indeed across the intersection of characteristics. Moreover, as some states begin to end their lockdowns and others move into the next phase of their response, there are credible warnings about the emerging and potential discriminatory impacts of state responses.

This section offers selected examples of evidenced and emerging impacts. It should be reiterated, for the avoidance of doubt, that the examples provided here are illustrative, not comprehensive nor exhaustive. New evidence is emerging with each week, while new policy measures are having novel discriminatory effects and consequences. Many discriminatory impacts have yet to be fully documented or verified, while other discriminatory impacts are as yet only anticipated. As such, these examples are provided with the purpose of demonstrating the breadth, depth and severity of the problem.

The Equal Rights Trust launched its #NoCOVIDiscrimination initiative in June 2020 to help equality defenders in their essential work to identify, document and challenge discriminatory responses to the COVID-19 pandemic. The Trust is committed to providing legal, technical and strategic support. To submit a request for support or to find out more, email: covidresponse@equalrightstrust.org

3.1) Evidenced impacts

RIGHT TO HEALTH

Lockdown and other containment strategies adopted by many States to control the spread of the virus have not been applied equally in all settings, resulting in discrimination in respect of the right to health. Early in the crisis, the UN Independent Expert on the enjoyment of all human rights by older persons has highlighted the impacts on older people residing in care homes, stating that "[r]eports of abandoned older persons in care homes or of dead corpses found in nursing homes are alarming".⁵⁶ Conversely, the UN Special Rapporteur on the rights of persons with disabilities has noted that "containment measures, such as social distancing and self-isolation, may be impossible for those who rely on the support of others to eat, dress and bathe".⁵⁷ Despite these warnings, there are ongoing concerns that older persons and persons with disabilities living in residential care facilities may be denied medical care.⁵⁸ Older people make up the majority of

⁵⁶ UN Independent Expert on the enjoyment of all human rights by older persons, “‘Unacceptable’ – UN expert urges better protection of older persons facing the highest risk of the COVID-19 pandemic”, March 2020, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25748&LangID=E>.

⁵⁷ UN Special Rapporteur on the rights of persons with disabilities, “COVID-19: Who is protecting the people with disabilities?”, March 2020, available

at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25725&LangID=E>.

⁵⁸ Disability Rights International, “Action steps to protect children and adults with disabilities during COVID-19 pandemic – especially in institutions and orphanages”, 20 April 2020, p.10-12, available at:

<https://www.driadvocacy.org/covid19-action-steps/>

reported COVID-19 deaths, yet there is a lack of age-disaggregated mortality data in many States, meaning that the true impact of the pandemic on older people may be significantly understated.⁵⁹

The crisis has also exposed the way in which pre-existing inequalities between ethnic groups can result in discrimination in health. For example, a June 2020 review from Public Health England found that the highest age standardised diagnosis rates of COVID-19 per 100,000 population were in people of Black ethnic groups (486 in females and 649 in males) and the lowest were in people of White ethnic groups (220 in females and 224 in males).⁶⁰ Death rates from COVID-19 were higher for Black and Asian ethnic groups when compared to White ethnic groups. This is the opposite of what is seen in previous years, when the all-cause mortality rates are lower in Asian and Black ethnic groups.⁶¹ The review noted that:

Health inequalities known to affect the BAME communities in England may be increasing the risk of transmission (overcrowded housing, reliance on transport, living in population centres) and the risk of mortality (high underlying risk of co-morbidities: CVD, diabetes, obesity). Furthermore, the measures to control the spread of the COVID-19 across the country may have led to further economic or housing instability. Local and national policy initiatives will need to be sensitive to BAME communities to ensure existing health and economic inequalities are not widened due to the extraordinary measures taken during the pandemic. ⁶²

Similarly, a June 2020 study by the APM Research Lab in the United States of America, which compiled mortality data for Washington D.C. and 43 states, found significant racial disparities.⁶³ It noted that almost 22,000 Black people have died from COVID-19 in the US, accounting for about a quarter of overall deaths even while making up roughly 13 per cent of the population. Another study published in the same month by the Economic Policy Institute⁶⁴ highlights that:

Although the current strain of the coronavirus is one that humans have never experienced before, the disparate racial impact of the virus is deeply rooted in historic and ongoing social and economic injustices. Persistent racial disparities in health status, access to health care, wealth, employment, wages, housing, income, and poverty all contribute to greater susceptibility to the virus—both economically and physically.

⁵⁹ Lloyd-Sherlock, P., et al., “COVID-19 and older adults in low and middle-income countries”, *Corona Older*, 25 June 2020, available at: <https://www.corona-older.com/post/problems-of-data-availability-and-quality-for-covid-19-and-older-people-in-lmics>

⁶⁰ Public Health England, *Beyond the data: Understanding the impact of COVID-19 on BAME groups*, 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf.

⁶¹ *Ibid.*, p.4.

⁶² *Ibid.*, pp. 23-24.

⁶³ APM Research Labs, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, updated 10 June 2020, available at: <https://www.apmresearchlab.org/covid/deaths-by-race>.

⁶⁴ Economic Policy Institute, *Black workers face two of the most lethal pre-existing conditions for coronavirus – racism and economic inequality*, 1 June 2020, available at: <https://www.epi.org/publication/black-workers-covid/>

Moreover, a study in Brazil by the Nucleus of Health Operations and Intelligence,⁶⁵ found evidence that the COVID-19 pandemic is killing proportionately more Black Brazilians than Whites, exposing underlying inequalities. The study examined health service data on 30,000 patients diagnosed with COVID-19, who had either recovered or died by 18 May 2020. It found that 55% of the Black and mixed-race patients died, compared to 38% of White patients.

There is also evidence that indigenous persons have been disproportionately impacted by Covid-19. In the US, reports have shown that the Navajo Nation has one of the highest Covid-19 infection rates per capita in the US.⁶⁶ The Navajo Nation is reported to have instated one of the country's most extensive lockdown orders, but inadequate infrastructure and lack of access to basic needs is intensifying the crisis; 30% of the population does not have access to running water in their homes. According to figures compiled by the Articulation of Indigenous Peoples of Brazil (APIB), the country's principal indigenous federation, 9.1% of indigenous people who contract the disease are dying, nearly double the 5.2% rate among the general Brazilian population.⁶⁷ In Canada, while public health officials are expressing cautious optimism that efforts to contain COVID-19 are proving effective, Human Rights Watch highlights that indigenous communities are still at risk because of the systemic inequities and discrimination they face.⁶⁸

The UN High Commissioner for Human Rights Michelle Bachelet declared in June 2020: ⁶⁹[t]he data tells us of a devastating impact from COVID-19 on people of African descent, as well as ethnic minorities in some countries, including Brazil, France, the United Kingdom and the United States. In many other places, we expect similar patterns are occurring, but we are unable to say for sure given that data by race and ethnicity is simply not being collected or reported. Bachelet has noted the need for urgent action by governments to prioritise the collection and analysis of disaggregated data in order to address inequalities and structural discrimination that contribute to poor health inequalities, including for COVID-19. She has also noted the critical importance of “[s]erious and sustained consultation with ethnic and racial minorities on ways forward in the COVID-19 response”.⁷⁰

DISCRIMINATORY VIOLENCE AND HATE SPEECH

Many groups at risk of discrimination have been exposed to increased discriminatory violence and hate speech as a result of the crisis. There have been reports of racist and xenophobic hate speech and hate crimes being committed against individuals perceived as Asian, as well as other

⁶⁵ Batista, A. et al., “Análise socioeconômica da taxa de letalidade da COVID-19 no Brasil”, *Núcleo de Operações e Inteligência em Saúde (NOIS)*, Nota Técnica 11, 27 May 2020, available at: <https://drive.google.com/file/d/1tSU7mV4OPnLRFEMMY47JIXZgzkkklykyd0/view>.

⁶⁶ Baek, G., “Navajo Nation residents face coronavirus without running water”, *CBS News*, 8 May 2020, available at: <https://www.cbsnews.com/news/coronavirus-navajo-nation-running-water-cbsn-originals/>.

⁶⁷ Wallace, S., “Disaster looms for indigenous Amazon tribes as COVID-19 cases multiply”, *National Geographic*, 15 June 2020, available at: <https://www.nationalgeographic.co.uk/science-and-technology/2020/06/disaster-looms-for-indigenous-amazon-tribes-as-covid-19-cases>.

⁶⁸ Carling, A. and Mankani, I., “Systemic Inequalities Increase Covid-19 Risk for Indigenous People in Canada”, *Human Rights Watch Dispatches*, 9 June 2020, available at: <https://www.hrw.org/news/2020/06/09/systemic-inequities-increase-covid-19-risk-indigenous-people-canada>.

⁶⁹ UN High Commissioner for Human Rights, “Disproportionate impact of COVID-19 on racial and ethnic minorities needs to be urgently addressed – Bachelet”, June 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25916&LangID=E>.

⁷⁰ *Ibid.*

ethnic and religious groups.⁷¹ In India, Muslims have been scapegoated as “vectors” of the disease.⁷² After public authorities blamed a Muslim religious gathering of the Tablighi Jamaat movement in Delhi for the spread of the pandemic, online disinformation campaigns ensued, with #CoronaJihad trending on Twitter and the religious gathering being labelled as “corona terrorism”.⁷³ Ageism against older people has trended on social media⁷⁴ and the worth of saving older people’s lives has been called into question;⁷⁵ in one instance, a UK journalist suggested “culling” older people would have a beneficial economic effect.⁷⁶

The Office of the UN High Commissioner for Human Rights has noted that “LGBTI people have previously been blamed for disasters, both manmade and natural, and there are scattered reports of this happening in the context of the COVID-19 pandemic”.⁷⁷ These reports include a priest in Poland stating that Covid-19 is divine punishment for homosexuality and abortion,⁷⁸ and a DUP councillor in Northern Ireland suggesting the pandemic was the “judgement of God” on the legalisation of abortion and same sex marriage in Northern Ireland, and an “immoral and corrupt government”.⁷⁹

There is also emerging evidence of an increase in domestic violence against women during lockdowns in a number of States.⁸⁰ The European Network for Equality Bodies, Equinet, has reported that national equality bodies have identified increased domestic violence against women resulting from State imposed lockdowns.⁸¹

⁷¹ UN, “COVID-19 stoking xenophobia, hate and exclusion, minority rights expert warns”, *UN News*, 30 March 2020, available at: <https://news.un.org/en/story/2020/03/1060602>.

⁷² Citizens Against Hate, *Hit Job: Using COVID-19 to Deepen Anti-Muslim Bias and Weaken Muslim Voice*, 18 May 2020, available at: <http://citizensagainsthate.org/wp-content/uploads/2020/05/Hit-Job-Final.pdf>.

⁷³ *Ibid.*

⁷⁴ Whalen, A., “What is “Boomer Remover” and Why Is It Making People So Angry?”, *Newsweek*, 31 March 2020, available at: <https://www.newsweek.com/boomer-remover-meme-trends-virus-coronavirus-social-media-covid-19-baby-boomers-1492190>.

⁷⁵ Der Tagesspiegel, “Boris Palmer provoziert in Coronavirus-Krise”, *Der Tagesspiegel*, 28 April 2020, available at: <https://m.tagesspiegel.de/politik/boris-palmer-provoziert-in-coronavirus-krise-wir-retten-moeglicherweise-menschen-die-in-einem-halben-jahr-sowieso-tot-waeren/25782926.html>.

⁷⁶ Roberts, J., “Telegraph journalist says coronavirus “cull” of elderly could benefit economy”, *Metro*, 11 March 2020, available at: <https://metro.co.uk/2020/03/11/telegraph-journalist-says-coronavirus-cull-elderly-benefit-economy-12383907/>.

⁷⁷ Office of the UN High Commissioner for Human Rights, *COVID-19 and the Human Rights of LGBTI People*, 17 April 2020, available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>.

⁷⁸ Gowans, G., “Wrocław Priest Blames Coronavirus on Homosexuality & Abortion”, *Wrocław Uncut*, 5 March 2020, available at: <https://wroclawuncut.com/2020/03/05/priest-coronavirus-lgbt-abortion/>.

⁷⁹ Cockburn, H., “Coronavirus: DUP politician ‘blames pandemic on abortions and same-sex marriage’”, *Independent*, 2 April 2020, available at: <https://www.independent.co.uk/news/uk/politics/coronavirus-dup-john-carson-ballymena-county-antrim-abortion-same-sex-marriage-god-facebook-a9444216.html>.

⁸⁰ UN, “UN chief calls for domestic violence ‘ceasefire’ amid ‘horrifying global surge’”, *UN News*, 6 April 2020, available at: <https://news.un.org/en/story/2020/04/1061052>.

⁸¹ Hale, S., “COVID-19 Impact on Equality: Equinet Launches New Online Database”, *Equinet*, 20 May 2020, available at: <https://equineteurope.org/2020/covid-19-impact-on-equality-equinet-launches-new-online-database/>.

FREEDOM OF ASSEMBLY AND POLICE BRUTALITY

Examples have also been recorded of discrimination in respect of freedom of assembly and policing. In Kyrgyzstan, for example, following a decision to ban mass rallies citing COVID-19,⁸² a march for International Women's Day was dispersed,⁸³ while at the same time, a large group of men were permitted to participate in a traditional ceremony to ward off coronavirus.⁸⁴ There have been reports from Uganda of police targeting LGBTI organisations under the pretext of enforcing presidential directives to combat the spread of COVID-19.⁸⁵ Nairobi, Kenya has seen an increase in police brutality and extrajudicial killings since the implementation of a dusk-till-dawn curfew in March 2020 with the stated aim of mitigating the spread of COVID-19.⁸⁶

In the USA, protests in May and June 2020 sparked by the killing of George Floyd by a Minneapolis police officer have been marked by widespread incidents of police violence,⁸⁷ including punching, kicking, gassing, pepper-spraying and driving vehicles at often peaceful protesters in state across the country. The excessive force used in the police response to Black Lives Matter protests has been contrasted with the policing of anti-lockdown protests which took place across the country.⁸⁸ A joint statement from UN Special Procedures mandates on 5 June 2020 highlighted:

*The uprising also reflects public frustration and protest against the many other glaring manifestations of systemic racism that have been impossible to ignore in the past months, including the racially disparate death rate and socioeconomic impact of the COVID-19 pandemic and the disparate and discriminatory enforcement of pandemic-related restrictions.*⁸⁹

⁸² The News International, "Volatile Kyrgyzstan temporarily bans protests", *The News International*, 6 March 2020, available at: <https://www.thenews.com.pk/print/624656-volatile-kyrgyzstan-temporarily-bans-protests>.

⁸³ AKIpress, "Как сорвали женский марш солидарности", *AKIpress*, 9 March 2020, available at: <https://tv.akipress.org/news:1601467/?from=kgnews&place=maincats>.

⁸⁴ AKIpress, "В Бишкеке провели тӯлоо против коронавируса", *AKIpress*, 8 March 2020, available at: <https://kg.akipress.org/news:1601482?from=svodka&place=newstoplast>.

⁸⁵ Ghosal, N., "Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext", *Human Rights Watch Dispatches*, 3 April 2020, available at: <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>.

⁸⁶ Sperber, A., "'They have killed us more than corona': Kenyans protest against police brutality", *The Guardian*, 9 June 2020, available at: <https://www.theguardian.com/global-development/2020/jun/09/they-have-killed-us-more-than-corona-kenyans-protest-against-police-brutality>.

⁸⁷ See, for instance, Gabbatt, A., "Protests about police brutality are met with wave of police brutality across US", *The Guardian*, 6 June 2020, available at: <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd>.

⁸⁸ See, for instance, Ismail, A., "The Anti-Lockdown Protests Prove Police Know How to Treat Protesters Fairly", *Slate*, 28 May 2020, available at: <https://slate.com/news-and-politics/2020/05/police-response-george-floyd-minneapolis-shutdowns.html>; SBS News, "How US police responded differently to protesters demanding justice for George Floyd and anti-lockdown rallies", *SBS News*, 28 May 2020, available at: <https://www.sbs.com.au/news/how-us-police-responded-differently-to-protesters-demanding-justice-for-george-floyd-and-anti-lockdown-rallies>; Zhou, L. and Amaria, K., "These photos capture the stark contrast in police response to the George Floyd protests and the anti-lockdown protests", *Vox*, 27 May 2020, available at: <https://www.vox.com/2020/5/27/21271811/george-floyd-protests-minneapolis-lockdown-protests>.

⁸⁹ Special Procedures of the UN Human Rights Council, "Statement on the Protests against Systemic Racism in the United States", June 2020, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25927&LangID=E>.

Lockdown regulations have been applied by the police in the UK to restrict Black Lives Matter protests.⁹⁰ An analysis of data obtained by Liberty Investigates, part of the civil liberties group Liberty and *The Guardian*, has shown that across England and Wales, BAME people were 54% more likely to be fined for violating lockdown regulations than White people.⁹¹ The most ethnically disproportionate use of fines was the Cumbria police force, where BAME people were 6.8 times more likely to be fined than White people.⁹²

3.2) Emerging impacts

In the May 2020 Call to Action, the Equal Rights Trust and its partners noted that there were “credible warnings about the emerging and potential discriminatory impacts of state responses”. The co-signatories of that statement have, *inter alia*, raised concerns that responses to the virus were feeding and deepening the historical and structural discrimination against persons with disabilities;⁹³ exacerbating inequalities for women and girls;⁹⁴ creating barriers preventing transgender and intersex individuals from accessing healthcare,⁹⁵ and failing to factor the stateless into decision-making.⁹⁶ In the intervening period, many of these concerns have been borne out by the emerging evidence.

Moreover, as states emerge from lockdown or move into the next phase of their response, our experience at the Equal Rights Trust – and our engagement with equality defenders across the globe – leads us to anticipate that other patterns of discrimination will emerge. Our partners have highlighted emerging discriminatory threats, ranging from expected impacts of education policies on black children in the UK to emerging evidence of employment discrimination in Bolivia and Pakistan. We are also seriously concerned at the myriad potential discriminatory impacts of antibody testing, immunity passports and associated policies. We highlight in this manual three areas in which evidence of discriminatory impacts is emergent but not yet confirmed, and others in which we anticipate discriminatory impacts which have yet to manifest.

⁹⁰ Liberty, “Our Right to Protest is More Important Than Ever During Lockdown”, *Liberty*, 12 June 2020, available at: <https://www.libertyhumanrights.org.uk/issue/our-right-to-protest-is-more-important-than-ever-during-lockdown/>.

⁹¹ Gidda, M. and Dodd, V., “Police Forces In England and Wales up to Seven Times More Likely to Fine BAME People in Lockdown”, *Liberty Investigates*, 17 June 2020, available at: <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>.

⁹² *Ibid.*

⁹³ International Disability Alliance, “Disability Rights During the Coronavirus Pandemic: Launch of the COVID-19 Disability Rights Monitor”, *International Disability Alliance*, 17 April 2020, available at: <http://www.internationaldisabilityalliance.org/covid-drm>.

⁹⁴ Equality Now, “COVID-19: A time for strength, humanity and kindness”, *Equality Now*, 26 March 2020, available at: https://www.equalitynow.org/covid_19.

⁹⁵ Botha, K., “LBTI Caucus Statement in Response to the COVID-19 Pandemic”, *ILGA*, 6 April 2020, available at: <https://ilga.org/lbti-caucus-covid19-statement>.

⁹⁶ De Chickera, A., “As the world washes its hands of the stateless, they risk facing COVID-19 alone”, *Open Democracy*, 27 April 2020, available at: <https://www.opendemocracy.net/en/world-washes-its-hands-stateless-they-risk-facing-covid-19-alone/>; see also, Institute on Statelessness and Inclusion, *Joint Statement in Solidarity with the Stateless*, 2020, available at: <https://www.institutesi.org/resources/joint-statement-in-solidarity-with-the-stateless>.

RIGHT TO WORK

As the International Labour Organisation has highlighted, “[t]he world of work is being profoundly affected by the global virus pandemic”.⁹⁷ The discriminatory impacts of lockdown and business closures on the right to work are becoming clearer with each week. Before the crisis, labour markets in many states were effectively segregated on the basis of race, gender and other characteristics, with women being overrepresented in social care and ethnic minorities being overrepresented in service sector roles, for example. In the context of horizontally segregated labour markets, States’ decisions on issues such as whether and how to close certain sectors of the economy; designate essential roles; enforce working from home requirements; and provide financial support to workers who cannot work, all have serious potential discriminatory impacts.

Further issues will arise as we move forward, where restrictions which have previously been of a blanket nature are lifted for specific sectors of the economy, public services, or groups of people. We are concerned that both horizontal and vertical segregation in labour markets will result in discriminatory impacts on women, ethnic minorities and other groups who are overrepresented in certain sectors or in certain positions within particular sectors.

ANTI-BODY TESTING, IMMUNITY PASSPORTS AND ASSOCIATED POLICIES

States’ movement towards the use of anti-body testing, immunity passports, “track-and-trace” applications and other measures designed to identify those at risk of infection and those who pose a risk of spreading the virus and to track and manage the spread of the virus pose myriad discriminatory risks.

The use of new information technologies in States’ responses to the pandemic not only threatens the rights to privacy and data protection, but also risks long-standing discriminatory effects. The discriminatory potential of the mass collection and processing of personal data is yet to be fully understood.⁹⁸ Nevertheless, in the context of the pandemic, there is a real and pertinent risk that the collection of location data will enable the monitoring of specific communities,⁹⁹ and that the use of profiling and predictive data models will “lead to discriminatory outcomes, often shielded from interrogation by the ‘black box’ of indecipherably complex technology”.¹⁰⁰

There is a significant risk that the use of anti-body testing and immunity data will result in discriminatory restrictions on movement or on access to services on the basis of health status. There are, for example, historical precedents for disease-based restrictions on entering, living, and working in countries.¹⁰¹ We are concerned that as anti-body testing and data collection regimes are rolled out, discriminatory treatment may occur at the hands of the state or private actors, in employment – in the form of dismissal, demotion, exclusion from work-related

⁹⁷ International Labour Organisation, “COVID-19 and the world of work”, n.d., available at: <https://www.ilo.org/global/topics/coronavirus/lang--en/index.htm>

⁹⁸ Equal Rights Trust, “Submission to the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on new information technologies, racial equality and nondiscrimination”, 19 December 2019, available at: <https://www.equalrightstrust.org/news/equal-rights-trusts-submission-un-special-rapporteur-contemporary-forms-racism>

⁹⁹ Joint Committee on Human Rights, “Written evidence from the Information Law and Policy Centre, Institute for Advanced Legal Studies, University of London (COV0098)”, 11 May 2020, available at: <https://committees.parliament.uk/writtenevidence/4720/html/>

¹⁰⁰ Joint Committee on Human Rights, “Written evidence from Liberty (COV0092)”, 6 May 2020, available at: <https://committees.parliament.uk/writtenevidence/4081/html/>

¹⁰¹ Ada Lovelace Institute, “Something to declare? Surfacing issues with immunity certificates” 2 June 2020, available at: <https://www.adalovelaceinstitute.org/something-to-declare-surfacing-issues-with-immunity-certificates/>

opportunities – and in access to goods and services. While these discriminatory impacts are potentially justifiable as measures to protect the health of the individual or as a public health measure, these justifications must be tested to ensure that a legitimate purpose is being achieved only by means which are necessary and proportionate.

Moreover, the use of new information technologies risks compounding pre-existing patterns of discrimination, with particularly harmful consequences for groups who have already been exposed to discrimination in state responses to the COVID-19 pandemic. There is real threat of discriminatory impacts occurring on the basis of perceived immunity status among individuals whose non-immunity may relate to age, disability, or one or more other protected characteristics; or among communities with worse outcomes of infection with the disease.¹⁰² The use of digital tracing and immunity certification may also reinforce patterns of discrimination already exacerbated in the context of the COVID-19 pandemic, such as the disproportionate use of force in policing, and the use of stop and search.¹⁰³

RIGHT TO EDUCATION

While access to education for millions of learners has been compromised by school closures, the Right to Education Initiative,¹⁰⁴ amongst others, has highlighted the potentially discriminatory impacts on the right to education for students whose households cannot afford the equipment necessary to facilitate online and home learning. In Lebanon, concerns have been raised that students with visual disabilities cannot make use of many online courses which are available.¹⁰⁵ In the UK, there are concerns that the routine under-prediction of grades for Black students¹⁰⁶ will lead to even greater challenges than normal as the UK moves to a system in which the grades of all final year students will be predicted by exam boards and teachers.¹⁰⁷ Serious concerns have also been raised about the other discriminatory impacts of school closures on children in vulnerable situations, including, for example, girls at risk of sexual abuse.¹⁰⁸

¹⁰² Nuffield Council of Bioethics, “Rapid policy briefing: COVID-19 antibody testing and ‘immunity certification’”, 18 June 2020, available at: <https://www.nuffieldbioethics.org/assets/pdfs/Immunity-certificates-rapid-policy-briefing.pdf>

¹⁰³ *Ibid.*

¹⁰⁴ Right to Education Initiative, “Pandemic shakes up the world’s education systems”, 19 March 2020, available at: <https://www.right-to-education.org/blog/pandemic-shakes-world-s-education-systems>

¹⁰⁵ *Ibid.*

¹⁰⁶ UCL Institute of Education, “Predicted grades: accuracy and impact: A report for University and College Union”, December 2016, available at: https://www.ucu.org.uk/media/8409/Predicted-grades-accuracy-and-impact-Dec-16/pdf/Predicted_grades_report_Dec2016.pdf

¹⁰⁷ Thompson, I., “Guest Post: “Let us look into the UK’s Equality and Discrimination laws in the Age of Black Lives Matter” by Ife Thompson”, *Equal Rights Trust*, 25 June 2020, available at: https://www.ucu.org.uk/media/8409/Predicted-grades-accuracy-and-impact-Dec-16/pdf/Predicted_grades_report_Dec2016.pdf<https://www.equalrightstrust.org/news/guest-post-let-us-look-uk%E2%80%99s-equality-and-discrimination-laws-age-black-lives-matter-ife-thompson>

¹⁰⁸ Thomson Reuters Foundation, “Teen pregnancy risks rises as schools shut for coronavirus in Africa”, 19 March 2020, available at: <https://news.trust.org/item/20200319115906-eieyl/>

4) Equality Impact Assessment: a tool to meeting non-discrimination obligations

Equality Impact Assessment is an essential tool for States to meet their non-discrimination obligations under the ICCPR and the ICESCR. It is only through assessing the equality impacts of their policy responses that States can anticipate and eliminate their discriminatory effects, including those which are unintended or unforeseen.

Equality Impact Assessments must be aimed at identifying and eliminating the actual or potential discriminatory effects of State policies. They should also ensure that policies and programmes respond to and accommodate the different needs of diverse groups with due consideration to intersectionality and that they do not create or exacerbate inequality.

All policy responses to the crisis must be subject to Equality Impact Assessment, including those relating to the management of healthcare and other resources, the restriction of civil liberties, closure and reopening of businesses and educational establishments, adaptation of support services, economic and social protection programmes, immigration and border control, data collection and processing, and the use of new information technologies. The actual or potential equality impacts of actions by both state and private actors must be assessed.

What is an Equality Impact Assessment? States must:

- Collect and consider data and research on the experiences and outcomes of groups exposed to discrimination;
- Consult all groups that may be disproportionately affected by a policy;
- Use the information gathered to decide whether there is, or is likely to be, a differential impact, whether direct or indirect, upon a protected group (or groups);
- If there is likely to be such an impact, consider whether the policy is justified;
- If the policy can be justified, consider and implement any measures which might mitigate the impact.

It is important to note that qualitative data through engagement with groups exposed to discrimination and experiencing inequality is extremely valuable and can be just as valuable where quantitative data is not available. In the context of the impact of policy responses to the pandemic, qualitative data can in fact be *more* valuable – quantitative data will usually be available after the harm has been done.

In order to ensure that States comply with their international legal obligations under the ICCPR and the ICESCR, Equality Impact Assessments should be pre-emptive, coming before new policy measures are adopted and before any changes are made to policies which are already in force. Where measures have already been adopted, Equality Impact Assessment should be undertaken as an urgent priority. Where discriminatory impacts are identified, measures to eliminate any discrimination or inequality of impact should be taken with immediate effect. States must ensure that Equality Impact Assessment is an essential element of their monitoring and review of policy responses to the pandemic and of their on the ground effects.