ABOUT US

The Centre for Disability Law and Policy (CDLP) at National University of Ireland, Galway was formally established in 2008 and is the successor to the Disability Law Policy and Research Unit, which was established in 2002. The CDLP works in pursuit of equal opportunities and social justice for persons with disabilities in Ireland and around the world. Since its establishment, the CDLP has organized and participated in a number of key events regarding disability law reform. The CDLP’s operating philosophy is ‘scholarship in action’ which entails research that addresses the problems that ordinary citizen’s face and providing practical policy solutions. In the course of our work we have made submissions to national and international bodies advocating for policies and laws that best facilitate the free and full exercise of rights for people with disabilities.

INTRODUCTION

The CDLP welcomes the opportunity to make this submission to the Committee on the Rights of Persons with Disabilities (hereinafter, “CRPD Committee”) draft general comment Nº 6 on Equality and Non-discrimination (Article 5). The CDLP appreciates and welcomes the Committee commitment to defending and equality and of non-discrimination as a cross-cutting issue. We appreciate the acknowledgment of the Committee, considering equality in all its dimensions: as value, as a principle, as a right and as an obligation of public authorities.

We welcome this opportunity to present our suggestions related to the wording and additional text within particular paragraphs. We have underlined the proposed amendments or additions for ease of reference.

GENERAL

The CDLP considers that following paragraph 4 (or otherwise included in the introductory section), a brief overview of the subsequent sections in the general comment should be provided, along with a summary of the key “takeaways”. We believe that this signposting and summary will make the General Comment more accessible and easier to follow, while at the same time emphasise the key points. We appreciate that General Comments follow a structure, but think that such an introduction would add to the accessibility of General Comments.

The CDLP appreciates that this is a draft General Comment and that is must be edited significantly we therefore recommend less direct quotes, see in particular paragraph 8 and 9 which contain lengthy quotes. We also think that the document would benefit from more concise language and less repetition.

SECTION I. INTRODUCTION

PARAGRAPH 1

REWORD PARAGRAPH 1.

1. The aim of this General Comment is to guide State parties and other stakeholders and to clarify the obligations of States parties in relation to non-discrimination and equality as enshrined in article 5 of the Convention. The Committee considers that guidance in this regard is necessary as, having completed more than 60 constructive dialogues with States parties to the Convention representing all regions of the world, the Committee is concerned that discrimination of persons with disabilities persists. The Committee continuously bears witness to discriminatory treatment of persons based only on actual or perceived disability. This treatment impairs or nullifies the enjoyment of the rights of persons with disabilities and those associated with them. Having completed more than 60 … (continue as per paragraph 1).

PARAGRAPHS 2 – 4

In paragraph 2 in respect of the phrase “to assess their incapacity to work” we accept that such assessments are firmly rooted in the medical model. The question relates to alternatives to such systems, are there agreed alternatives and if so can they be signposted within the General Comment.

PARAGRAPH 3

We recommend the removal of the last word of this paragraph “directly” and to just end the paragraph as set out below.

3. In a large number of States parties, it is encouraging to see that the broadening of anti-discrimination laws and human rights frameworks has led to extended protection to persons with disabilities of their rights. The Committee also welcomes that in many cases, disability has been explicitly included as prohibited grounds for discrimination. Nevertheless, the Committee observes that anti-discrimination laws and regulatory frameworks remain imperfect and incomplete or ineffective. In this regard, they very often lack a recognition of multiple and intersectional discrimination, fail to acknowledge that the denial of reasonable accommodation constitutes discrimination, and lack effective mechanisms of legal redress and reparation, effective compensations included. The Committee regrets that, in general, persons with disabilities, through their representative organizations, are not systematically and meaningfully consulted in decision-making processes on legal and other reforms that affect them.

SECTION III. THE HISTORY OF ARTICLE 5 AND ARTICLE 2 OF THE CONVENTION AND THE HUMAN RIGHTS MODEL OF DISABILITY

PARAGRAPH [9-12]

PARAGRAPH 10

The CDLP agree that the use of inclusive equality is an important shift and a step towards substantive equality and that it is the concept that is most closely aligned with the Human Rights model and stated the goals set out in the CRPD. However, bearing in mind the misunderstanding and lack of consensus amongst countries regarding the term “inclusive” as is perhaps best evidenced in respect of the right to inclusive education. We would, therefore, consider it important to ensure a clear and common understanding of this term and if possible to ensure an official translation of the concept itself or of its meaning.

In addition, we are concerned about the reference to the necessity to achieve inclusive equality progressively while also discussing the non-discrimination norms. We therefore have added a sentence, or would wish to have a sentence to clarify and reinforce the immediacy of the non-discrimination norm.

*Last sentence of paragraph 10*

**Proposed text of amendment**

10. …. It is evident that the goal of inclusive equality is far-reaching and that fundamental systemic and structural changes cannot be realised in one day but require time. The Committee wishes to emphasise though, that corresponding non-discrimination obligations however, are of immediate legal nature. The CRPD uses many tools to achieve inclusive equality some of which are progressive such as accessibility norms and some of which are immediate such as the non-discrimination norm.

At last, the CDLP is concerned that the Committee is saying that the CRPD is the first Human Rights Treaty to acknowledge explicitly intersectional discrimination. We, the CDLP on the one hand consider that, for sure, is the first human rights treaty that address multiple discrimination (Article 6). On the other hand, we also consider that the CRPD is considering different identities in paragraph (p) of the preamble and we acknowledge the twin track approach of Article 6. Nevertheless, the acknowledgement of intersectional discrimination is not explicit, on the contrary, there is a need of interpretation of Article 6 in in this behalf.

SECTION V. NORMATIVE CONTENT (i) EQUAL PROTECTION AND EQUAL BENEFIT OF THE LAW

PARAGRAPH [15]

15. Several international human rights treaties include the term “equal before the law”,[[1]](#footnote-1) which is usually interpreted as meaning equal treatment by the judiciary or law enforcement officers.[[2]](#footnote-2) The recognition that all persons with disabilities are equal before the law thus means that the justice system, all law enforcement officers and the administration, do not discriminate against persons because of their actual or perceived impairment.

PARAGRAPH 18

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We were concerned that it was not always clear the distinction between positive measures and reasonable accommodation so we would re-word the section as underlined below.

… Bearing in mind that this legal interpretation from the Canadian jurisdiction cannot be translated automatically to article 5 (1) of the Convention, the drafting history of the Convention discloses that “equal benefit of the law” goes beyond a guarantee of mere formal equality. A contextual interpretation of the wording in line with article 1, article 3 and article 4 of the Convention clarifies that in order to facilitate the enjoyment of rights guaranteed by the legislation to persons with disabilities on an equal basis with others, positive measures, accessibility, reasonable accommodation and individual supports are often required. Accessibility can be implemented by adopting building, transportation, Information, and Communications Technology (ICT) laws, which incorporate legal accessibility standards for the built environment, for transportation and information and communications.[[3]](#footnote-3) Reasonable accommodation may be incorporated into employment laws that prohibit discrimination through denial of reasonable accommodation. Education laws shall ensure individualized education, including reasonable accommodations for each child without relegating children with disabilities to special education schools or classrooms.

SECTION V – NORMATIVE CONTENT (iii) PROHIBITION OF DISCRIMINATION AND EQUAL AND EFFECTIVE LEGAL PROTECTION PARAGRAPH [20-22]

PARAGRAPH 20(e)

The CDLP is concerned about the definition and wording regarding intersectional discrimination in this draft of General Comment No. 6 and especially, in this paragraph.

Accordingly to literature, intersectional discrimination is a unique form of discrimination (see for example Crenshaw, 1989, 1991, 2002, 2016; Collins, 2000 and Collins and Bilge, 2016). In intersectional discrimination, there are discriminatory layers that intersect with each other creating a unique form of discrimination. The discriminatory layers in intersectional discrimination connect with each other, provoking a synergy among themselves, which forms a single form of discrimination. Furthermore, in each social context this interaction could vary.

As we stated above in paragraph 10, multiple discrimination (wording of Article 6) is not the same as intersectional discrimination.

Discrimination can take different forms and can consequently, be addressed through different approaches. The multiple and intersectional terminology regarding non-discrimination should not be confused. The multiple word suggests the sum of all those discriminatory layers: gender + disability + race + migrant + (...). The identitary factors can be innumerable and the sum of the discriminatory layers has a certain particular impact on the person.

That sum of layers and their treatment in parallel is the key to understanding the difference between multiple discrimination and intersectional discrimination. When facing intersectional discrimination, layers cannot and should not be separated because that intersection, that synergy causes a single form of discrimination.

The combined effect of discrimination on the basis of disability on women, migrants, older persons, racial or ethnic minorities between others, has had and continues to have devastating consequences for the exercise and enjoyment of human rights and fundamental freedoms in both, public and private spheres.

Multiple and intersectional discriminations are constructed based on more than one discriminatory layer. If we affirm this and we can take care of its legislative consequences, it is necessary to recognize that the identity of the person as we saw does not respond to a single factor, is not categorical, and this is something that the CRPD acknowledge. In this sense, we the CDLP are concerned that the Committee is addressing the identity of the person as a status. Persons do not have a status, but different identities. That is why we will appreciate if the Committee can improve the following text on this paragraph: “(…) when a person having a status or a characteristic associated with one or more prohibited grounds is discriminated on several prohibited grounds or statuses.”

The law tends to classify the reasons of discrimination into categories related to people identities. In this sense, since the signing of the Charter of the United Nations in 1945 to the Charter of Fundamental Rights of the European Union in 2000, the number of categories recognized in the relevant provisions against discrimination has increased from four to seventeen. Despite this, measures regarding discrimination against people with disabilities of different identities sometimes becomes quite surreal and causes that the most common situation of discrimination in a daily life be the least resolved and therefore the remedies and policies could become into exceptional ones or into temporally or special measures. This is, when a person differs from the standards of "normality" (able, man, bourgeois, white, heterosexual, etc.) it is more likely for he or she to experience discrimination, however and paradoxically, it is less likely to have adequate reparations and protection measures appropriate to their situation.

The United Nations system recognizes multiple and intersectional discrimination through the work of the CEDAW Committee and more recently through the CRPD Committee. However, this development has not been entirely comprehensive. The concept of intersectionality has never been well defined in United Nations legal instruments, except on the GR of the CEDAW Committee No.28. In fact, is common to find in international documents of human rights (legally binding or not) an assumption that multiple and intersectional discrimination are synonyms.

However, intersectional discrimination in the UN system has been framed almost exclusively in terms of gender / sex and culture / origin, excluding people living among other intersections and facing other forms of discrimination. What is more, intersectionality itself was never properly been incorporated into a legal system.

In this sense, we the CDLP encourage to the Committee to give a proper definition of intersectional discrimination using besides feminist literature, the General Recommendation No. 28 of the CEDAW Committee. In addition, the Committee may wish to cross-refer to the General Comment No.3 as an example of where intersectional discrimination is discussed in further detail.

SECTION V – NORMATIVE CONTENT (iv) ART. 5(3) REASONABLE ACCOMMODATION

PARAGRAPHS [24-28]

The CDLP consider the express inclusion of the duty to provide reasonable accommodation into the CRPD as one of the most important cornerstones of this provision. To that end we consider it most important that this provision is as clear as can be expressed. We have made some suggestions below which we hope will aid with such comprehension.

1. Reasonable accommodation is an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability.[[4]](#footnote-4) Examples of reasonable accommodations include making existing facilities and information accessible to the individual person with a disability; modifying equipment; reorganizing activities; rescheduling work; adapting curricula and learning materials; adjusting medical procedures; implementing specific medication modalities; or enabling access to support personnel.[[5]](#footnote-5) Other examples may be: giving the person with a disability training, modifying procedures for testing or assessment providing supervision, modifying instructions or reference manuals.
2. Reasonable accommodation duties are different from accessibility duties. Accessibility is related to groups, whereas reasonable accommodation is related to individuals. The duty to provide accessibility is an *ex ante* duty, which means that it has to be provided before a person with a disability wants to use exercise his or her right, for example to enjoy access to a building, service or product, on an equal basis with others. States parties need to set accessibility standards that must be developed and adopted in consultation with organizations of persons with disabilities (DPOs). In contrast, the duty to provide reasonable accommodation is an *ex nunc* duty. **It applies in a particular situation and in a particular context, often, but not necessarily, upon request by the person with a disability**. It is an individualised reactive duty, that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual person with a disability concerned. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination is ensured, taking the human dignity, autonomy, and choices of the individual into account.[[6]](#footnote-6)

In paragraph 25 and 47 there is a repetition of the distinction between accessibility and reasonable accommodation and we do welcome that distinction. However, we worry that the sentence “It applies in a particular situation and in a particular context, often, but not necessarily upon request by the person with a disability.” Is not as clear as it could be. We were not clear whether this was a reference to an anticipatory duty to accommodate which is of course laudable but not arguably legally required, or in the alternative was it a reference to a third party seeking that accommodation on behalf of another, a third alternative is that these if anticipated are in fact accessibility provisions and not reasonable accommodation provisions. As it is not clear we would like clarity or removal of the sentence in bold in paragraph 25.

The CDLP also would like a distinction made between the legal duty set out in Article 5(3) the duty to provide reasonable accommodation and that in Article 5(4) which allows for positive or affirmative actions. Positive measures are optional, or permitted general and often group related. In contrast, reasonable accommodations relate to individuals and are mandatory obligations. We recommend that this distinction is clarified.

1. The Committee observes that there exists a lot of confusion with respect to the duty to provide reasonable accommodation in accordance with articles 2 and 5 CRPD. The duty to provide reasonable accommodation can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation which is a ‘modification’ or an ‘adjustment’ that is ‘necessary and appropriate’ where it is required ‘in a particular case’ to ensure that a person with a disability is able to enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a ‘disproportionate or undue burden’ on the duty-bearer.
2. The following is intended to clarify this concept:
   1. “Reasonable accommodation” is a single term and “reasonable” should not be misunderstood as another exception clause; the concept of “reasonableness” should not act as another qualifier or modifier to the duty. It is not a means by which the costs of accommodation or the availability of resources can be assessed – this occurs at a later stage when the “disproportionate or undue burden” assessment in undertaken. Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable therefore if it (i) achieves the purpose (or purposes) for which it is being made; and (ii) it is tailored to meet the needs of the person with disability.
   2. “Disproportionate or undue burden” should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. Both terms should be considered synonyms insofar as they refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party.
   3. “Reasonable accommodation” should also not be confused with “specific measures”, including “affirmative action measures” or similar positive duties. While both concepts aim at achieving *de facto* equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others. Examples of specific measures include: temporary measures for countering the low numbers of women with disabilities employed in the private sector, and support programmes to increase the number of students with disabilities in tertiary education. Similarly, reasonable accommodation should not be confused with the provision of support such as personal assistants under the right to live independently and being included in the community, or support to exercise legal capacity.
   4. “Procedural accommodations” in the context of access to justice should not be confused with reasonable accommodation. While the latter is limited by the concept of disproportionality, procedural accommodations are not.
3. Key elements that guide the implementation of the duty to provide reasonable accommodation include:[[7]](#footnote-7)
   1. The identification and removal of barriers that impact on the enjoyment of human rights for persons with disabilities in dialogue with the person with a disability concerned;
   2. Proving that an accommodation is feasible (legally or in practice). An accommodation that is legally or materially impossible is unfeasible. For example, breaching a law that is in alignment with the Convention cannot be required as a reasonable accommodation. Moreover, [the ways in which] a reasonable accommodation [can be provided] must exist and be available. [The cost of the accommodation shall not play a role in deciding whether the accommodation is reasonable since cost factors are to be considered under the undue burden test].
   3. Proving that the accommodation is relevant, meaning necessary and appropriate, or effective in ensuring the realization of the right in question.
   4. Assessing whether the modification imposes a disproportionate or undue burden on the duty bearer; the determination of whether a reasonable accommodation is disproportionate or unduly burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned. Although reasonable accommodation is in principle an individual measure, assessments also need to take into account the potential beneficial effects of the accommodation in question for the future enjoyment of the right concerned by other persons with disabilities.[[8]](#footnote-8)
   5. Ensuring that the reasonable accommodation has, as the essential objective, the promotion of equality and the elimination of discrimination against persons with disabilities. A case-by-case approach based on consultations with the person concerned is therefore required. Potential factors to be considered include financial costs, resources available (public subsidies), the size of the accommodating party, the effect of the modification on the institution or the enterprise, third-party benefits, as well as negative impacts on other persons, and health and safety requirements.[[9]](#footnote-9)
   6. Dispensing the person with a disability concerned from proving that the desired accommodation would not impose a disproportionate or undue burden. The burden of proof in this regard should instead rest with the duty bearer who claims that his or her burden would be disproportionate or undue.
4. While duty bearers must make good faith efforts to provide reasonable accommodation, there might be legal or material limits. Any justification of the denial of reasonable accommodation must be based on objective criteria and analysis and communicated in a timely fashion to the person with a disability concerned. A justification that perpetuates negative stereotypes or discrimination against persons with disabilities cannot be deemed legitimate. For example, the assumption that including students with disabilities in the classroom would have a detrimental effect on other students is in itself discriminatory.

SECTION V – NORMATIVE CONTENT (iv) ART. 5(4) SPECIFIC MEASURES

PARAGRAPH [30]

This paragraph states that specific measures are generally not mandatory but then states that there may be occasions where they become mandatory. It was suggested that an example would assist in clarification of when non-mandatory measures could become mandatory.

SECTION VII. RELATIONSHIP WITH OTHER SPECIFIC ARTICLES OF THE CONVENTION

PARAGRAPH 45

**Proposed text of the amendment:**

45. In particular, States parties should raise awareness of non-discrimination among members of the legal profession, including the judiciary, clearly highlighting (amongst other important concepts) that the obligation on duty-bearers to provide reasonable accommodation is a non-discrimination obligation to ensure equality.

PARAGRAPH 47

While this repeats comments made in paragraph 25, we do agree it is important to stress those distinctions we would however recommend a restructuring of the paragraph and some amendments for clarity.

**Proposed text of the amendment:**

47. As noted above, accessibility and reasonable accommodations are two distinct concepts of equality laws and policies.

a. **Accessibility** duties relate to groups and have to be implemented progressively but unconditionally; and

b. **Reasonable accommodation** duties, on the other hand, are individualized, apply immediately to all rights and may be limited by its disproportionality.

Because the progressive realization of accessibility in the built environment, public transportation and information and communication services may take time, reasonable accommodation may be used as a means to provide access to individuals in the meantime, as it is an immediate duty.

PARAGRAPH 60(c)

**Proposed text of the amendment to the sub-section 60©:**

Reasonable accommodation for the person with disabilities to attend or be alternatively present throughout all stages of the process

PARAGRAPH 73(g)

The text “State parties should” should be deleted, as it is repetitive of the lead in to the sub-paragraphs.

PARAGRAPH 74(a)

**Proposed text of amendment**

Reform all laws that exclude persons with disabilities from voting and from standing as a candidate in elections.

PARAGRAPH 76 (b)

76(b) Where necessary States Parties should create (develop) anti-discrimination laws where they are not existing, include in anti-discrimination …

We think it is important to stress that existing laws should be amended, repealed and include reference to disability but it is equally important to stress the necessity to create the laws if needed.

PARAGRAPH 76(d)

**Proposed text of the amendment:**

d. Protection from discrimination for persons with disabilities should have the same standard as for other social groups and should include protection against all forms of discrimination including direct and indirect discrimination, denial of reasonable accommodation, discrimination, harassment, and intersectional discrimination.

We would consider it important to refer to the relationship between Article 5 and Article 25 and also 28.

We would welcome further assistance to the CRPD Committee if required.

1. See International Covenant on Civil and Political Rights, Art. 14 (1) and Art. 26, Art. 5 (a) CERD and Convention on the Elimination of All Forms of Discrimination against Women, Art. 15 [↑](#footnote-ref-1)
2. Committee on Economic, Social and Cultural rights, General Comment N. 16 (2005), E/C.12/2005/3, para. 9. [↑](#footnote-ref-2)
3. Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9, Accessibility, para 28. CRPD/C/GC/2. [↑](#footnote-ref-3)
4. Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, United Nations Doc. E/1995/22, 1994, para 15. [↑](#footnote-ref-4)
5. Report of the Office of the United Nations High Commissioner for Human Rights, Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities, 9 December 2016, para. 28, A/HRC/34/26. [↑](#footnote-ref-5)
6. Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9, Accessibility, para. 26. CRPD/C/GC/2. [↑](#footnote-ref-6)
7. Report of the Office of the United Nations High Commissioner for Human Rights, Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities, 9 December 2016, para. 55-61, A/HRC/34/26; Committee on the Rights of Persons with Disabilities, *Jungelin vs. Sweden*, Communication No. 5/2011, 2014, CRPD/C/12/D/5/2011, para. 2-6,. [↑](#footnote-ref-7)
8. Committee on the Rights of Persons with Disabilities, *Jungelin vs. Sweden*, Communication No. 5/2011, 2014, para. 2-6, CRPD/C/12/D/5/2011, Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting), para. 5. [↑](#footnote-ref-8)
9. Ibid. (note 42) [↑](#footnote-ref-9)