

Prof Theresia Degener, Chairperson

Committee on the Rights of Persons with Disabilities

Office of the United Nations High Commissioner for Human Rights

30 Nov., 2017

Re: Comments on the Draft General Comment No. 6 on Equality and Non- discrimination (Article 5)

Dear Prof Degener,

We write in response to the CRPD Committee’s Draft General Comment No. 6 on the right of persons with disabilities to equality and non-discrimination (DGC No. 6). We are researchers from the University of Essex in the United Kingdom and we work together in the context of the Essex Autonomy Project (EAP) and the Mental Health and Justice Project (MHJ).

EAP has been involved in legal capacity law reforms in several jurisdictions both within and outside the UK. Our experience is that States Parties to the CRPD are struggling with the implementation of the CRPD, especially when it comes to Articles 12, 14, 19 and 25 taken together with Article 5.

We would like to thank the Committee for drafting DGC No. 6 and also for the opportunity to comment on it. EAP considers this General Comment as an important tool for States Parties when implementing the CRPD, and also for other stakeholders when advancing the rights of persons with disabilities.

We turn below to raise concerns about the current drafting of DGC No. 6. Before doing so, however, we wish to emphasise that there is a great deal in the draft that we welcome. We particularly welcome the Committee’s clarification (in paragraph 20 of the draft) of the scope of the Convention’s prohibition on “all discrimination” in CRPD Art. 5(2). We also welcome the Committee’s clarification of concept of “indirect discrimination” (para 20(b)), and the elaboration of the Convention’s principle that denial of reasonable accommodation can itself be tantamount to discriminatory treatment (paras 3, 19 *et passim*).

We turn now to raise the following concerning the current drafting of the General Comment.

1. Articles 12 and 19 taken together with Article 5 (regarding para. 66)

In our work with States Parties on compliance with CRPD Art. 12, one continuing issue of concern pertains to the question of how support needs under CPRD Art. 12(3) are to be identified, and how support itself is to be delivered. The Committee’s General Comment on Art. 12 made clear that the basis for provision of support must itself be non-discriminatory.[[1]](#footnote-1) But States Parties continue to struggle with the question of how to design and implement a non-discriminatory basis for the allocation and provision of support.

DGC No.6 expands on this matter, particularly in para. 66. We welcome this clarification, for example in the text that makes clear that provision of support services for specific groups (e.g., children, students, etc.) is not in and of itself discriminatory. Our concern relates to the following sentence in para. 66.

Eligibility criteria and procedures for accessing support services need to be defined in a non-discriminatory, objective way, and focus on the requirements of the person rather than the impairment, following a human rights-based approach.[[2]](#footnote-2)

Our concern about this formulation pertains to the use of the phrase “objective way.” We note that this concept is neither defined nor clarified in DGC No. 6. The draft language also fails to make clear whether and how the requirement of objectivity relates to the requirement of non-discrimination. Is this an additional requirement or an elaboration of the same requirement? Without clarification of these matters, we believe the States Parties will struggle to understand and apply this provision of DGC No. 6.

**Recommendation One: We invite the Committee either to eliminate or to explain the concept of “objective way” so that States Parties will have the benefit on clear guidance when it comes to implementing the CRPD.**

1. Articles 14 and 25 taken together with Article 5 (regarding para. 63)

Article 14(1) (b) obliges States Parties to ensure that persons with disabilities, on an equal basis with others, are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. Article 25 (d) obliges States Parties to require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.

In para. 66, DGC No. 6 underlines that

The Committee is particularly concerned about discriminatory deprivation of liberty, discriminatory torture or cruel, inhuman or degrading treatment or punishment, violence against persons with disabilities and discriminatory forced treatment of persons with disabilities in and outside mental health facilities.[[3]](#footnote-3)

We believe that this passage in the draft is insufficiently clear and precise to provide States Parties with the guidance that they need.

We note, first, that the passage states that the Committee is *particularly* concerned about *discriminatory* deprivation of liberty, torture, degrading treatment, etc. Does this mean that the Committee is somehow less concerned about torture, degrading treatment, etc., that is *not* carried out on a discriminatory basis? Clearly this is not the intended meaning, but the language as drafted is confusing on this point.

Secondly, we note that this passage undertakes to address, in a single sentence, three quite distinct issues: discriminatory deprivation of liberty, discriminatory torture, discriminatory forced treatment. We respectfully suggest that this is a strategic error in the current drafting. These three issues raise quite distinct challenges for States Parties, and merit separate discussion. For example, the Committee has itself indicated that non-discriminatory provisions for deprivation of liberty (e.g., in the criminal justice system) can be compliant with the CRPD.[[4]](#footnote-4) But non-discriminatory torture or inhuman and degrading treatment clearly never can be.

Third, we have found in our work with States Parties that clearer guidance from the Committee is needed on the question of whether and how a disability-neutral approach to involuntary treatment might be devised. Does the Committee mean to say that all involuntary treatment is intrinsically discriminatory? If so, then it would be helpful to say so explicitly and clearly explain to States Parties the basis for this position. If the Committee means to allow for the possibility of non-discriminatory involuntary treatment, then guidance should be provided to States Parties as to how such an approach might be designed so as to comply with the CRPD.

**Recommendation Two: We urge the Committee to treat in separate paragraphs the three distinct issues regarding (i) deprivation of liberty, (ii) torture, cruel, inhuman or degrading treatment, (iii) involuntary treatment.**

**Recommendation Three: We urge the Committee to clarify whether all involuntary treatment is intrinsically discriminatory or whether a disability-neutral approach to involuntary treatment can comply with the CRPD.**

**Recommendation Four: If the position of the Committee is that all involuntary treatment is intrinsically discriminatory, then we urge the Committee to clarify the basis for this claim.**

**Recommendation Four: If the position of the Committee is that a disability-neutral approach to involuntary treatment can comply with the CRPD, then we urge the Committee to use the opportunity of this General Comment to provide clarity and guidance to States Parties on how such an approach should be devised and evaluated.**

Respectfully,

Prof Wayne Martin and

Dr Sándor Gurbai

1. UN Committee on the Rights of Persons with Disabilities, 2014: *“General Comment No. 1 on Article 12: Equal recognition before the law.”* CRPD/C/GC/1, para 29 (i). [↑](#footnote-ref-1)
2. DGC No. 6, para 66. [↑](#footnote-ref-2)
3. DGC No. 6, para 63. [↑](#footnote-ref-3)
4. UN Committee on the Rights of Persons with Disabilities, 2014: *“General Comment No. 1 on Article 12: Equal recognition before the law.”* CRPD/C/GC/1, para. 32. [↑](#footnote-ref-4)