**Submissions on the Draft General Comments on Article 5 of the Convention on the Rights of Persons with Disabilities**

# Summary

The Public Defender of Rights of the Czech Republic hereby takes the liberty to provide submissions and suggestions for supplementing the Draft General Comment on Article 5 of the Convention on the Rights of Persons with Disabilities, which are based on her experience in protection of persons with disabilities against malpractice of administrative authorities and other institutions, and against discrimination.

According to the Defender, the Committee should consider supplementing the wording of the draft in the following aspects:

1. Clearly define the obligation of the States parties to ensure effective legal counselling and legal aid, including free legal aid for victims of discrimination on the grounds of disability, based on respect to their will and preferences (Paragraphs 23, 56 (c), 58 to 62).
2. Emphasise the absolute prohibition of limiting the legal capacity or procedural rights (right to legal capacity) in the area of protection against discrimination (Paragraphs 23, 54 to 57).
3. Recommend to the States parties that they establish a mechanism for an action in public interest (actio popularis) to be used in cases of discrimination against the most vulnerable groups of persons.
4. Further specify the purpose of sanctions imposed in cases of proven discrimination, or propose a non-exhaustive list of said sanctions (Paragraphs 23, 36 (e)).
5. Define in more detail the undue burden test in fulfilling the obligation to carry out reasonable accommodations (Paragraphs 26, 27, 73, 76 (f)).

# Role of the Public Defender of Rights

The Public Defender of Rights protects persons against the conduct by authorities and other institutions if such conduct is contrary to the law, does not correspond to the principles of democratic rule of law and good governance, or in case the authorities fail to act. In addition, as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, the Defender also performs preventive systematic visits to places where freedom of persons could be restricted and seeks to promote respect for their fundamental rights. The Defender also contributes to the enforcement of the right to equal treatment and protection against discrimination.

As from the 1 January 2018, the Public Defender of Rights will have competence in the area of monitoring the implementation of the Convention on the Rights of Persons with Disabilities pursuant to Article 33 (2) of the Convention.

# Specific submissions regarding the Draft

## Ensure effective legal counselling and legal aid for persons with disabilities

The Committee emphasises that substantive prohibition of discrimination on the grounds of disability must have a counterweight in the procedural regulations, which must ensure effective remedies. It then adds, in conjunction with Article 13, that the States parties are obliged to provide access to justice through relevant procedural regulations. However, according to the findings of the Defender, the phase taking place prior to any proceedings is the greatest obstacle in access to justice.

In 2015, the Defender conducted a survey regarding the accessibility of legal protection against discrimination. It followed from her final report Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice[[1]](#footnote-1) that up to 80% of persons, regardless of whether disabled or not, were not ready to contact the Defender or an attorney-at-law, and up to 74% of persons considered it difficult to achieve justice in the area of discrimination. Furthermore, compared to other groups of minorities, persons with disabilities are less capable of identifying different treatment as discriminatory.[[2]](#footnote-2)

A limitation of legal capacity, as well as practical issues related to accessibility of legal counselling and aid for persons living in facilities providing residential healthcare or social services may constitute further obstacles. As many persons with disabilities live on the poverty line, the affordability of legal counselling and representation is not a negligible factor.[[3]](#footnote-3)

The system of protection against discrimination can only be effective if it is accessible to every person with disability regardless of the scope of suport needed or financial capacities. Unfortunately, there is currently no adequate system of legal aid for vulnerable persons in the Czech Republic; this state of affairs has been repeatedly criticised, among others, by international authorities.[[4]](#footnote-4) Furthermore, even though there has been a change in legislation so as to reflect the new paradigm in perception of decision-making of persons with disability, the only procedural protection available for these persons, i.e. guardianship *ad litem*,[[5]](#footnote-5) is still based on the concept of substitute decision-making “in the best interest” of the person. The approach of lawyers, as well as other persons in court proceedings is then based on the old system of substitute decision-making, which does not comply with Article 12. The duty of the States parties in providing protection against discrimination should be to establish an accessible, low-threshold network of high-quality free legal counselling or legal aid which must respect the will and preferences of these persons and protect their procedural rights (right to legal capacity) at the same level as for other types of legal representation.

## Prohibition of limiting the legal capacity and procedural rights in the area of protection against discrimination

In the Draft Comment, the Committee states with reference to Article 12 (2) that any limitation of the legal capacity of persons with disabilities constitutes discrimination. Although I realise that the Committee addressed the issue of legal capacity in more detail in the General Comment on Article 12 of the Convention, I believe that the above rule must also be expressly emphasised in relation to limitation of procedural rights in protection against discrimination.

In the Czech Republic, if the person who has been appointed a guardian (with or without limited legal capacity) goes to the court him/herself, the court shall require the procedural act be approved by a guardianship court. If the guardianship court does not approve the act, the proceedings may be discontinued. Although the aim of this procedure might be to protect persons with disabilities against negative consequences of lodging an action (especially in the form of reimbursement of the costs and expenses of the adversary), it does constitute an interference with his or her procedural rights which is at variance with the right to enjoy legal capacity in all aspects of life pursuant to Article 12. The States parties must consistently ensure that instruments for protection are not based on removing procedural capacity or otherwise hindering the access of persons with disabilities to justice. This is all the more important in respect of legal instruments for protection against discrimination.

## Action in public interest as a manner of ensuring access to justice for the most vulnerable groups

As mentioned above, the access to justice for persons with disabilities may be more difficult compared to others. Therefore, it is necessary that the States parties establish systems of accessible legal aid serving all, regardless of the scope of required assistance. On the other hand, I keep encountering two types of situations where the individual protection model cannot be relied upon in removing systemic discrimination of the most vulnerable groups. First, this is true in cases where the consequences of potential litigation could be so unfavourable that they discourage a majority of victims. For example, the unwillingness of parents to file a complaint against the school which is attended (and will be attended during the proceedings) by their child with a disability. The second case is the protection of persons who are not able to defend themselves even when provided with formal support, i.e. persons with most severe disabilities and persons placed in institutions. When considering whether protection against discrimination is effective in practice, it is necessary for the States parties to take account of the overall situation of victims of discrimination with disabilities.

A suitable measure, which can protect persons who are not able to defend themselves against discrimination, not even when provided with supports, or whose options are greatly limited by fear of the negative consequences of such attempts, is an action in public interest (actio popularis). This concept is enshrined in the legislation of just a few States parties that have ratified the Convention.[[6]](#footnote-6) It is not present in the laws of the other the States parties, and this is why some systemic forms of discrimination are never brought before a court. Within implementation of Article 5, the Committee should recommend that the States parties consider introducing an action in public interest in cases of discrimination of persons with disabilities.[[7]](#footnote-7)

## Specification of the purpose of sanctions and their list

According to the Draft Comment, the existence of effective sanctions against those who discriminate constitutes an essential part of legal protection against discrimination. However, the manner of imposing said sanctions, their purpose and their goal (except for deterring potential offenders and individual reparation for harm) are not precisely specified.

Pursuant to Section 10 of the Czech Anti-Discrimination Act,[[8]](#footnote-8) the victim of discrimination may claim in court that the discrimination be stopped, that the consequences of discrimination be remedied and that the victim be granted appropriate compensation, or that immaterial damage be compensated. In practice, the courts in the Czech Republic grant monetary compensation in a majority of cases; sometimes they order the relevant entity to refrain from further discriminatory conduct. However, where the discrimination has systemic nature, mere granting of compensation to an individual may not have any real effect in terms of changing the approach. In these cases, it would be desirable to utilise remedies to improve the state of affairs in the future (“forward-looking, non-pecuniary remedies”).[[9]](#footnote-9) The Comments on Article 5 should contain more detailed specification of the goals of sanctions for breach of the prohibition of discrimination, or offer the States parties a non-exhaustive list of such sanctions. The Committee should recommend to the States parties that they also implement “forward-looking, non-pecuniary remedies” in their legislations.

## More specific definition of reasonable accommodations and the test of an undue burden

The Draft Comment emphasises that “appropriateness” of the adjustment provided must not be perceived in terms of expenses but rather in terms of the effectiveness of the measure in question. Furthermore, they provide a general description of individual elements of the duty to provide reasonable accommodations. Paragraph 73, which deals with discrimination at work, contains no further specification regarding the issue of reasonable accommodations, apart from access to training and professional education.

The concept of reasonable accommodations has been introduced into the Czech legislation in 2009 by the Anti-Discrimination Act. Pursuant to Section 3 (2) of the Act, a failure to adopt reasonable accommodations in order for the person with disability to have access to certain employment, performance of work or functional or other advancement in employment or to be able to use services available to the public, constitutes indirect discrimination. Situations where such measure constitutes an undue or disproportionate burden are an exception. The interpretation of terms “reasonable accommodations” or “undue or disproportionate burden” is neither stipulated nor addressed in the national case-law or the case-law of the Court of Justice of the European Union. In the area of employment, it means, in practice, that employers are often not willing to accept other forms of accommodations than reassignment to a different available job. Other, more creative measures are thus deemed to exceed the limits of a reasonable accommodation.[[10]](#footnote-10) However, some national courts have already ruled that employers are obliged to prove that in adopting reasonable measures, they have also considered the redistribution of working tasks.[[11]](#footnote-11)

A solution could lie in the adoption of a clearer definition or a non-exhaustive list of possible measures in the area of employment as is the case with legislations of some other countries.[[12]](#footnote-12)

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1. The Public Defender of Rights. *Survey report: Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* [online]. Public Defender of Rights © 2015. [Retrieved on: 2016-November-21]. Available at: <https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/diskriminace_EN_fin.pdf> [↑](#footnote-ref-1)
2. Only two actions were lodged with Czech courts in the 2007-2014 period where the plaintiffs invoked discrimination on the grounds of disability. For more details see the *Survey report: Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice,* p. 97. [↑](#footnote-ref-2)
3. According to the European Disability Strategy 2010–2020, the number of persons living in poverty is 70% higher for persons with disabilities than it is for persons without disabilities. [↑](#footnote-ref-3)
4. Most recently, for example, the Human Rights Council. *Draft report of the Working Group on the Universal Periodic Review. Czechia* [PDF document] No.A/HRC/WG.6/28/L.1. Human Rights Council © 2017, Paragraph 6.94 [Retrieved on: 2013-October-12]. Available at: <https://www.upr-info.org/sites/default/files/document/czechia/session_28_-_november_2017/a_hrc_wg.6_28_l.1.pdf>. [↑](#footnote-ref-4)
5. Pursuant to Section 29 (1) and (3) of Act No. 99/1963 Coll., the Code of Civil Procedure, a guardian *ad litem* is appointed by court to represent a person who, as a party to the proceedings, cannot independently act before the court due to a lack of procedural capacity in cases of limitation of legal capacity or due to a mental disorder or health problems. [↑](#footnote-ref-5)
6. See European network of legal experts in gender equality and non-discrimination. *A comparative analysis of non-discrimination law in Europe 2016* [online]. European Commission © 2016, pp. 94–96 [retrieved on 2017-November-21]. Available at: <http://www.equalitylaw.eu/downloads/3987-a-comparative-analyses-of-non-discrimination-law-in-europe-2016-pdf-1-2-mb> [↑](#footnote-ref-6)
7. The NHRI, equality bodies, ombudspersons and NGOs protecting the rights of persons with disabilities should have *locus standi* to lodge an action. [↑](#footnote-ref-7)
8. Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination, as amended. [↑](#footnote-ref-8)
9. Forward-looking, non-pecuniary remedies are presented in the laws of various European countries (e.g. the United Kingdom, Ireland and Portugal). The remedies may consist in revision of the rules governing employment (in the areas of recruitment, remuneration or protection against harassment), performance of an audit of accessibility in a specific organisation, adoption of a desegregation plan, prohibition to participate in tender procedures for public contracts etc. For more details see IONESCU, Justina and JORDACHE, Romanita. Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti-Discrimination Law. In: *European Anti-Discrimination Law Review* [online]. Brussels: European Union © 2014, 2014(19) [Retrieved on 2017-November-21], pp. 11‑24. Available at: <http://www.equalitylaw.eu/content/media/Review%2019%20EN%20web%20version.pdf> [↑](#footnote-ref-9)
10. A complaint dealt with by the Public Defender of Rights concerned a postwoman, who, due to long-term health problems, lost her fitness to perform the work of a (walking) postwoman and asked her employer to be assigned a vehicle delivery position. The employer refused such reassignment and terminated her employment contract. The complainant turned to the District Labour Inspectorate which found no errors in the employer’s conduct, particularly due to the fact that according to their survey, even postmen on a vehicle delivery had to walk over greater distances. The test used by the Inspectorate to assess the fulfilment of the reasonable accommodation condition was the existence of a suitable position under the present organisation of work (not whether the reorganisation of work in the branch – in particular, the redrawing of delivery districts – would impose an undue or disproportionate burden on the employer). [↑](#footnote-ref-10)
11. European network of legal experts in gender equality and non-discrimination. *Newspaper report*. [online]. European Commission © 2016. [Retrieved on 2017-November-21]. Available at: <http://www.equalitylaw.eu/downloads/3673-ireland-important-high-court-judgment-on-extent-of-an-employer-s-obligation-to-provide-reasonable-accommodation-in-a-disability-case> [↑](#footnote-ref-11)
12. This includes, for example, the United Kingdom; for more information see Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. *The Concept of Reasonable Accommodation in Selected National Disability Legislation* [online]. No. A/AC.265/2006/CRP.1. United Nations. © 2005. [Retrieved on 2017-November-21]. Available at: <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>. [↑](#footnote-ref-12)