**COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES: DRAFT GENERAL COMMENT ON EQUALITY AND NON-DISCRIMINATION**

**COMMENTS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

**General observations**

1. The United Kingdom thanks the Committee on the Rights of Persons with Disabilities for their work on the draft General Comment on equality and non-discrimination and is grateful for this opportunity to provide comments on the current draft.
2. The UK has a long-standing tradition of ensuring that all individuals, rights are protected domestically, and of fulfilling our international equality and human rights obligations. [The Equality Act 2010](http://www.legislation.gov.uk/ukpga/2010/15/contents) (the 2010 Act) is based on the principles of preventing discrimination and ensuring equality of outcomes for all protected groups. The disability-specific provisions encompass measures intended to protect disabled people and to improve their life choices, opportunities and independence in employment, in education, in the provision of services, in their private lives and in their communities. The protection and promotion of rights for all persons with disabilities forms an integral part of the UK’s human rights agenda, ensuring that rights and liberties are protected domestically whilst fulfilling our international obligations. The 2010 Act prohibits discrimination on grounds of disability and imposes a duty on providers of goods and services to make “reasonable adjustments” to prevent this.
3. We welcome the focus to clarify the obligations of States parties in relation to non-discrimination and equality as enshrined in article 5 of the Convention in the General Comment, on the right to equality and non-discrimination.  We do however have some concerns in the achievement of clarity in the interpretation of article 5 and to language that is prohibitory in application. In particular, the reference to new types of discrimination such as prenatal screening being included in article 8 awareness raising, and mental health facilities and treatment in article 14In the UK, the key objective of the prenatal screening programme is to enable parents to have the information and support they need to make informed choices, at each step along the screening pathway. The UK agrees that people with mental illness should live with as much autonomy and freedom as possible, and without discrimination. The legal framework that allows for detention and treatment differs from devolved nation to devolved nation within the UK – the Mental Health Act 1983 applies to England and Wales; the Mental Health (Care and Treatment) (Scotland) Act 2003 applies to Scotland; and the Mental Capacity Act (Northern Ireland) 2016  will supersede the Mental Health (NI) Order 1986 in Northern Ireland. These legal frameworks promote consent wherever possible – but they do permit mental health assessment and treatment, and detention, segregation and restraint for that purpose, without consent, in limited circumstances.

**Specific drafting comments**

Introduction

1. In relation to paragraph 3, we have a language suggestion in the first two sentences in order to make it a little clearer, which reads as follows, “it is encouraging to see that the broadening of anti-discrimination laws and human rights frameworks has led to extended protection of the rights of persons with disabilities. The Committee also welcomes that in many cases, disability has been explicitly included as a ground on which discrimination is prohibited.”
2. In relation to paragraph 4, we are concerned that the term “institutionalisation” can be understood in many differing ways. For example, the UK does not consider appropriate residential care in the community as “institutionalisation”. Rather we would see institutionalisation as being about, for example, long stay hospitals and care homes.

Equality and non-discrimination for persons with disabilities in international law

1. In relation to paragraph 6, we suggest deleting the word “core” in the first sentence. The abbreviation of the International Covenant on Economic, Social and Cultural Rights should be “ICESCR”.
2. We are not convinced that paragraph 8 adds real substance to the draft in terms of looking at the interpretation of Article 5 of the Convention; in addition, we are concerned that not all examples are equal and therefore correctly categorised as “brutal and less brutal”. For example, we have domestic provisions, which enable non-consensual sterilisation, but only in very specific circumstances and with a range of legal protections in place. Overall, we consider this paragraph too broad in its assertions and therefore we would propose deleting paragraph 8, with the possible exception of the first two sentences.

The history of article 5 and article 2 of the Convention and the human rights model of disability

1. In paragraph 9, and as a preliminary point, the UK has reservations about the statement that the adoption of a medical model is detrimental to the rights of disabled people. Although the 2010 Act definition of disability is largely based around a medical model, the provisions are broad enough to ensure that any person with a condition (including recurring, progressive and life-threatening conditions) that meets the definition of a disability (i.e. a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-today activities) is protected. The condition does not necessarily have to be medically diagnosed by a health professional, so long as it has an adverse impact on a person’s ability to carry out normal daily activities.
2. The 2010 Act provisions, including the disability provisions, are based on the principles of equality of opportunity. The 2010 Act protects disabled people by taking measures to improve their life choices and opportunities in the provision of services, in employment, in education, in their private lives and in their communities, and their independence. In addition, the Public Sector Equality Duty also requires public bodies to proactively consider how they can positively contribute to the advancement of equality and the prevention of discrimination by taking into account the potential effects of their policies, functions and service delivery on groups with protected characteristics, including disabled people. Public bodies are encouraged to gather data that will help with their equality analysis, including consulting with relevant groups such as disabled people, where relevant.
3. While the UK also supports the concept of the social model of defining disability, this can make it difficult to legislate for in terms that can effectively be described and enforced in specific circumstances. For this reason, the 2010 Act’s definition of disability continues to follow the medical model.
4. The UK’s support for the social model is demonstrated through the many policies and initiatives undertaken by government departments to improve life choices and opportunities for disabled people in all the areas covered by the 2010 Act.
5. In paragraph 10, instead of “ignoring” in the fourth sentence we would suggest “Substantive equality acknowledges that the “dilemma of difference” requires acknowledging and addressing the range of similarities and differences among human beings in order to achieve *de* *facto* equality. However, in order to overcome deeply entrenched disability-based discrimination, States, local authorities and devolved governments need to do more than combat discriminatory behaviour, structures and systems”. Furthermore, the UK has reservations about intersectional discrimination. The multiple/dual discrimination provisions under the 2010 Act have not been implemented because of regulatory complexity and the potential for disproportionate new and increased burdens for businesses, local authorities and other stakeholders. The 2010 Act already provides robust protection across a range of protected characteristics, to enable a person who has been discriminated against to bring a claim under more than one ground. The courts already have the discretion to allow people to bring claims on different grounds where it is justifiable to do so.

Legal character of non-discrimination and equality

1. In paragraph 14 we are of the view that the final sentence must be deleted since article 4(1)(e) cannot be read as implying that the entire Convention applies to the private sector.

Normative content

1. We are concerned that paragraph 15 is drafted too narrowly and would instead propose the following formulation: “Several international human rights treaties include the term “equal before the law”, which describes the entitlement of human beings to equal treatment by, and in the application of, the law, as a field. In order that this right can be fully realised, the judiciary and law enforcement officers must not, in the administration of justice, discriminate against persons because of their actual or perceived disability.”
2. In paragraph 16, instead of the language “be equal in the sense that all groups of a given society are treated fairly under the law, that the legal standards are the same for all to whom they apply and that all persons in a given jurisdiction are included” we suggest “guarantee the substantive equality of all those within a given jurisdiction”.
3. In relation to paragraphs 18, 32, and 70-72 we are concerned that the Committee appears to suggest that a specialist education setting is intrinsically inferior.
4. As the Committee is aware, we are fully committed to the inclusive education of disabled children and young people and the progressive removal of barriers to learning and participation in mainstream education. This is one of the key principles of our Special Educational Needs (SEN) legislation, which we strengthened through the Children and Families Act 2014. This legislation secures the general presumption in law of mainstream education in relation to decisions about where children and young people with SEN should be educated. Alongside this, the 2010 Act prohibits discrimination against disabled people. This legislative framework helps contribute to the fact that 98.6 per cent of all pupils attend a mainstream school, including many with severe and complex SEN. Our legislation also places considerable weight on the views of the families of children with complex SEN about whether their child should be educated in a mainstream school, a mainstream school with specialist provision such as a unit, or a special school. For a small minority of children with SEN, a specialist setting may be the place that would lead to the best outcomes for them and therefore the positive choice of parents. And this holds true too for a small minority of young people with SEN, who may choose a specialist college as the place where they are most likely to fulfil their potential.
5. It follows from this that we are committed to the provision of high quality education in both mainstream and specialist settings. Our Reservation to article 24 and the accompanying Interpretative Declaration reflect our commitment to inclusion and to providing meaningful choice over where those with complex SEN can be educated. Specialist provision is a context where a small minority of students with SEN will best fulfil their potential and prepare effectively for a fulfilling adult life.
6. In paragraph 19, we call for the first sentence to be deleted as it does not accurately reflect article 5(2) of the Convention. Article 5(2) imposes duties to prevent discrimination on the ground of disability, not duties to achieve equal rights generally. In the second sentence, we suggest the following amendments so the sentence would read “impose positive duties on States parties to prevent discrimination”.
7. In relation to paragraph 22, while we agree that all these grounds enumerated are possible grounds, we do not consider it necessary for each one to be expressly distinguished in domestic systems.
8. In paragraph 24, we consider that the concepts of proportionality and reasonable costs should be incorporated. We think that the concept of “disproportionate or undue burden” should be referenced in this paragraph as well as in para 26 below.
9. In paragraph 30, we consider that it is for the organisations concerned to determine whether temporary or permanent specific measures are required. Under the 2010 Act, positive action measures are voluntary and organisations are able to determine if it is relevant for them to consider using these provisions for a limited period, to take lawful proportionate action to overcome a disadvantage, meet the particular needs of those with particular protected characteristics, or encourage participation in an activity.

General obligation of State parties under the Convention relating to non-discrimination and equality

1. On paragraph 32, we agree that people with mental illness should live with as much autonomy and freedom as possible, and without discrimination. The legal framework that allows for such detention and treatment differs from devolved nation to devolved nation within the UK.
2. These legal frameworks promote consent wherever possible – but they do permit mental health assessment and treatment, and detention, segregation and restraint for that purpose, without consent in limited circumstances. Detentions and treatment for people with mental illness are never arbitrary or unlawful in the UK. Legislation sets out the limited circumstances under which such compulsory action may be taken, without consent where necessary, to make sure that people with mental disorders get the care and treatment they need for their own health or safety, or for the protection of other people.
3. UK legislation sets out the criteria that must be met before compulsory measures can be taken, along with the protections and safeguards that are there for patients – including clear appeals processes, and an independent and impartial tribunal system. Patients also have the right to receive support from statutory Independent Mental Health Advocates, who would help take a case to a Tribunal if the patient wishes. All hospitals where patients may be detained are registered, monitored or inspected by the Care Quality Commission (CQC) in England and equivalent regulatory bodies in other UK devolved nations.
4. The UK therefore maintains that in limited circumstances and within the safeguards set out in UK legislation, mental health treatment without consent is lawful under international law.
5. In relation to paragraph 36, we consider that sub-paragraph (a) needs the following qualification: “Measures to ensure access to justice for all persons who have experienced discrimination, including effective access to judicial and/or administrative procedures and, where applicable and subject to statutory tests of means and merits,, appropriate legal aid;”.
6. In relation to paragraph 39, we agree that the collection of data is extremely important, however we also think that it is worth recalling that as systems are updated, this is often the best time to encourage States to make them more specific (e.g. by enabling disaggregated data to be collected); otherwise the sheer complexity and cost of creating new databases may be off-putting to States.

Awareness raising

1. In paragraph 44, whereas we are of course in favour of awareness-raising among all sectors of society, we caution against suggesting that States can or should control the free media in this regard. We do not agree that article 5 should be interpreted to restrict the choice of antenatal screening because it enables parents to have the information and support they need to make informed choices. Those women who are shown to have a higher chance of having a baby with certain conditions should be offered follow up testing. We propose that the paragraph is amended so as to delete from ‘in particular’ to ‘without autonomy’ replace this with "States parties should take measures to raise public and societal awareness of the need to portray persons with disabilities in a manner consistent with the purpose of the Convention, with the aim of combatting harmful views of persons with disabilities".
2. In paragraph 45, we suggest two small amendments which would acknowledge that some States are raising awareness of non-discrimination and also making a distinction between the “legal profession” and the “judiciary” as follows: “In particular, States parties should raise (or continue to raise) awareness of non-discrimination among members of the legal profession, and amongst the judiciary, clearly highlighting the duty to provide reasonable accommodation as an obligation to ensure equality.”
3. In paragraph 56, we think that “State parties must” should be replaced with “State parties should” which is more appropriate language in a general comment as this does not directly cite Convention obligations.
4. In paragraph 60, we consider that sub-paragraph (f) should be expanded as follows: “Financial assistance (in the case of Legal aid, where applicable and subject to statutory tests of means and merits)”.
5. In relation to paragraph 63, we share the Committee’s view, and are opposed to discriminatory deprivation of liberty, discriminatory torture or cruel, inhuman or degrading treatment or punishment. Detentions and treatment for people with mental illness are never arbitrary or unlawful in the UK. Legislation sets out the limited circumstances under which such compulsory action may be taken, without consent where necessary, to make sure that people with mental disorders get the care and treatment they need for their own health or safety, or for the protection of other people.
6. We are concerned that as currently drafted, paragraph 64 does not reflect the reality that in some instances (e.g. under the UK’s Mental Health Act) detention may be permitted on basis of risks of harm to self or others and allows other restrictions to be applied.
7. In relation to paragraph 70-72 please refer to our comments on paragraph 18 above.

Implementation at the national level

1. In paragraph 76, sub-paragraph (g) we propose amending the language around legal aid as follows: “and, where applicable and subject to statutory test of means and merits, legal aid”.

30 November 2017