Response to Draft General Comment No 6

*Submitted jointly by the University of Leeds’ Centre for Disability Studies and the Disability Law Hub of its Centre for Law and Social Justice – with helpful input from students on the Human Rights and Disabled People LLM module.*

*We wish to thank the Committee for this opportunity for external input. Like the Committee, we regard discrimination and equality as issues of pivotal importance to the realisation of the human rights of people with disabilities and share the Committee’s sense that there is an urgent need for clear guidance on the implementation of Article 5. We congratulate and thank the Committee for its very valuable work to this end.*

Our response is divided into eight main sections as follows:

1. Models of Disability and Equality

2. Breadth of the Obligation on States to Prohibit Discrimination

3. Discriminatory Violence

4. Reasonable Accommodation

5. Intersectionality

6. On the Basis of Disability

7. Relationship with Other CRPD Articles which are Omitted

8. Language and Typing Errors

# 1. Models of Disability and Equality

## 1.1 Models of Disability

First, if the medical model is regarded as one manifestation of an individual model approach to disability, it would be helpful to amend para 9 so that it acknowledges this eg by changing

“For a long time the medical model of disability prevented …” to

“For a long time individual or medical models of disability prevented ...”

And changing

“The medical model determined early international law and policy …” to

“Individual or medical models determined early international law and policy …”.

Second, in para 11, the second sentence begins

“Rather, disability is a social construct”.

We suggest that this should be amended to draw on the language of the CRPD (Article 1 and Preamble para (e)). Thus, it could read instead:

“Rather, disability results from the interaction between persons with impairments and attitudinal and environmental barriers””.

## 1.2 Formal Equality

In para 10, it is stated that “formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently”. However, formal equality is generally understood as focusing only on the former and not the latter. In other words, it is not generally understood to recognise the need to treat people who are differently situated differently. Fredman (in ‘Discrimination Law’ (OUP, 2011)) links formal equality to a conception of equality as ‘consistency’ which results in identical treatment (rather than different treatment). Accordingly, we suggest that the explanation of formal equality given in para 10 be amended so that it focuses only on treating “persons in a similar situation similarly”.

Further, also in para 10, we suggest that the assertion that “Formal equality helps to combat negative stereotypes” should be qualified because formal equality approaches may sometimes entrench rather than combat stereotypes (by establishing a norm from which people with disabilities are regarded as deviating and therefore being excluded from claims to similar treatment). It could be rephrased to read something like:

“Formal equality may help to combat negative stereotypes”.

# 2. Breadth of the Obligation on States to Prohibit Discrimination

The CRPD clearly requires States parties to ensure that their laws and policies are not based on disability discrimination and to prohibit discrimination on a cross-cutting basis in connection with all of the rights it sets out. The draft comment makes this clear and, at various points, gives examples of types of disability discrimination. While this is helpful, we are concerned that the examples given might create the impression that States should frame discrimination prohibitions more broadly than is required by the CRPD. This is problematic because it risks confusing States and disabled people and their organisations about how disability discrimination prohibitions should be drafted; and because it risks over-extending discrimination prohibitions so that they become more difficult to enforce and punish, and consequently lose their power. Some rewording of relevant paragraphs would help reduce or avoid this problem - eg:-

In para 1, the final sentence is phrased in such a way as to suggest that breach of any CRPD right will necessarily be discriminatory. We would suggest either deleting the last sentence of para 1 or rewording it so that it reads:

“The Committee routinely observes discrimination including in the contexts of access to the built environment, transportation, information and communications; access to justice and laws on legal capacity; education; employment; and culture, recreation, leisure and sport. The Committee also routinely observes negative portrayals of disability in the media and harmful stereotypes which significantly increase the likelihood of discrimination on the basis of disability.”

In para 4, the penultimate sentence suggests that all forms of inaccessibility, institutionalisation and segregation necessarily amount to discrimination. We suggest that this should be rephrased as follows:

“The Committee has observed that disability-based discrimination (for example in contexts of lack of accessibility, institutionalization policies or forms of segregated provision) is often incorrectly not regarded as discrimination because it is wrongly justified as being for the protection or care of the person with a disability in question, in his or her best interests, or in the interest of public order.”

# 3. Discriminatory Violence

In para 20(a), disability-based violence is listed as an example of direct discrimination. Unless there is authority that supports this approach at the UN level, we suggest that there might be advantages to providing this as an example of harassment in para 20(d).

# 4. Reasonable accommodation

## 4.1 Paragraphs 24-29

The explanation of reasonable accommodation in paras 24-29 is clear and helpful. The following suggestions may nevertheless help strengthen it still further:

(a) In para 24, after “Other examples may be: giving the person with a disability training,” adding the following words:

“giving other people (eg colleagues or teachers or front-of-house staff) training about interacting and supporting a particular person with a disability or people with disabilities more generally,”.

This might help to challenge as discriminatory situations in which an employer or a school has failed to train its staff in the needs of people with particular disabilities whose work or school life is made difficult or impossible because of the behaviour of others.

(b) Adding an explicit statement to the effect that the cost of reasonable accommodations cannot be passed onto the person with a disability or onto people with disabilities more generally.

(c) Adding guidance about the knowledge which a potential duty-bearer should have in order for the duty to apply. In particular, it would be helpful to indicate that the duty is not limited to situations in which the person with a disability had requested an accommodation or in which it could be proved that the alleged duty-bearer was actually aware that the person in question had a disability. It should also apply in situations in which a potential duty-bearer ought to have realised that the person in question had a disability which might require accommodations.

(d) Adding, perhaps in connection with Article 5(3) and Article 4, guidance to States on the need to ensure that the owners or managers of premises which are occupied by employers or service providers cannot unreasonably withhold consent to requests by employers and service providers to make the premises in question more accessible in order to fulfil their own reasonable accommodation duties.

## 4.2 Paragraph 20

According to para 20(c), “denial of reasonable accommodation constitutes a form of discrimination distinct from other forms, such as direct or indirect discrimination” because a denial to provide reasonable accommodation “meets a justification test which is different from the justification of indirect discrimination”.

We suggest that there are other distinctions that could be made between reasonable accommodation duties and direct and indirect discrimination (including in connection with the circumstances in which the duty is triggered). We would therefore suggest that this last sentence of para 20(c) be amended to read:

“Denial of reasonable accommodation constitutes a form of discrimination distinct from other forms, such as direct or indirect discrimination.”

Alternatively, this sentence could be omitted altogether because the listing of reasonable accommodation as one of the distinct forms of discrimination in para 20 already indicates that the Committee regard it as a distinct form of discrimination.

## 4.3 Elsewhere in the General Comment

In other parts of the draft general comment, there are several places where the wording used appears to treat reasonable accommodation as something separate from discrimination. The fact that it should be treated as part of discrimination is, however, made clear in paras 24-29 and indeed in para 20. Nevertheless, if left unchanged, these misleading passages could cause confusion. Examples are as follows:

Para 4 refers to ‘disability-based differential treatment’, and its potentially humiliating and exclusionary effects. However, it fails to mention (in that context) situations in which people with disabilities are treated in the same way as others even though their circumstances are significantly different. These latter situations call for different treatment through reasonable accommodation. Failure to be treated differently through reasonable accommodation can also be humiliating and exclusionary.

Para 10 ends by stating that:

“However, in order to overcome deeply entrenched disability-based discrimination, States and local authorities, devolved governments need to do more than combat discriminatory behaviour, structures and systems. In order to change discriminatory structures and systems, positive measures are necessary.”

We felt that the distinction made between combatting discrimination, on the one hand, and taking positive measures (which would include reasonable accommodation), on the other, was unfortunate. The problem could be avoided if the word “directly” were inserted in the penultimate sentence, so that it read:

“However, in order to overcome deeply entrenched disability-based discrimination, States … need to do more than combat directly discriminatory behaviour, structures and systems.”

Para 13 refers to

“The principles of equality, non-discrimination and the obligation to provide reasonable accommodation are a cornerstone of the international protection guaranteed by the Convention. It is a right to be protected against discrimination and to be provided reasonable accommodation, applicable to all the Convention.”

We suggest that either the references to “reasonable accommodation” should be deleted from these sentences (because it is part of non-discrimination and therefore does not need to be articulated as an additional principle/obligation) or that these sentences are amended to make it clear that references to non-discrimination include reasonable accommodation – eg

“The principles of equality and non-discrimination (which includes the obligation to provide reasonable accommodation) are a cornerstone of the international protection guaranteed by the Convention. It is a right to be protected against discrimination including by being provided with reasonable accommodation, applicable to all the Convention.”

Para 18 uses language which could suggest that reasonable accommodation duties are optional (the word “may”) and could also give the impression that it does not need to be included in all discrimination laws – but just those relating to employment. The relevant sentence currently reads:

“Reasonable accommodation may be incorporated into employment laws that prohibit discrimination through denial of reasonable accommodation.”

It would reduce the risk of confusion if this were changed.

# 5. Intersectionality

We have two suggestions relating to the treatment of intersectionality in the general comment – as follows:

## 5.1 Relationship with Direct Discrimination, Indirect Discrimination, Reasonable Accommodation and Harassment

In para 20(e), intersectionality is presented as one of five different forms of discrimination but it is stated that it will manifest itself as one of the previous four forms of discrimination –

”Intersectional discrimination can appear as direct or indirect discrimination, denial of reasonable accommodation and as harassment.”

We suggest that the general comment would provide clearer guidance if para 20 were amended so that para 20 para e was deleted and only four types of discrimination were listed – direct, indirect, failure to provide reasonable accommodation and harassment. However, the opening words of para 20 should be amended to make it clear that prohibitions of each of these forms of discrimination should be framed to prohibit discrimination which is multiple or intersectional in nature.

## 5.2 Clarity about what Intersectional Discrimination is and its Relationship with Multiple Discrimination

The first sentence of para 20(e) does not mention multiple discrimination and does not explain intersectional discrimination in a way that differentiates it from multiple discrimination – a distinction which is set out in para 22. If para 20(e) is deleted, as we suggest above, this ceases to be a problem. If the Committee decides to retain something like para 20(e), however, (contrary to the suggestion made above) then it is important that it includes mention of multiple as well as intersectional discrimination.

Para 22, as already noted, differentiates between multiple and intersectional discrimination. We suggest that it would be helpful to add a few words to the end of the paragraph and to the explanation of intersectional discrimination. This would mean that the last sentence would read:

“ ‘Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable’[[1]](#footnote-1) and thereby expose relevant individuals to unique types of disadvantage and discrimination.”

# 6. On the Basis of Disability

We welcome the approach of the Committee to this issue. Nevertheless, we have the following suggestions:

In the first sentence of para 21, it would appear to be more consistent to change “disabilities” to “impairments” (or with “impairments or disabilities”) after the phrase “those who are associated with a persons with”.

Para 76(b) is very helpful. However, we suggest that it would be strengthened by an explicit mention of the barriers to bringing discrimination claims which can be created by laws which require victims of disability discrimination to prove, in addition to proving ‘impairment’, that they experience a limitation of ability/opportunity to participate in society or to carry out ordinary tasks.

# 7. Relationship with Other CRPD Articles which are Omitted

We suggest that it would be helpful to insert additional paragraphs which explain the linkage between Article 5 and three other provisions. These are as follows:

Article 23, which concerns the right to respect for home and the family – this requires attention to non-discrimination obligations in a number of important ways. Some of these are touched on elsewhere in the draft comment. However, it would be helpful if the comment could also stress the importance of approaches to adoption, fostering and marriage which do not discriminate against people with disabilities. While the best interests of the child must be paramount, it is important that stereotypes or unfounded assumptions about the parenting potential of people with disabilities do not cloud assessments of these best interests.

Article 28, on social protection – This also requires careful observance of duties not to discriminate. Recent UK cases illustrate how housing benefits can indirectly discriminate against people with disabilities if they fail to take into account the fact that there may be disability-related reasons for needing an additional bedroom. Further, in addition to designing social protection policies in ways that do not discriminate, they must be operated and administered in ways that do not discriminate against people with disabilities (eg communications must be provided in formats accessible to claimants with disabilities).

Article 30, on cultural life, recreation, leisure and sport - This also raises important discrimination issues which it would be helpful to highlight in the general comment.

# 8. Language and Typing Errors

Greater clarity would be achieved through a careful language edit. The following specific points might also be helpful to note:

The phrase “discrimination of” is often used (eg in para 1) instead of “discrimination against”.

In para 2, the following sentence is very difficult to follow:

“The Committee notes with concern that one of the main remaining challenges regarding the persistence of disability-based discrimination is that despite the adoption of the Convention and its ratification by a large number of countries, approaches to disability in laws, policies, the media and practices based on charity and/or medical paradigms to disability commonly continue to be used to a large extent, despite their incompatibility with the Convention.”

In para 6, there is a reference to IESCR instead of ICESCR and the date given for the CRC is 1979 instead of 1989.

In para 76, there is a reference to “reasonable discrimination” instead of “reasonable accommodation”.

1. Committee on the Rights of Persons with Disabilities, General comment No. 3 (2016) on women and girls with disabilities, para. 4, CRPD/C/GC/3; See Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) on temporary special measures, para. 12; General recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 18. [↑](#footnote-ref-1)