**Submission on Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities**

**Compiled by the Kaleidoscope Human Rights Foundation**

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1. **BACKGROUND**

Kaleidoscope Human Rights Foundation(**Kaleidoscope**)is an NGO that works with local activists to protect the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) personsin the Asia-Pacific region. More information can be found at our website: [www.kaleidoscopeaustralia.com](http://www.kaleidoscopeaustralia.com).

1. **GENERAL REMARKS**

Kaleidoscope welcomes the release of the *Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (**Draft General Comment**) by the Committee on Economic, Social and Cultural Rights (**ESCR Committee**).

However, Kaleidoscope notes that the Draft General Comment does not make any references to sexual orientation, gender identity and intersex status, or to lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons. As will be explained in this submission, this is inconsistent with General Comments issued by the ESCR Committee in previous years, which have explicitly recognised sexual orientation, gender identity and intersex status as prohibited grounds of discrimination under Article 2(2) of the Covenant, and have noted the specific challenges faced by LGBTI people in exercising their Covenant rights.

LGBTI people globally face a disproportionate level of violation of their Covenant rights, including in the context of business activities. Accordingly, Kaleidoscope considers that the General Comment should be amended to specifically recognise LGBTI people, alongside groups that are already mentioned (e.g. women, indigenous people and ethnic or religious minorities).

The **recommendations** set out in grey boxes in this submission provide suggestions for amending the General Comment.

1. **Non-Discrimination**

Kaleidoscope considers that the non-discrimination section of the Draft General Comment (paras. 9–11) should be amended to make reference to the specific protected grounds of discrimination recognised under Article 2(2) of the Covenant. This is important given that the ESCR Committee has recognised additional protected grounds since it issued *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights* (2009). Accordingly, the failure to include an updated and clear list of protected grounds could create ambiguity about the scope of States Parties’ obligation to guarantee the enjoyment of Covenant rights without discrimination.

In particular, the Draft General Comment should make it clear that the protected grounds under Article 2(2) of the Covenant include **sexual orientation**, **gender identity** and **intersex status**. These grounds have been recognised as falling within the scope of Article 2(2) in previous General Comments:

* + 1. *General Comment No. 20* recognised that the words “other status” in Article 2(2) include “sexual orientation” and “gender identity”.[[1]](#footnote-2)
    2. *General Comment No. 22 on the Right to Sexual and Reproductive Health* (2016) recognised that non-discrimination, in the context of the right to sexual and reproductive health, encompassed the right of all persons to be fully respected “for their sexual orientation, gender identity and intersex status”.[[2]](#footnote-3) Footnote 26 of *General Comment No. 22* also sets out a very extensive list of the protected grounds recognised under Article 2(2) of the Covenant, which include sexual orientation, gender identity and intersex status.[[3]](#footnote-4)
    3. *General Comment No. 23 on the Right to Just and Favourable Conditions of Work* (2016) recognised that States Parties have a core obligation to guarantee through law the exercise of Covenant rights without discrimination of any kind as to “sexual orientation, gender identity, intersex status” and other grounds.[[4]](#footnote-5)

Given that previous General Comments have made explicit reference to sexual orientation, gender identity and intersex status, Kaleidoscope recommends that the same be done for the current Draft General Comment.

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| **Recommendation 1**  Kaleidoscope recommends that the first sentence of para. 9 of the Draft General Comment be amended to read:  “Under articles 2 and 3 of the Covenant, States Parties have the obligation to guarantee the enjoyment of Covenant rights to all without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including ethnicity, age, nationality, marital and family status, disability, sexual orientation, gender identity, intersex status, health status, place of residence, and economic and social situation.” |

In addition, the Draft General Comment includes several examples of groups who are disproportionately affected by business activities (para. 9) and who face a greater risk of suffering intersectional and multiple discrimination (para. 11).

However, no reference is made to LGBTI people in either para. 9 or para. 11. This is despite the fact that intersectional and multiple discrimination is a particular concern for LGBTI people from ethnic or religious minorities, who tend to face distinct barriers in realising their Covenant rights that are cannot be singularly attributed to their sexual orientation, gender identity or intersex status. For example, in the United States,[[5]](#footnote-6) lesbian, gay, bisexual and transgender (**LGBT**) workers of colour face higher unemployment rates and greater wage discrimination than both white LGBT people and non-LGBT people of colour.[[6]](#footnote-7) In the Netherlands, lesbian, gay and bisexual children from ethnic and religious minorities face particular challenges.[[7]](#footnote-8)

A statement made by a group of UN and independent human rights experts, including the Committee on the Rights of the Child and several Special Rapporteurs, on 17 May 2015, recognised that States should “address intersectional discrimination and violence against LGBT and intersex youth on the basis of race and ethnicity”.[[8]](#footnote-9)

Kaleidoscope therefore considers that the Draft General Comment should be amended to recognise that LGBTI people face a particular risk of intersectional and multiple discrimination.

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| **Recommendation 2**  Kaleidoscope recommends that the para. 11 of the Draft General Comment be amended to read:  “Committee reiterates its grave concern that certain segments of population face a greater risk of suffering intersectional and multiple discrimination. For instance, investment-linked evictions and displacements often result in physical and sexual violence against, and inadequate compensation and additional burden related to resettlement for, women and girls. Lesbian, gay, bisexual, transgender and intersex (LGBTI) people who are members of ethnic and religious minorities face particular challenges in exercising their Covenant rights, including their rights to work and education. In addition, women are overrepresented in the informal economy and are less likely to enjoy labor-related and social security protections. Furthermore, despite some improvement, women continue to be underrepresented in business decision-making processes worldwide. The Committee therefore recommends States Parties to address this issue of specific impacts of business activities on women and girls and to incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights, including by consulting the Guidance on National Actions Plans on Business and Human Rights. States Parties should also take appropriate steps, including through temporary special measures, to improve women’s representation in the labour market, including at the upper echelons of the business hierarchy.” |

1. **DUTY TO PROTECT**

At para. 19, the Draft General Comment mentions that the “obligation to protect” requires States Parties to regulate “business activities concerning the Covenant rights to education, employment, and reproductive health, in order to effectively combat **gender discrimination**” (emphasis added).

Kaleidoscope considers that this reference should be amended to refer to discrimination more broadly, on all protected grounds, including **sexual orientation**, **gender identity** and **intersex status**. Private business activities can have a significant impact on the rights to education, work and health of all groups protected under Article 2(2) of the Covenant, including LGBTI people. For example:

* + 1. LGBTI people’s right to education (Article 13 of the Covenant) is infringed where private schools expel students on the basis of their sexual orientation, gender identity or intersex status or allow bullying to take place on these grounds. According to *General Comment No. 13 on the Right to Education,* States Parties must ensure that primary, secondary and higher education is accessible to all, especially the *“most vulnerable groups”*, without discrimination.[[9]](#footnote-10)
    2. The right to work of LGBTI people (Articles 6 and 7 of the Covenant) is infringed where private businesses fail to hire or dismiss employees on the basis of their sexual orientation, gender identity or intersex status, or discriminate against them in respect of remuneration, promotion opportunities and working conditions. As mentioned above, *General Comment No. 23 on the Right to Just and Favourable Conditions of Work* (2016) recognises the “core obligation” of States Parties to “guarantee through law the exercise of the right to just and favourable conditions of work without discrimination of any kind as to … sexual orientation, gender identity [and] intersex status”.[[10]](#footnote-11) This right applies as much in relation to private businesses as it does to state institutions.
    3. The right to sexual and reproductive health of intersex people can be violated by private hospitals who carry out non-consensual “normalising” surgeries on intersex infants. *General Comment No. 22 on the Right to Sexual and Reproductive Health* (2016) specifically recognised that“medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children” constitute a violation of their right to sexual and reproductive health.[[11]](#footnote-12)

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| **Recommendation 3**  Kaleidoscope recommends that para. 19 of the Draft General Comment be amended to read:  “This obligation to protect at times necessitates more direct regulation and intervention. States Parties should consider measures such as, for instance: restricting marketing and advertising of certain goods and services in order to protect public health or to combat stereotyping and discrimination; exercising rent control in the private housing market to as required for the protection of everyone’s right to adequate housing; establishing minimum wage and fair remuneration practices to ensure adequate working conditions; and regulating other business activities concerning the Covenant rights to education, employment, and reproductive health, in order to effectively combat gender discrimination and other forms of discrimination on grounds prohibited under Article 2(2) of the Covenant (see para. 9).” |

Kaleidoscope welcomes the recognition in para. 24 of the Draft General Comment that States Parties violate the Covenant when they fail to adopt legislation aimed at preventing private health providers from “denying access to affordable and quality services, treatments or information”. The Draft General Comment mentions that this includes the provision of “inadequate protection against non-consensual medical treatment and experimentation”.

However, Kaleidoscope considers that para. 24 should specifically make reference to the non-consensual medical treatment of intersex infants. As mentioned in para. 4.2.3 above, the ESCR Committee has previously recognised that non-consensual medical interventions on intersex infants and children are a violation of their right to sexual and reproductive health.[[12]](#footnote-13) Such interventions are also widespread globally, with Malta and Chile being the only States Parties to prohibit non-consensual medical interventions on intersex infants as of January 2017.[[13]](#footnote-14)

To provide greater clarity to States Parties’ obligation in this area, para. 24 should therefore be amended to specifically mention this issue.

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| **Recommendation 4**  Kaleidoscope recommends that the first bullet point of para. 24 of the Draft General Comment be amended to read:  “States Parties’ failure to adopt and enforce necessary legislation aimed at preventing private health providers from denying access to affordable and quality services, treatments or information. This includes denial of services and care necessary for the realization of women’s sexual and reproductive rights and inadequate protection against non-consensual medical treatment and experimentation (including non-consensual surgeries and other medical interventions performed on intersex infants or children).” |

1. ESCR Committee, *General comment No. 20 on Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, UN Doc E/C.12/GC/20, para. 32. [↑](#footnote-ref-2)
2. ESCR Committee, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, UN Doc E/C.12/GC/22, para. 23. [↑](#footnote-ref-3)
3. Footnote 26 states, in the context of intersectionality and multiple discrimination: “Including groups that are discriminated against on the grounds of race and colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including ethnicity, age, nationality, marital and family status, disability, sexual orientation and gender identity, intersex status, health status, place of residence, economic and social situation or other status, and those facing multiple forms of discrimination. See Committee on Economic, Social and Cultural Rights general comment No. 20”. [↑](#footnote-ref-4)
4. ESCR Committee, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 27 April 2016, UN Doc E/C.12/GC/23, para. 65(a). [↑](#footnote-ref-5)
5. Despite not being a State Party to the Covenant, the United States’ experience with intersectional discrimination of LGBT people is not unique to that country and is included here for illustrative purposes. [↑](#footnote-ref-6)
6. Ben Penn, ‘LGBT Minorities Face High Unemployment, Job Discrimination, Low Wages, Study Finds’, 18 November 2013, <https://www.bna.com/lgbt-minorities-face-high-unemployment-job-discrimination-low-wages-study-finds/>; Al Jazeera, ‘Report: LGBT people of color at high risk of poverty’, 23 April 2015, <http://america.aljazeera.com/articles/2015/4/23/lgbt-people-of-color-more-likely-to-face-poverty.html> [↑](#footnote-ref-7)
7. COC Nederland, ‘The Rights of LGBTI Children in the Netherlands: A Shadow Report to the UN Committee on the Rights of the Child’, 4 August 2014, <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NLD/INT_CRC_NGO_NLD_20215_E.pdf> [↑](#footnote-ref-8)
8. UN Office of the High Commissioner for Human Rights, ‘Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia, 17 May 2015, [http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E) [↑](#footnote-ref-9)
9. ESCR Committee, *General comment No. 13 (1999) on the right to education (article 13 of the Covenant)*, 8 December 1999, UN Doc E/C.12/1999/10, para. 6(b)(i). [↑](#footnote-ref-10)
10. ESCR Committee, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 27 April 2016, UN Doc E/C.12/GC/23, para. 65(a). [↑](#footnote-ref-11)
11. ESCR Committee, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, UN Doc E/C.12/GC/22, para. 23. [↑](#footnote-ref-12)
12. ESCR Committee, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, UN Doc E/C.12/GC/22, para. 23. [↑](#footnote-ref-13)
13. *Gender Identity, Gender Expression and Sex Characteristics Act* *2015* (Malta), section 14(1) (“*It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent: Provided that such sex assignment treatment and/or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor*.”); OII Australia, ‘Chilean Ministry of Health issues instructions stopping “normalising” interventions on intersex children’, 11 January 2016, <https://oii.org.au/30250/chilean-ministry-stops-normalising/> [↑](#footnote-ref-14)