

**Equinet’s submission to the UN CRPD draft General Comment on Article 5 - Equality and Non-Discrimination**

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## Introduction

Reference is made to the call for submissions on the outline of the draft General Comment on article 5 by the Committee on the Rights of Persons with Disabilities. Equinet highly appreciates that the Committee is in the process of developing a General Comment on article 5 on equality and non-discrimination, which will hopefully be a useful tool for many of our members. We also warmly welcome the opportunity to give our input to the Committee already at this early stage.

**Equinet is the European network of national equality bodies**, and brings together 46 equality bodies from 34 European countries. [[1]](#footnote-1) National equality bodies are public institutions established under the EU Equal Treatment Directives.[[2]](#footnote-2) They have the mandate to provide **independent assistance to victims of discrimination, monitor discrimination issues and promote equality**. Fifteen equality bodies are also designated as independent monitoring mechanisms under the UN CRPD article 33. [[3]](#footnote-3) As a network, Equinet promotes equality in Europe by supporting the work of its members as independent and effective institutions and valuable catalysts for more equal societies. While equality bodies conduct their work mainly at national level, Equinet works to contribute to the EU and European agendas, **and this submission therefore concerns issues both related to national and international levels**.

In the current submission, we will mainly focus on the **legal concept and framework for protection against discrimination based on disability**, including intersectional discrimination and reasonable accommodation. Further on, we will give input on **the role of equality bodies in the implementation of the UN CRPD** in the Member States, and issues related to **legal remedies and affirmative action**. Each section of the submission will make reference to the relevant number and heading of the paragraph in the outline of the General Comment.

## Equality and non-discrimination – both principle and right

*This section refers to the outline of the draft General Comment* ***chapter I Introduction,*** *and in particular* ***paragraph 4.******Legal character of art. 5***

The outline of the General Comment raises the question of whether Article 5 constitutes a principle or a right. From Equinet`s point of view, **it is clear that equality and non-discrimination are both.**

A principle can be defined as a general law that has numerous special applications across a wide field. Equality and non-discrimination is listed in the General Principles in CRPD article 3, and is highlighted in the preamble UN CRPD, as well as in article 4 concerning the general obligations under the convention, underpinning that equality and non-discrimination is to be considered an overarching principle of the convention. Moreover, the same fundamental nature of equality and non-discrimination as a principle is to be found in a number of other core human rights instruments, including the Universal Declaration of Human Rights, the European Convention of Human rights, the UN Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child. Further on, the European Court of Justice has held that the principle of non-discriminations one of the general principles of EU law.[[4]](#footnote-4)

Understanding Article 5 as a principle also includes having due regard to this article when interpreting the other rights of the Convention. Further on, the specific application of the principle of equality and non-discrimination in concrete cases constitutes **a right** for the individual to not be discriminated against. This can be read directly from article 5 (2), which oblige the State Parties to prohibit all discrimination on the basis of disability.

## Legal framework for protection against discrimination

### Protection against discrimination outside employment

*This section refers to the outline of the draft General Comment* ***chapter II on Normative Content****, paragraph 7. Discrimination and* ***chapter IV on State Party obligations,*** *paragraph 19. Legislative obligations: Anti-Discrimination Laws.*

According to CRPD article 5 (2) member states are obliged to ensure that persons with disabilities have an “*equal and effective legal protection against discrimination on all grounds*.” According to this formulation, the protection against discrimination in the Convention concerns **all areas of society**, including access to the labour market, education, goods and services, health services and social protection. On the contrary, the **EU legal framework (Directive 2000/78/EC)** only protects persons with disability in the labour market, leaving people with disabilities without protection against discrimination in other areas in a number of European countries.

At European level, a directive concerning discrimination outside employment (the so-called Horizontal Directive) was proposed by the European Commission in 2008.[[5]](#footnote-5) However, this directive would require unanimous support in the Council of the EU and it has unfortunately not been moving forward due to objections from some Member States. At national level, several European countries have already prohibited discrimination on the ground of disability outside employment. Even though there will always be room for improvement, one promising example can be found in the Norwegian Accessibility and Discrimination Act which covers discrimination on all areas and require all undertakings open to the public to be accessible for persons with disabilities.

Equinet recommends the Committee to put a **strong emphasis on the importance of adopting comprehensive legislation** at both national and European level **prohibiting discrimination on the ground of disability outside employment**, including in social protection, social advantage, education, goods and services and housing.

### Intersectional and multiple discrimination

*This section refers to the outline of the draft General Comment* ***chapter II on Normative Content,*** *paragraph 7. Discrimination and* ***chapter IV on State Party obligations****, paragraph 19. Legislative obligations: Anti-Discrimination Laws.*

In the preamble of the UN CRPD, the State Parties highlights the “*difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status*”. Further on, multiple discrimination of women and girls with disabilities is regulated in article 6 of the Convention.

Multiple discrimination involves discrimination on a combination of grounds. However, persons have multiple identities and it is important to take into account their specific situation, experience and identity. This is crucial in responding to intersectional discrimination where different grounds interact in a manner that makes them inseparable. [[6]](#footnote-6)

To a certain extent, multiple discrimination can be dealt with within existing EU legal frameworks, but only in employment. Several countries also have national anti-discrimination legislation which includes provisions concerning multiple discrimination.[[7]](#footnote-7) However, **European anti-discrimination law and many national legislations do not cover intersectional discrimination**, leaving for example girls and women with disabilities without a protection reflecting their particular vulnerable situation and exposure to discrimination and abuse. The lack of legislation regulating intersectional discrimination is problematic in the light of UN CRPD article 5 read in conjunction with article 6 and 7, even if the articles do not explicitly mention intersectionality. This issue has already been highlighted by the UN Committee on the right of the Child in the General Comment no. 9 from 2007 concerning the rights of children with disabilities:

*Girls with disabilities are often even more vulnerable to discrimination due to gender discrimination. In this context, States parties are requested to pay particular attention to girls with disabilities by taking the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society.*

These considerations from the UN CRC should be mirrored by the UN CRPD, but not only related to children, and also on other ground such as sexual orientation, gender identity/expression, ethnicity, religion and belief.

Due to the synergistic nature of intersectional discrimination, developing effective legislation on this form of discrimination **can be a challenge**. In a 2016 report from the European network of legal experts in gender equality and non-discrimination, these and other challenges are taken into consideration. The report argues that discrimination law should focus on relationships of power in order to determine who to protect and how:[[8]](#footnote-8)

*Since everyone has a range of identities, a relational view allows us to see that some characteristics signal privilege, while others are relationships of disadvantage. In addition, the ways in which detriment or disadvantage is experienced might be significantly shaped by circumstances and context. Thus power operates vertically, diagonally and in layers. The aim of intersectionality should be to capture and address the wrongs suffered by those who are at the confluence of all these relationships.*

Even though developing such legislation can be challenging, Equinet recommends that that the Committee highlights the **need for explicit legislation regulating both intersectional and multiple discrimination at national and European levels on all grounds of discrimination**.

### Reasonable accommodation

*This section refers to the outline of the draft General Comment* ***chapter II on Normative Content,*** *paragraph 8. Reasonable Accommodation and* ***chapter IV on State Party obligations****, paragraph 19. Legislative obligations: Anti-Discrimination Laws.*

According to Article 5 (3), States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination. To be in line with their obligations under the Convention, the State Parties should therefore explicitly define lack of reasonable accommodation as discrimination in order to be in line with their obligations under the Convention.

The obligation to accommodate is not absolute. It is noteworthy that both the EU General Framework Directive and the UN CRPD explicitly refer to the limitation of the “disproportionate burden” of the duty bearer, namely to the latter’s obligation to provide accommodation measures without however being encumbered by any substantial financial burden, something which would turn such measures into “unreasonable”.[[9]](#footnote-9) Considering Member States and local authorities’ particular role as duty bearers under the Convention, such public bodies have a particular responsibility for providing persons with disabilities the necessary accommodation. It is important that the concept of disproportionate burden must be interpreted narrowly to prevent an abuse of this exception.

UN CRPD does not mention the questions of burden of proof. However, according to EU law, the burden of proof at first lies with the complainant – that is, it is up to the person complaining to present a certain amount and certain type of evidence supporting their claim. However, in discrimination cases, once the complainant provide the required amount of evidence, the burden of proof shifts to the defendant cf. articles 8 of the Race Directive and 10 of the General Framework Directive. When developing an Equinet report on the Race and Framework Directive in 2013,[[10]](#footnote-10) it became clear that there is need for a clarification of the use of the burden of proof in these cases.

Equinet therefore suggests the Committee to recommend that the **rule of the shifting burden of proof** should also apply to cases on reasonable accommodation, when taking into account that lack of reasonable accommodation is to be considered as discrimination under the Convention. Further on, the Committee should remind the State Parties of the obligation to **prohibit discrimination outside employment.**

## Equality bodies designated under CRPD article 33

*This section refers to the outline of the draft General Comment chapter IV on State Party obligations, in particular paragraph 20 on Institutional obligations: equality courts, bodies, ombudspersons and chapter 5 on National Monitoring, in particular paragraph 24 on Independent monitoring frameworks.*

Fifteen Equinet’s members are designated as independent monitoring mechanisms for the UNCRPD in their countries.[[11]](#footnote-11) Many equality bodies have had disability rights in their mandate long before they were designated under article 33(2), and had thorough knowledge of the field and experience in handling complaints due to discrimination, promoting equalities and conducting surveys. **This makes the equality bodies a natural choice when designating mechanisms at national level.** However, some equality bodies have faced **challenges** in the new role, *inter alia* due to lack of additional resources to accompany these responsibilities. This was one of the findings in a survey conducted by Equinet in 2015 in relation to the development of the Equinet perspective “Realising Rights: Equality Bodies and People with Disabilities.”[[12]](#footnote-12)

According to UNCRPD article 33 (2) the independent mechanisms shall promote, protect and monitor implementation of the Convention. Further on, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights (the Paris Principles). Some equality bodies are situated in organisations that are also designated as national human rights institutions.

However, **equality bodies are unique when compared to other institutions with mandates in the field of rights.** This difference is evident in that the promotion of full equality in practice goes beyond rights, the focus on ground-based discrimination locates the individual rights holder as members of specific groups, the combination of enforcement and developmental approaches to their mandate, and the provision of assistance to individuals in cases of discrimination.

For this reason, and taking into account that States Parties designated their equality bodies as CRPD independent mechanisms without making changes to ensure their full independence, sufficient resources and adequate functions, Equinet finds that there is a need for particular minimum standards related to the mandate, independence, effectiveness and establishment of equality bodies, and have been advocating for the development of such standards since 2015.[[13]](#footnote-13)

Regardless of the name and the status of such standards, the States Parties need to ensure that the bodies designated under the CRPD have a broad mandate, sufficient independence, human and financial resources and are part of an appropriate institutional architecture. Without strong monitoring mechanisms, there is a risk that the Convention will not be implemented well, that victims of discrimination will not have sufficient support and that and that the Committee will not have access to the relevant data concerning the actual situation in the relevant country.

On this background, Equinet strongly recommends the Committee to **acknowledge the variety in bodies designated under article 33(2),** and pay particular attention to the **need to ensure the proper functioning of these bodies, including sufficient powers, independence and resources.**

## Legal remedies

*This section refers to the outline of the draft General Comment* ***chapter IV on State Party obligations****, in particular paragraph 21 concerning legal remedies*

The UN CRPD does not include a specific demand for effective remedies, like for example the ECHR article 13. However, when reading article 4 concerning the general obligation in conjunction with article 13 on access to justice, a natural understanding of the Convention is that the State is obliged to ensure that persons who are subjected to violations of the rights in the convention, including discrimination, have access to some form of legal remedies. This includes both access to a complaints mechanism (tribunal/court) and compensation.

Many, but not all, Equality Bodies can handle individual cases concerning discrimination on the ground of disability. Many are so-called quasi-judicial bodies, meaning that they can handle complaints but their decision might have little or no legal effect. Strengthening the mandate of the equality bodies in this regard would also contribute to more effective remedies for victims of discrimination on the basis of disability.

A 2015 study commissioned by Equinet found that there is great variety in what sanctions can be imposed be imposed by equality bodies in cases where were equality law have been violated.[[14]](#footnote-14) The EU Directives on Equal treatment do not provide any guidance as to the nature of such sanctions, nor do they set a minimum standard or even lay down who should be the body in charge of issuing such sanctions. The experience of many of our members and NGOs working in the field of equality is that the lack of sanctions makes equal treatment legislation shallow.

To ensure the realization of the rights of the UN CRPD in practice, the Committee should recommend that all Member States **ensure low threshold complaint mechanisms** at national level, and that these bodies should be able to **impose sanctions, including compensation,** or take cases of discrimination **before the courts.**

## Positive action measures

*This section refers to the outline of the draft General Comment* ***chapter IV on State Party obligations,*** *in particular paragraph 22. Other positive obligations: affirmative action measures.*

According to article 5 (4), specific measures which are necessary to accelerate and achieve *de facto* equality of persons with disabilities shall not be considered discriminatory under the terms of the present Convention. Such measures are often named positive duties.

An Equinet report from 2014 on Positive Action Measures, shows that many positive action measures are being taken in Europe to improve the position of certain disadvantaged groups, including people with disabilities, typically relate to the field of employment. Despite the wealth of positive action measures implemented across the EU, the impact of these steps are not generally measured or evaluated.[[15]](#footnote-15) This is noteworthy, considering the fact that evaluation is shown to be a useful and indispensable tool for effective positive action.

The mentioned report *inter alia* recommends that the state and its authorities should play a leading role in implementing positive action measures. Obligations imposed by the state to take action can be effective, including placing duties on public authorities to promote equality and including the use of anti-discrimination and positive action clauses in public procurement contracts.

Based on the experience of equality bodies, affirmative action can have positive effect, and the Committee should therefore recommend the Member States and the EU to use their key role, not only as decision maker and duty bearer, but as employer, to implement, monitor and further develop such measures.

## Summary of recommendations

In this submission, seven main recommendations have been put forward.

Equinet recommends the UN CRPD Committee to include the following recommendations in the new General Comment:

1. EU and State Parties to the UN CRPD should adopt legislation prohibiting discrimination outside employment
2. EU and State Parties to the UN CRPD should adopt legislation explicitly regulating multiple and intersectional discrimination
3. Lack of reasonable accommodation should be recognized as a form of discrimination in national and European legislation
4. Where regional or national legislation sets forward a rule of a shifting burden of proof, this should include reasonable accommodation cases
5. EU and State Parties should ensure that independent monitoring mechanisms designated under article 33 have a broad mandate, sufficient independence, human and financial resources and an appropriate institutional architecture.
6. State Parties should ensure low threshold complaint mechanisms at national level, and that these bodies should be able to impose sanctions, including compensation, or take cases of discrimination before the courts.
7. EU and State Parties should use their key role, not only as decision makers and duty bearers, but as employers, to implement, monitor and further develop positive action measures.
1. More information about Equinet and our members can be found on our webpage: <http://www.equineteurope.org/> [↑](#footnote-ref-1)
2. Directive 2000/43/EC, Directive 2004/113/EC, Directive 2006/54/EU, Directive 2010/41/EU [↑](#footnote-ref-2)
3. In Belgium, Cyprus, Czech Republic, Denmark, France, Croatia, Ireland, Latvia, Luxemburg, Lithuania, Malta, Netherlands, Norway, Poland and UK [↑](#footnote-ref-3)
4. Cases 117/76 and 16/77 Ruckdeschel [1977] ECR 1753. [↑](#footnote-ref-4)
5. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2008. [↑](#footnote-ref-5)
6. Equinet perspective, Innovating at the Intersections. Equality Bodies tackling Intersectional Discrimination, 2016 <http://www.equineteurope.org/Equinet-Perspective-Innovating-at-the-Intersections-Equality-Bodies-tackling> [↑](#footnote-ref-6)
7. Equinet perspective, Innovating at the Intersections, 2016 <http://www.equineteurope.org/IMG/pdf/equinet_perspective_2016_-_intersectionality_final_web.pdf> [↑](#footnote-ref-7)
8. Fredman, Sandra. Intersectional discrimination in EU gender equality and non-discrimination law, European network of legal experts in gender equality and non-discrimination, 2016. [↑](#footnote-ref-8)
9. Equinet, Equality Bodies Supporting Good Practice on Making Reasonable Accommodation for People with Disabilities by Employers and Service Providers, 2014. <http://www.equineteurope.org/IMG/pdf/final_guide.pdf> [↑](#footnote-ref-9)
10. Equinet, Equality Law in Practice – Report on the Implementation of the Race and General Framework Directives, 2013. <http://www.equineteurope.org/IMG/pdf/equinet_equality_law_in_practice_2013_report_final_covers.pdf> [↑](#footnote-ref-10)
11. In Belgium, Cyprus, Czech Republic, Denmark, France, Croatia, Ireland, Latvia, Luxemburg, Lithuania, Malta, Netherlands, Norway, Poland and UK [↑](#footnote-ref-11)
12. Equinet, Realising Rights: Equality Bodies and People with Disabilities. Supporting the Review of the European Disability Strategy 2010-2020, 2014. <http://www.equineteurope.org/IMG/pdf/disabiliby_perspective_with_cover.pdf> [↑](#footnote-ref-12)
13. Equinet Working Paper on Developing Standards for Equality Bodies, 2015. <http://www.equineteurope.org/Equinet-Working-Paper-on-Developing-Standards-for-Equality-Bodies> [↑](#footnote-ref-13)
14. Equinet, The Sanctions Regime in Discrimination Cases and its Effects, 2015. <http://www.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf> [↑](#footnote-ref-14)
15. Equinet, Positive Action Measures. The Experience of Equality Bodies, 2014. <http://www.equineteurope.org/IMG/pdf/positive_action_measures_final_with_cover.pdf> [↑](#footnote-ref-15)