

Comments on the Draft General Comment on article 5 of the Convention on the Rights of Persons with Disabilities: Equality and non-discrimination

Submitting organisations

The Swedish Disability Rights Federation and Independent Living Institute.

The Swedish Disability Rights Federation is an umbrella organisation for 41 organisations of persons with disabilities, together representing approximately 400 000 persons. The work of the Federation is based on human rights and its goal is an inclusive society.

Independent Living Institute is a project-based policy and competence development centre that works with promoting self-determination for people with disabilities.

Contacts: mia.ahlgren@funktionsratt.se; ola@independentliving.org

General remarks

The Swedish Disability Rights Federation and Independent Living Institute find the Draft General Comment on article 5 important and timely. We have however found some parts of the draft too unclear in terms of obligations for states and other actors. Key concepts need clarification so that the General Comment will have a positive impact on national implementation of the rights under article 5 of the Convention on the Rights of Persons with Disabilities. Areas in need for clarification include

- the need for support to negotiate and litigate reasonable accommodation
- the relevance of the duration of the relationship between right holder and duty bearer in assessing reasonable accommodation
- how the justification test and undue burden test differ and are related to each other
- what “specific measures” according article 5 (4) can and cannot be
- how specific non-discrimination measures relate to individuals and groups

We particularly endorse the following paragraphs: 16 (last sentence), 19 (last sentence), 20 (apart from 20 c), 21, 22, 27 d (last sentence), 43, 48 (middle sentence), 68, 75, 76 e and g.

Finally, we would like to propose a new text about a state duty to systematically monitor complaints and claims of discrimination and their outcome. We hope to contribute to further clarification of the general comment, and alignment with especially article 9 and 19 of the CRPD, with the suggested changes below.

Proposed amendments art 5.1

Paragraph 16, 4th sentence

We propose a clear statement to avoid confusion.

Proposal: ~~“It appears, then, that~~ “Being equal under the law” refers to the substance of the law as such. “

Paragraph 18

We propose that the terminology regarding specific measures and similar expressions such as positive or affirmative measures are explained once and then used consistently to avoid confusion. Positive measures is used in para 10 (history), 18 and 19 (5.1), 23 (5.2). Positive or affirmative measures is used in para 29. Specific measures is used in art 5.4. In para 37 specific measures is an obligation of states.

Proposal: ...A contextual interpretation of the wording in line with article 1, article 3 and article 4 of the Convention clarifies that in order to facilitate the enjoyment of rights guaranteed by the legislation to persons with disabilities on an equal basis with others, **states have positive obligations to take action. Such obligations include** ~~positive measures are often required. Such measures include...~~

Proposed amendments Art 5.2

Paragraph 19

Avoid confusion concerning terminology.

Proposal: ...requires that States parties ~~take positive action~~ **take specific measures** to achieve *de facto* equality...

Paragraph 20 c

Avoid confusion by explaining justification test, related to the effect of the measure for the right holder, different from undue burden test related to the duty bearer.

Proposal: For instance, denying access to a public theater to a person with a disability just because he or she is accompanied by a guide dog constitutes ~~denial of reasonable accommodation~~ **direct or indirect discrimination. Not accepting an accompanying person, or denying to otherwise accommodate a person with a disability, are examples of denial of reasonable accommodation.** Denial of reasonable accommodation does not refer to groups but always to an individual in a given particular situation. As any such denial meets a justification test which is different from the justification of indirect discrimination, denial of reasonable accommodation constitutes a form of discrimination distinct from other forms, such as direct or indirect discrimination. **The justification test regarding reasonable accommodation shall test whether the denied modification, adjustment or measure would have attained sufficient effectiveness for the user, see para 26 and 27 d). The undue burden test is in principle a proportionality test, and refers to hinder excessive costs for the duty bearer, para 27 e).**

Paragraph 23

Avoid confusion concerning terminology and strengthen focus on equal and effective legal protection.

Proposal: ...means that states **have positive obligations** ~~have to take positive measures~~ to protect...

Proposed amendments Art 5.3

New paragraph 28

We propose add text to further explain the importance of the relation between the duty bearer and the individual right holder as parties in the negotiation. In case of a longer relation, for example in a school, or a work place the right holder might need support to find the best solutions for the accommodation related to the justification. A longer duration would also be considered in relation to undue burden test.

We find it important to relate to article 9, but maybe clarify the text "not necessarily on request" with an example. We are not sure what the committee means. Is this related to small measures like reading a menu in a restaurant for a customer?

Proposal to add text: **"The justification test in reasonable accommodation is related to the length of the relationship between the duty bearer and the rights holder. A longer duration of the relation as in case of employment or**

education programme requires independent support to find the best context-based solution. It also entails a more extensive duty for the duty bearer to investigate the needs for and provide reasonable accommodation in longer relations. A part of the undue burden test is also related to the length of the relationship between the duty bearer and the rights holder, where for example a longer employment or education programme lead to a more extensive duty for the duty bearer to investigate the needs for and provide reasonable accommodation.”

Paragraph 26

Separating the explanation about reasonable accommodation and specific measures by moving text might avoid confusion.

Proposal to amend text in the 5th sentence: ~~“Reasonable accommodation” should also not be confused with “specific measures”, including “affirmative action measures” or similar positive duties. While,~~ Reasonable accommodation is in part a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others. Both concepts aim at achieving *de facto* equality.

Proposal to amend and move to appropriate place in paras 29-31: Examples of specific measures include: temporary measures for countering the low numbers of women with disabilities employed in the private sector, and support programmes to increase the number of students with disabilities in tertiary education.”

Paragraph 27

Consider if necessary to clarify that the undue burden test is related to the duty bearer as different from the justification test (see proposal for 20c).

Proposal: The undue burden test is in principle a proportionality test, and refers to hinder excessive costs for the duty bearer, para 27 e).

Paragraph 29 or 30

Clarify specific measures in relation to group and individual and the state obligation under certain circumstances.

Proposal: 29. They are usually temporary in nature, however some instances demand permanent ~~positive action measures~~ use of specific

measures, depending on context and circumstances, including by virtue of a particular impairment or the structural barriers of society....

Paragraph 30

Add text to ensure that states parties implement structured work to prevent discrimination in the fields of work, education and publicly funded activities. Also consider clarifying text about measures that are obligations and measures that are not mandatory.

Proposal to add: *“States Parties have a duty to ensure that employers, providers of education and public authorities, including in public procurement, actively and continuously investigate, analyse, take measures against, and follow up possible risks for discrimination in their domain.”*

Proposed amendments general obligations

Paragraph 33

Clarify the duty of the state to adopt anti-discrimination law that prohibits discrimination in the work of public bodies and publicly procured services.

Proposal: Article 5 and 4 (1) (a) CRPD demand that States parties adopt anti-discrimination legislation that is both, comprehensive and specific. Comprehensive anti-discrimination law relating to disability has a broad material scope, covering education, employment, social protection, and goods and services, for example IT services and housing, **publicly procured services and public bodies**.

Paragraph 36

Add text about financial support in litigation for persons with disabilities to guarantee preconditions for litigation and other rights.

Proposal to add: f) Costs for legal procedures cannot be imposed on the person allegedly discriminated against if they would compromise the upholding of other rights under the convention, including article 28. **Legal aid must be provided to ensure access to justice for the claimant in discrimination litigation.**

Proposed amendments with other specific articles

Paragraph 50

Consider moving reference to sustainable development goal 11 and Sendai framework to a note to make the general comment sustainable after 2030

Paragraph 55

Add text to emphasise support measures during negotiations and litigation concerning reasonable accommodation.

Proposal to add text at the end: “The right to supported decision making shall be ensured regarding reasonable accommodation negotiations and litigation.”

Paragraph 62

Emphasize importance of training about the right based model to be included in training for agents of the law. It would also be consistent with the CRPD guidelines CRPD/C/3

Proposal to add training in the first sentence: In order to realise the right of equality and non-discrimination, **training** amongst agents of the law, awareness-raising and rights holders and capacity building of duty bearers to encourage appropriate respect for and fulfilment of rights and obligations is necessary. Appropriate training of those working in the field of administration of justice should include:

Proposal to add two points in the list:

Measures adopted to ensure the effective training of personnel, including but not limited to lawyers, magistrates, judges, prison staff, sign-language interpreters and the police and penitentiary system, on the rights of persons with disabilities:

The rights in the Convention and other Human Rights Treaties the state is bound by connected to the rights of persons with disabilities.

Paragraph 73 j

Add text to emphasise equal career development opportunities.

Proposal to add new point “j. **ensure equal opportunities for promotion, career guidance and competence development in the workplace.**”

Paragraph 74

Add text to emphasise the importance of ensuring access to political participation between elections to be able to make an informed decision on election day.

Proposal to add new point “e. **Create means of information and legislation that allows for continuous political participation for persons with disabilities, including the periods between elections.**”

Proposed amendments national implementation

Paragraph 76

The number of claims of discrimination are often used as indicators but they may not give the full picture, as persons with disabilities might not be aware of their rights, and they may choose not to make a complaint if it does not lead to further action. Adding text about monitoring would also be consistent with the CRPD guidelines CRPD/C/3

Proposal for editorial amendment: “d. Protection from discrimination for persons with disabilities should have the same standard as for other social groups and should include protection against all forms of discrimination including direct and indirect discrimination, denial of reasonable ~~discrimination~~ **accommodation**, harassment, and intersectional discrimination.

Proposal to add new point “e. **monitor how many of the total number of claims of discrimination on the basis of disability, disaggregated by sex, age, barriers identified, and the sector in which discrimination occurred, that lead to further action. Information is needed about cases settled outside of court, in court, adjudicated, and how many judgments that lead to compensation or sanctions.**

On behalf of the Swedish Disability Rights Federation and Independent Living Institute,



Lars Ohly
President



Jamie Bolling
Director