



Disability Research Initiative

Submission:

Committee on the Rights of Persons with Disabilities – Outline
of the Draft General Comment on Article 5

June 2017

Introduction

The Hallmark Disability Research Initiative welcomes the opportunity to provide this written submission to the Committee on the Rights of Persons with Disabilities on its Outline of the Draft General Comment on Article 5. The Disability Research Initiative was created at the University of Melbourne to facilitate the development of research that is responsive to the needs of persons with disabilities and the organisations that support them. Our aim is to forge

connections between academia and community organisations and to combine the strengths of both in order to support real outcomes for persons with

disabilities. We develop high quality applied research and policy that is formed in response to the lived-experiences of people with disabilities.

The submission addresses five sub-headings of Part III of the outline, 'Interrelation with specific other articles'. Recommendations are made in relation to Articles 12, 13, 16, 24 and 27. In relation to Article 12, recommendations are made to highlight the intrinsic connection between Article 5 and Article 12, and to clarify the distinction between the obligation to provide reasonable accommodation and the obligation to provide support under Article 12. In relation to Article 13, it is recommended to clarify that access to justice requires both participation and transparency, and to emphasise the importance of training stakeholders in equality and non-discrimination (including intersectional discrimination) to ensure access to justice.

In relation to Article 16, concerns are raised that States often view their responsibilities under this Article through a medical or charitable lens, leading to discriminatory outcomes; recommendations are made to produce further guidance on the implementation of Article 16, and to increase data collection in relation to this Article. In relation to Article 24, it is recommended that the General Comment emphasise States' responsibilities to provide reasonable accommodation for education, as well as the importance of complementary services like transportation. Finally, in relation to Article 27, recommendations are made to ensure that all elements of employment are non-discriminatory and inclusive of persons with disabilities, including women with disabilities and other groups.

III Interrelation with specific other articles

13. Article 12

Legal capacity is fundamental for full and effective participation of persons with disabilities in society on an equal basis with others. This reflects that the right to legal capacity is a threshold right – required for enjoyment of all other rights in the Convention, including the right to equality and non-discrimination.

Article 12 provides that person with disabilities have the right to recognition everywhere as persons before the law which is inclusive of the right to legal capacity on an equal basis with others. The application of Article 5 to legal capacity encompasses both legal personhood and legal agency as elaborated in General Comment No. 1. Article 5 recognizes that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. State parties must prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination.

These two articles are fundamentally connected, because equality before the law must include persons with disabilities' enjoyment of legal capacity on an equal basis. In other words, denying legal capacity on the basis of disability is discriminatory.

Discrimination through denial of legal capacity may present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems, detailed in paragraph 15 of the Committee's General Comment No. 1, is discriminatory.

A key difference between the reasonable accommodation that is required under Article 5 of the Convention and the support that must be provided for people exercising legal capacity under Article 12(3) is that there is no limit on the obligation under Article 12(3). The fact that support to exercise capacity may impose a disproportionate or undue burden does not limit the requirement to provide it.

Recommendations for implementation by State parties to ensure consistency with Article 5 and Article 12 of the Convention may include:

- reforming existing legislation premised on status, functional or outcome based models;
- replacing those with models of supported decision making; and
- resourcing systems of supported decision making to assist persons with disabilities navigate existing legal systems.

Legislating and resourcing such services should be consistent with key provisions identified in paragraph 29 of General Comment No. 1. This includes basing any systems of support on giving effect to the rights, will and preferences of those receiving support rather than what is perceived as being in their best interests.

Additional measures may include training and education for the relevant agencies such as legal decision makers, service providers and other stakeholders.

14. Article 13

The rights and obligations with respect to equality and non-discrimination outlined in Article 5 raise particular considerations with respect to Article 13. In understanding their own obligations under Article 13, State Parties should consider the following.

Article 13(1)

Ensuring effective access to justice means that processes both allow participation and are transparent.

State party actions that will enable participation include:

- reasonable avenues to ensure the delivery of information in an understandable and accessible manner;
- communication and accommodation of will and preference as to the procedure generally (including supports);
- reasonable accommodation for the person with disabilities to attend or be alternatively present in the process;
- physical accessibility and accommodation of physical constraints such as fatigue, and an appropriate physical environment;
- a process that doesn't limit engagement, which might include timing; and
- financial assistance.

Further state actions that will also enable transparency include:

- that all relevant information is accessible and available; and

- recording and reporting of all relevant claims, cases and writs.

Article 13(2)

In order to realise the right of equality and non-discrimination, awareness-raising amongst agents of the law and those entitled to equitable access that encourage appropriate institution of rights and obligations is necessary. Appropriate training of those working in the field of administration of justice should include:

- the complexities of intersectionality , including the individual’s cultural, religious and social identifications and does not identify the individual purely on the basis of disability;
- the diversity of the disability community and their individual needs in being able to effectively access all aspects of the justice system in an equal manner to others;
- the autonomy of persons with disabilities;
- the centrality of effective and meaningful communications to successful inclusion; and
- their obligations to raise awareness of legal rights and procedures when interacting with members of the disability community

15. Article 16

Article 16 – together with Article 5 – reinforces the concept that all persons, including persons with disabilities, should be free from exploitation, violence or abuse. In accordance with this, State parties under Article 16 should:

- take all appropriate measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse (Article 16(1));
- take all appropriate measures to prevent all forms of exploitation, violence and abuse for persons with disabilities, their families and caregivers, including information and education on how to avoid, recognize and report instances of exploitation, violence and abuse (Article 16(2));

- ensure that there is effective independent monitoring of all facilities and programs designed to serve persons with disabilities (Article 16(3));
- take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services (Article 16(4));
- ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted (Article 16(5)).

We strongly support the breadth of obligations set out in Article 16 to enable the prevention, promotion and protection of persons with disabilities against exploitation, violence or abuse and – if exploitation, violence or abuse does occur – that there are appropriate measures for rehabilitation, support and the prosecution of such crimes. We also support the specific reference of children and women with disabilities in Article 16(5) as this cohort can be a particularly marginalised group across the world.

However, we have the following concerns in relation to Article 16:

- That many countries, in practice, view their obligations under Article 16 through the lens of the medical or charity model of disability, which can further entrench exploitation, violence or abuse against persons with disabilities.
- That further specific and practical guidance on the obligations imposed on State parties under Article 16 is required to facilitate adoption in domestic legislation.

Accordingly, we make the following recommendations for the obligations on States Parties in Article 16 to be consistent with non-discrimination to reinforce the meaning and expression of Article 5:

- Further guidance should be provided to illustrate the meaning of exploitation, violence or abuse and, in particular, of intersectionality.

- In recognition that the denial of legal capacity places persons with disabilities at particular risk of exploitation, violence or abuse, States Parties should amend their laws to recognise that all persons with disabilities have an equal right to legal capacity and are equal before and under the law in line with Articles 12 and 5.
- State parties should provide access to facilities for persons with disabilities to be safe from violence, abuse or exploitation.
- State parties should provide training, education and information dissemination, focusing on the early identification of exploitation, violence and abuse against persons with disabilities as well as access to appropriate services. All training and education should include community leaders, including health, education and religious leaders.
- State Parties should be required to establish an independent comprehensive data collection system on cases of exploitation, violence and abuse, disaggregated by age, sex, gender, ethnic background and type of impairment.
- State parties should promote access to justice initiatives to persons with disabilities exposed to violence, exploitation and abuse – especially women and children with disabilities.

17. Article 24

The failure of some States to provide children with disabilities with access to mainstream, inclusive education is discriminatory, contrary to the objectives of the Convention, and in direct contravention of Articles 5 and 24.

Article 5(1) interacts with Article 24 of the Convention to recognize the right of all persons with disabilities to enjoy the right to education on an equal basis with others. This requires States to remove all types of discriminatory barriers, including legal and social barriers, to inclusive education, where all students, including students with disabilities, are welcomed and supported to participate in the classroom setting and school of their choice. Equality cannot be achieved for students with disabilities if they continue to be segregated from mainstream education settings.

Article 5(2) of the Convention requires that States prohibit all forms of discrimination on the basis of disability. Segregation models of education, which exclude children with disabilities from mainstream education on the basis of disability, contravene articles 5(2) and 24(1)(a) of the Convention. Article 5(3) of the Convention requires State parties to take all appropriate steps to ensure reasonable accommodation is provided to promote equality and eliminate discrimination. This right is strengthened for young persons with disabilities in Article 24(2)(b) which requires States to ensure an inclusive education on an equal basis with others in the communities in which they live by providing reasonable accommodation of an individual's requirement in accordance with Article 24(2)(c). States' obligations extend beyond the school. States must ensure school transportation is provided to all for children with disabilities where transportation options are limited due to social or economic barriers.

In accordance with Articles 5 and 24, States are required to take the following steps to ensure children with disabilities are able to access equality in education (including but not limited to):

- provide adequate support for children with disabilities to transition from segregated to mainstream education settings;
- provide transportation to and from school for children with disabilities;
- increase number of teachers with disabilities;
- support socialisation between school peers with and without disabilities;
- staff training for children with disabilities;
- ensure accessibility/universal design of schools and other education settings;
- develop curriculum on diversity and lessons on human rights.

18. Article 27

To achieve true equality in terms of the Convention and attain full economic and social participation, we need to ensure that there is no discrimination on the grounds of disability in connection to work and employment. In order to ensure reasonable accommodation under Article 5(3) and to achieve or accelerate de facto equality in the work environment under Article 5(4) the following specific measures are recommended:

- State parties should transition away from segregated work environments and support full engagement with the open labour market of persons with disabilities;
- State parties should ensure the availability of industry support workers and advocates that protect the rights of workers with disability and ensure the right to choice in employment;
- State parties should recognise the requirements and promote the acceleration of women with disability to ascertain equality in the workplace;
- State parties should ensure proper transition into and out of work for persons with disability in a non discriminatory manner;
- State parties should promote work in inclusive accessible environments in both the public and private sectors;
- State parties should ensure equal opportunity and gender equality;
- State parties should ensure that persons with disabilities are not discriminated against during employment contract negotiations;
- State parties should ensure that persons with disabilities have equal access to rights and opportunities while negotiating in contracts and engaging in bargaining agreements;
- State parties should ensure reasonable adjustments for persons with disabilities to guarantee access to training and education including vocational training, capacity building, etc;
- State parties should guarantee minimum wages for persons with disabilities in a non-discriminatory manner;
- State parties should guarantee employment or unemployment benefits for persons with disability in a non-discriminatory manner;
- State parties are obligated to ensure safe working conditions irrespective of whether the person has a disability;
- State parties should work towards universally applicable occupational health and safety measures for persons with disabilities;
- State parties should recognise the right of persons with disabilities to access trade and labour unions;

- State parties should ensure protection from dismissal for persons with disabilities on the grounds of discrimination.

Submission details

This submission was prepared by Anna Arstein-Kerslake (Academic Convenor) and Yvette Maker (Research Fellow) of the Disability Research Initiative, and Research Higher Degree (Masters) students enrolled in the Disability Human Rights Law course in June 2017 at Melbourne Law School:

Pavel Ananikyan

Sophie Banks

Jennifer Black

Elissa Campbell

David Carolan

McLytton Clever

Sally Cockburn

Fiona Downing

Jordan Hekt Woodrow

Michelle Hughes

Mohammad Ibrahim

Ann Jorgensen

Lucy Ledger

Alison Lilley

Yair Rios Davila

Yulia Roif

Pallabi Sengupta

Emma Von Veh

Jamie Yew

Amelia Eddy

Contact for this submission:

Name Anna Arstein-Kerslake

Title Academic Convenor, Hallmark Disability Research Initiative

Email anna.arstein@unimelb.edu.au

<http://disabilityresearch.unimelb.edu.au/>

