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**Response to call for submissions on: Draft General Comment on article 27 on the right of persons with disabilities to work and employment**

*December 2021*

**Statement of Interest**

1. The Equal Rights Trust(the Trust) is grateful for this opportunity to provide information to the Committee on the Rights of Persons with Disabilities in order to inform its forthcoming General Comment on article 27 on the right of persons with disabilities to work and employment.
2. The Equal Rights Trust is an independent, international organisation which works with civil society organisations (CSOs) and lawyers, providing them with the technical, strategic and practical support they need to secure the adoption, enforcement and implementation of comprehensive equality laws. In connection with this work, we engage with UN bodies and procedures with the aim of increasing knowledge and understanding of equality law and its role in the realisation of other rights and development.
3. In the last decade, we have supported disabled persons organisations (DPOs) to document and challenge discrimination against persons with disabilities in countries ranging from Kenya to Kyrgyzstan. We are currently partnering with Saraki, a Paraguayan DPO, in a major new initiative which aims to improve the implementation of Articles 5 and 27 of the Convention of the Rights of Persons with Disabilities throughout Latin America, and with a consortium of partners, led by Sightsavers, on a project which aims to promote inclusive work for persons with disabilities in Kenya, and to generate good practice of global relevance.
4. Alongside this work, since early 2020, we have been working in collaboration with the Indigenous Peoples and Minorities Section (IPMS) of the Office of the High Commissioner for Human Rights (OHCHR) to produce a ***Practical Guide on the Development of Comprehensive Anti-Discrimination Legislation***. The Guide sets out the normative human rights law framework on equality and non-discrimination and is thus highly relevant to the present consultation. While the Guide is not scheduled for publication until 2022, an advanced draft of the Guide is available from IPMS.
5. This submission follows our intervention in the Committee’s Day of General Discussion on this General Comment. It also builds on our engagement with the Committee in the development of its General Comment 6 on the right to non-discrimination. Our comments focus on the intersection between Article 27 and Article 5, and in particular on ensuring consistency between the forthcoming General Comment and General Comment 6.

**Comments**

1. We welcome the Committee’s initiative to produce a General Comment on the right to work – a right which the Committee rightly notes is essential for the enjoyment of many other Convention rights. We welcome the fact that the draft recognises the essential role of the right to non-discrimination in ensuring the realisation of the right to work and note with gratitude that a number of our recommendations for emphasising and elaborating the links between the two rights have been taken on board in this draft.
2. Nevertheless, we consider it important that the General Comment consistently reinforces the importance of comprehensive and effective protection from all forms of discrimination for the realisation of the right to work. In particular, we believe it is essential that the General Comment defines discrimination and related concepts in line with the definitions provided in General Comment 6, to ensure consistency of interpretation and implementation. We offer specific comments and recommendations below on how this consistency can be achieved.
3. At the same time, we believe that the General Comment provides the Committee with an opportunity to underline the fact that states not only have a *negative* obligation to *refrain from and prevent discrimination* in the enjoyment of the right to work, but a *positive* obligation to *ensure the equal and non-discriminatory enjoyment* of the right. Again, we offer specific comments and recommendations on how this could be achieved.

**Introduction**

1. We consider it important that, in addition to recognising, paragraphs 4 and 5, the role of ableism in driving the denial of equal work for persons with disabilities, the Introduction to the General Comment also discusses the role of discrimination. While ableism – both conscious and unconscious – is rightly recognised here as a social force which underpins many of the barriers which prevent equal participation in employment, we consider that it is important that the manifestations of this bias – in different forms of discrimination – is identified and named. We ask that the Committee includes a new paragraph in this section which discusses the relationship between ableism and different forms of disability discrimination and places state obligations in this respect within the context of Article 5.
2. Furthermore, we consider it essential that, in paragraph 6, when discussing the interrelationship with other provisions of the Convention, the General Comment discusses the relevance of Article 5. Indeed, given the centrality of the right to non-discrimination for ensuring the right to work on an equal basis with others, we would suggest that a new paragraph is included discussing the need for states to meet their Article 5 obligations as a necessary – though not sufficient – condition for the realisation of Article 27.

**Human rights model of disability**

1. In line with our comments above, on the Introduction, we believe it is important that, at the end of paragraph 7, the General Comment refers to discrimination as the key barrier which prevents persons with disabilities from accessing and participating in work on an equal basis with others. We ask that the Committee notes the need for states to effectively prohibit all forms of discrimination[[1]](#footnote-1) – direct and indirect discrimination, harassment, failure to make reasonable accommodation and segregation– as a means to empower persons with disabilities as rights holders. We also ask that the Committee notes that while stereotypes and stigma are frequent drivers of discrimination, discrimination can occur both intentionally and unintentionally.[[2]](#footnote-2)

**Normative content**

***Article 27(1) The right, on an equal basis with others, to freely chosen or accepted work in an open, inclusive and accessible workplace***

1. We welcome the fact that the Committee has included discussion of the introductory paragraph of Article 27(1), which, as we noted in our remarks at the Day of General Discussion, articulates three essential guiding principles: (i) that persons with disabilities have a right to work on an *equal basis with others*; (ii) that the right to work is a right to *gain a living by work freely chosen*; (iii) that the right to work is a right to *work in an environment which is inclusive*. We note that paragraph 13 reiterates and highlights these principles. In addition, however, we consider it essential that the Committee articulates clearly that Article 27(1) establishes a *positive obligation on states to ensure equal enjoyment of the right to work*, and that this in turn necessitates both the removal of discriminatory barriers and positive, proactive measures to enable freedom of choice and equal participation.
2. In particular, we would ask that the Committee takes this opportunity to set out explicitly that Article 27 requires states to take effective action to protect the right to non-discrimination through enacting, enforcing and implementing comprehensive anti-discrimination laws, in line with the guidance provided by the Committee in its General Comment 6. We would also ask that the Committee underlines that the enactment and implementation of such laws should be accompanied by a wide range of positive, proactive measures to ensure the enjoyment of the right, including the implementation of positive action (specific measures), the adoption of equality duties and the development and delivery of educational, public awareness-raising and sensitisation programmes directed to combat ableism and other prejudices and stereotypes.[[3]](#footnote-3)
3. Again, we welcome the important discussion of segregation within the labour market, and agree with the Committee’s assertion that this continues to be the greatest challenge for persons with disabilities. However, we would ask the Committee to consider relocating its discussion of segregated employment arrangements to the next section, on paragraph 27(1)(a). It is clearly established at international law that segregation is a particularly severe form of discrimination and the Committee’s previous practice has been to define it as such.[[4]](#footnote-4) For this reason, we believe that it would be beneficial to discuss segregated employment arrangements in the context of the right to non-discrimination.
4. Furthermore, we would ask that the Committee considers including a definition of segregation as a form of discrimination. As the Committee will be aware, segregation is not explicitly defined in any of the core UN human rights treaties. Nevertheless, through the research and consultation which we have undertaken with colleagues from OHCHR in the preparation of the aforementioned Practical Guide, we have developed the following definition, building on the interpretations and approaches taken by the Committee and the other UN treaty bodies:

*Segregation occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.*

***Article 27(1)(a) Prohibition of discrimination on the basis of disability***

1. We warmly welcome the Committee’s clear statement that non-discrimination and equality are core obligations of Article 27 and the elaboration of states’ obligations in this area. Nevertheless, we would ask that the Committee makes a number of small amendments to ensure that the text here is fully consistent with the Committee’s General Comment 6.
2. In paragraph 19, we would ask that the Committee notes that states have a specific, immediate obligation, arising under Articles 4 and 5, to enact and enforce specific, comprehensive anti-discrimination legislation[[5]](#footnote-5) – that is, legislation prohibiting all forms of discrimination, on all grounds recognised at international law and in all areas of life regulated by law. It is only through the adoption and implementation of such laws that states can ensure that non-discrimination obligations are properly extended to the private sector.
3. In paragraph 21, we would ask that the Committee replaces the example provided with an alternative one, which focuses on the application of uniform rules, policies and practices which have disproportionate impacts on persons with disabilities of another protected characteristic,[[6]](#footnote-6) rather than a situation where reasonable accommodation is required. For example, the Committee could give the following example:

*An employer adopts a policy to award bonuses to its employees based on number of hours worked in the previous year, rather than their achievements or other metrics. Such a policy would indirectly discriminate against any persons with disabilities who might need more time off work to attend medical appointments or for other reasons associated with their disability.*

1. In paragraph 23, we would recommend in the strongest terms that the Committee replaces the word “and” with “or in the phrase “purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Definitions of harassment used by the other UN treaty bodies use the word “or”;[[7]](#footnote-7) and replacing the word with “and” has the effect of narrowing the scope of the prohibited conduct. We would also ask that the Committee draws a clear distinction between harassment as defined here and harassment as referred to in ILO Convention 190 (2019), which focuses on violent and other harmful behaviours. It is important to underline the fact that harassment as an aspect of the right to non-discrimination does not require violence or other physical acts and can occur through communication, media or other actions. Finally, we would ask that the Committee includes within the list of examples of harassment conduct which has the *effect* of creating a hostile environment, to emphasise that harassment can occur unintentionally, for example through the sharing of harmful prejudices or stereotypes about persons with disabilities in general, rather than in a way directed at a particular individual.
2. In paragraph 24, we would ask that the Committee clarifies that the additional grounds which it refers to can include “but is not limited to” the listed grounds. We would also ask that the Committee replaces “religion” with “religion or belief” and that it considers adding further grounds recognised at international law, including health status, for example.[[8]](#footnote-8)

***Article 27(1)(b) on just and favourable conditions of work on an equal basis with others***

1. We would recommend that where references are made at paragraph 31 to persons with disabilities’ right to equal remuneration for equal value, the General Comment states explicitly that any pay inequality or pay gap arising on the basis of disability is a form of direct discrimination as prohibited by Article 5, and that there can be no legitimate justification for such discrimination.

***Article 27(1)(e) on promoting employment opportunities and career advancement***

1. In this section of the General Comment, we ask the Committee to include discussion of the full range of obligations on states if they are to meet their obligations in respect of Article 27 read together with Article 5. In particular, we consider it important that discussion of this paragraph goes beyond consideration of career advancement opportunities for those already in employment and that it is clearly grounded in states immediate obligations to eliminate discrimination.
2. We would recommend that the General Comment discusses obligations to combat stereotypes and prejudices about the abilities of persons with disabilities (Article 8(1)(b)) and to raise awareness of the “capabilities and contributions of persons with disabilities” (Article 8(1)(c)). The measures set out in Article 8(2) are all good examples of steps which states should take to promote employment opportunities for persons with disabilities.
3. Equally, we would encourage the Committee to highlight the need for states to adopt appropriate specific measures to accelerate equality for persons with disabilities (Article 5(4)) in order to meet their obligation to provide “assistance in finding, obtaining, maintaining and returning to employment”.

***Article 27(1)(g) on employment in the public sector***

1. We are concerned that this section of the General Comment may over-emphasise differences between the obligations of employers in the public and private sector. In particular, we are concerned that the proposal that the state should take a “more rigorous approach to inclusion” where it is an employer could be misinterpreted in ways which would undermine states’ obligations to ensure non-discrimination in employment through the adoption and enforcement of anti-discrimination laws. We would urge the Committee to remove this phrase. Moreover, we would ask that language is included to make clear that measures such as the introduction of objective standards for hiring and promotion are necessary for ensuring non-discrimination and are thus applicable equally to public and private actors.

***Article 27(1)(h) on employment in the private sector and affirmative action programmes***

1. We consider it a problematic omission that this section of the General Comment does not engage with private sector employers in the formal economy. While this section rightly highlights the vulnerability of workers in the informal economy – and the particular vulnerabilities of persons with disabilities in this context – it is essential that the General Comment discusses the formal economy. In particular, this section should discuss the obligation of states, under Articles 4 and 5, to adopt comprehensive anti-discrimination laws which prohibit all forms of discrimination, apply to both public and private actors in all areas of life regulated by law – including employment – and which mandate and require positive (affirmative) action. We would urge the Committee to include a specific discussion on states’ legislative obligations under Article 5 at this point in the General Comment.
2. In paragraph 46 – and in paragraph 44 and at all other points where referencing affirmative action or specific measures – we would ask the Committee to reiterate the position set out in its General Comnent 6, that Article 5(2) “requires that States parties take concrete specific measures to achieve de facto equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms”.[[9]](#footnote-9) As this statement makes clear, positive action measures are not merely permitted but required in situations of substantive inequality.
3. Furthermore, we would ask that the Committee includes, in its discussion of affirmative action, further discussion of how states can ensure that positive action measures do not have the effect of reinforcing stereotypes, isolation or segregation. We welcome the Committee‘s elaboration of preventive principles – in paragraph 47 – to ensure that affirmative action measures do not lead to negative consequences. However, we would also urge the Committee to take this opportunity to explain the need for states – in their design of positive action measures – to focus on the identification and removal of barriers to participation, rather than the use of quotas and other measures which can serve to reinforce charitable models of disability.

***Article 27(1)(i) on the provision of reasonable accommodation***

1. We welcome the Committee’s discussion of reasonable accommodation but would ask the Committee to reference and recall the principles for its operation set out in paragraph 26 of General Comment 6.

**State Parties Obligations**

***General obligations***

1. We are concerned that the section of the General Comment which discusses states’ obligations begins with discussion of Article 4(2) and the obligation of progressive realisation, rather than with the immediate obligation of non-discrimination. States have an obligation, under Article 27(1) to ensure the enjoyment of the right to work on an equal basis with others. As the Committee on Economic, Social and Cultural Rights has noted, the right to non-discrimination gives rise an “immediate and cross-cutting obligation” which is not subject to progressive realisation, [[10]](#footnote-10) Discriminatory denial or limitation of work on the basis of disability (or any other ground) is an immediate violation of both Article 27 and Article 5.
2. States have duties under Article 4(1)(b) and (d) to repeal discriminatory laws, regilations and policies, and under Article 4(1)(a) and (e) enact comprehensive anti-discrimination legislation to prohibit and prevent discrimination by both private and public employers. These obligations apply in respect of the right to work as they do to all other rights guaranteed by the Convention, The specific obligations set out in Article 27 – whether to prohibit discrimination in all matters concerning employment, to ensure the ability to exercise trade union rights on an equal basis or to ensure reasonable accommodation – are immediate, not subject to progressive realisation As such, we urge the Committee in the strongest possible terms to remove paragraph 59 and discussion of progressive realisation in respect of Article 27.
3. In discussion of the obligations to respect, protect and fulfil in paragraph 60 and beyond, the Committee makes a number of amendments, to ensure consistency with international standards, as expressed *inter alia* in the Committee’s General Comment 6 and the Committee on the Elimination of Discrimination Against Womens’ General Recommendation 28.[[11]](#footnote-11) Specifically, we would ask that the Committee notes that the obligation to respect is given effect through both paragraphs (b) and (d) of Article 4(1), and that the obligation to protect is embodied in paragraph (a) of that Article, as well as paragraphs (c) and (e). Most importantly, we believe it is essential that the Committee states here that the obligation to *fulfil* not only requires the adoption of the measures outlined in Article 4(1)(f) and (g), but also requires states to ensure the effectiveness in practice of all measures identified in Article 4(1) and indeed requires a comprehensive package of measures to give full effect to obligations arising *inter alia* under Articles 5, 8 and 9,

**Relationship with other specific articles of the Convention**

1. We would ask that in its discussion of Article 6 at paragraph 80 - and indeed wherever the General Comment refers to multiple discrimination and obligations arising under Article 6 – that it reiterates the position adopted in General Comment 6 that Article 6 “must be regarded as illustrative, rather than exhaustive, setting out obligations in respect of the two prominent examples of multiple and intersectional discrimination”.[[12]](#footnote-12)

**Conclusion**

1. We would once again like to congratulate the Committee for the initiative to draft this General Comment and for its exemplary work in elaborating the nature, content and scope of the obligations arising under Article 27. We thank the Committee for this opportunity to comment on and inform its work in this area. Our hope is that this submission helps to identify some areas in which the General Comment can be strengthened and can thus continue the Committee’s record of developing progressive standards in the realisation of the rights to equality and non-discrimination. We stand ready to support the Committee in this endeavour, and in particular to provide additional information, evidence or research on any of the points identified here.
1. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para 18. [↑](#footnote-ref-1)
2. Under international human rights law, conduct is prohibited where it has the “purpose or effect” of impairing the equal enjoyment of rights (see, for example, International Convention on the Elimination of all forms of Racial Discrimination, article 1; Convention on the Elimination of All Forms of Discrimination Against Women, article 1; Convention on the Rights of Persons with Disabilities, article 2; Human Rights Committee, General Comment No. 18, 1989, paras. 6 and 7; Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 7). [↑](#footnote-ref-2)
3. For further information on these positive, proactive obligations, see Office of the High Commissioner for Human Rights and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, Part 2B: Positive action; Part 2C: Equality Duties; Part 6: Obligations to Address the Root Causes of Discrimination, available on request. [↑](#footnote-ref-3)
4. See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 4 (CRPD/C/GC/4), 2016, para. 13 and Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, paras. 30, 64, 67(a) and 73(c). [↑](#footnote-ref-4)
5. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para 22. [↑](#footnote-ref-5)
6. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, paras 18(b) [↑](#footnote-ref-6)
7. See, for example: Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 7. [↑](#footnote-ref-7)
8. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para 21. See also: : Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009. [↑](#footnote-ref-8)
9. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para 17. [↑](#footnote-ref-9)
10. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 7; Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para. 12. See, also, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/26/29), 2014, para. 19. [↑](#footnote-ref-10)
11. Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (CEDAW/C/GC/28), 2010, para. 9. [↑](#footnote-ref-11)
12. Committee on the Rights of Persons with Disabilities, General Comment No. 6 (CRPD/C/GC/6), 2018, para 36. [↑](#footnote-ref-12)