##### **About the submitting organization**

The Klagsverband (English name: Litigation Association of NGOs Against Discrimination ) is an Austrian umbrella organisation founded in 2004 by NGOs working against discrimination and supporting victims of discrimination by representing them. Our focus is on policy, advocating for amendments of equality legislation, and strategic litigation. We also host seminars on different topics, including for instance individual complaints. Combating discrimination against persons with disabilities is one of our major focuses, last year for instance 31% of our cases dealt with discrimination on the grounds of disability. One of our previous cases resulted in an individual complaint to the Committee on the Rights of Persons with Disabilities (hereinafter Committee). Most Austrian independent living organisations are active members of the Klagsverband and maintain a close cooperation with us.[[1]](#footnote-1)

The Klagsverband is also active on a European level. We are a member of the Fundamental Rights Platform of the European Union’s Fundamental Rights Agency and our staff attends international conferences and trainings.

##### **Introduction**

##### The Klagsverband welcomes the draft General Comment on Article 5 and the opportunity to comment on it. Equality and non-discrimination are the rights our organization is based on, their realization is the reason for our existence. To us equality is not only the foundation of the very concept of human rights protection but it is therefore also one of the guiding principles of their respective interpretation and realization. From our understanding it is however more than just a principle of interpretation but a core human right in itself that requires active, comprehensive approaches from any state. By focusing on equality and non-discrimination we can effectively advance the rights guaranteed by the CRPD, which are interrelated and inseparable.

##### We are therefore pleased with the wide approach of equality embraced by the draft General Comment and its view of equality as a ’golden thread’ of the entire Convention. The draft General Comment is an important tool to put the meaning of equality in context with the legal, historical and human rights context of disability. It is clear on the crosscutting nature of equality and the fact that equality is a matter of immediate realization, contrary to many national current policy approaches and that it works towards equality of opportunities. We are especially pleased to find clarifications of the different terminologies in Article 5, for instance „equality before the law“ and „equality under the law“ as some of these phrases are fairly new in the Austrian national context.We think we can furthermore especially build on the clarity the draft provides on the inherently discriminatory nature of specific legislation for persons with disabilities, separating them from the wider society and/or denying certain human rights, in fields such as institutionalization or substituted decision-making.

##### We do however think that the analysis of the impact of Article 5 on the substantive articles and especially how they interrelate still lacks some connections and that specific aspects need to be highlighted more, to ensure a fully comprehensive picture. We understand that the General Comment provides general, universal guidance only, and is not a detailed manual. We therefore limit our submission to issues we consider of general importance. Our submission does not aim to provide an exhaustive statement on the draft General Comment but rather focuses on some specific issues that have come to our attention, are of especial importance for our own work and/or lie within our specific expertise. Based on our experience gained from consultations and strategic litigation cases, we hope to provide some useful input from a practical perspective on some often overlooked areas of discrimination and issues arising when seeking justice. We will therefore focus our submission primarily on 3 main areas: (1) discrimination in the field of services and goods and by private contract partners; (2) effective and comprehensive remedies and access to courts and (3) - to start with - the different conceptualizations of equality and their limits.

##### **Provisions that need to be changed or need additional information**

##### **To be amended:**

##### **para 10**

##### Paragraph 10 outlines the difference between formal and substantive equality, including the following parts: *While formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently, substantive equality seeks to address structural and indirect discrimination and takes into account power relations. (…) The Convention is based on this new model of equality, which is also known as transformative or inclusive equality.* The definition of the substantive model of equality as proposed by the Committee therefore includes what is known as the anti-subordination approach as most famously promoted by Catharine MacKinnon in the context of gender equality.[[2]](#footnote-2) Substantive equality can be seen as still being based on formal equality while adding special measures where needed to ensure fair outcomes. The anti-subordination approach targets power relationships that form the basis of the system we live in, rather than focusing on the effects and outcomes of specific rules. It follows an overall approach to combat domination in a society which was created without the involvement of the oppressed. Equality needs to ensure it does not follow an assimilationist approach in guaranteeing rights. The human rights approach to disability targets such patterns of domination and therefore follows a concept of equality broader than the traditional substantive model of equality. We consider the CRPD in general however as following a more practical approach, borrowing from the different theoretical models of equality and combining their approaches, instead of following one specific model. We therefore suggest the following wording: ***While formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently, substantive equality and the anti-subordination principle are needed to address structural and indirect discrimination and to take into account power relations. (…) The Convention is based on these models of equality that address systemic issues, alongside those known as transformative or inclusive equality.***

##### While we understand the motivation of introducing inclusive equality as a new, undisputed framework for equality, we fear that this specific choice of terminology might not achieve the desired goal. Firstly we doubt that other UN Committees will take up the terminology, as inclusion is less used in other contexts (for instance in the context of migration, the word „integration“ is far less disputed and the predominant descriptor). Secondly and more importantly in the context of the CRPD we would like to highlight that the exact meaning and the duties connected to the principle of inclusion are not yet fully understood by several State Parties.[[3]](#footnote-3) While this can in no way pose an excuse regarding the fulfillment of the rights enshrined by the CRPD, including the concept of inclusion, we fear that by combining the words inclusion and equality in the context of equality, we might risk adding room for further misunderstandings and incomplete implementations of the right to equality by State Parties. We therefore cannot support the introduction of the concept of inclusive equality at this stage. A clearer alternative, following the same goals might be the concept of diversity, which seems to be compliant with a systemic approach to equality combined with the continued use of inclusion in its established contexts.

##### **para 18**

##### Paragraph 18 includes at the moment the following passage: *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, positive measures are often required. Such measures include the provision of accessibility and reasonable accommodation as well as individualized supports.*

##### We argue that both the examples of accessibility and reasonable accommodation have to be deleted in this context. The CRPD clearly states that reasonable accommodation, as a reactive, individual response to an inaccessible environment in a specific case, is to be dealt with in the context of anti-discrimination.[[4]](#footnote-4) It can therefore not fall into the category of positive measures, which are - also elsewhere in the draft general comment - called affirmative action or specific measures. We argue further that accessibility is a tool of transformative equality rather than a positive measure. Accessibility measures might include positive measures, for instance if extra budget is set aside for subsidies to persons with disabilities building a house, to ensure accessibility features, but are usually general, proactive measures that benefit society in total. Furthermore it is a way to highlight and address systemic exclusionary issues, for instance what we currently perceive a good built environment, without noticing the exclusionary effects, on the contrary, seeing the built environment as a justification for exclusionary effects, as we take the environment for a fact, a necessity. We therefore ask for the removal of the examples of reasonable accommodation and accessibility from the aforementioned quote.

##### **para 19**

##### From our experience a common approach towards protection against discrimination - and other violations of the principle of equality - is that of the State Parties to wait for a person with a disability to act against an infringement of their rights. A common example is that of a blocked disabled parking space. If someone needs this space, which is taken by a car without the necessary license, they can call and request for the car to be towed. While this is a necessary enforcement mechanism, we argue that the officials have to act more preemptively to ensure that the parking spaces are available in the first place, that this right is respected by society and is not violated as part of systemic inequality. We argue that the duty of the State Parties to ensure premptively that no infringements of a person’s rights or acts counteracting the effect of positive measures, accessibility efforts or any other measures undertaken, is included in the the duty to ensure „*equal benefit of the law*“. We therefore suggest to add to para 19 of the draft the following sentence: ***State Parties are obliged to ensure the effective equal enjoyment of the benefits of the law by preemptively reacting to violations or denials of special measures, reasonable accommodation, accessibility features or any other provisions of services.***

##### **section xi**

##### While we welcome the specific reference to the importance of the connection between equality and employment we feel that some specific aspects could benefit from additional clarification or need to be added to provide a fuller picture.

##### para 73 lit a: *Facilitate the transition away from segregated work environments for persons with disabilities and support their engagement in the open labour market;* While the need for this transition is undisputed, we want to emphasize that this shift will need careful planning and support for those that are already in such a segregated setting, so as to ensure that they will find a workplace that accommodates them and a type of employment that is truly freely chosen (a requirement set out in the following paragraph of the draft General Comment). In the meantime, State Parties should take immediate action to guarantee the applicability of labour rights to segregated settings, such as sheltered workshops. We therefore ask to add the following phrase to lit a: ***and ensure the immediate applicability of labour rights to those settings in the meantime.***

##### para 73 lit b: *Ensure the availability of supported employment and protection of the rights of workers with disabilities and ensure the right to freely chosen employment;* Here we suggest to add examples of the core contents of supported employment, which is a concept not yet used extensively in all parts of the world. Furthermore we consider a stronger emphasis on the right to participate in supported employment programs, which are still widely seen as a voluntary service provided by the public sector rather than a right and an active measure to promote substantive equality. We therefore suggest the following phrase: ***Ensure the right to supported employment, including but not limited to, work assistance, job coaching, and vocational qualification programs; and the protection of the rights of workers with disabilities and ensure the right to freely chosen employment;***

##### para 73 lit c: *Recognise multiple discrimination of women with disabilities and take measures to ensure gender equality in the workplace;* While we welcome the focus on the multiple barriers faced by women, we feel that other groups which also face multiple barriers, should be included in this section as well. We suggest to also include ethnic and religious minorities with disabilities and older workers with disabilities.

##### **To be added:**

##### **A dedicated paragraph regarding the provision of goods and services by private actors:**

##### From our experience the protection against discrimination from the private sector is often weaker from a legal standpoint and also harder to utilize, for instance because discrimination happens in a less formal way, is difficult to prove, or is not even understood as discrimination. Discriminatory behavior, often resulting in a denial of access to certain services or goods, is less questioned but seen as an expression of the freedom of contract.

##### One clear example can be found in access to life insurances. Persons with Down Syndrome (amongst others) have been denied life insurances based on the mere fact that they have the aforementioned medical diagnosis. They do not even get to the stage of a non-standard risk assessment but receive a rejection as soon as their diagnosis is mentioned. This rejection based on one’s disability amounts to direct discrimination, but is however hard to prove as insurance companies (as part of the private sector) do not have to justify why they refuse to offer a policy. Even where the issue of the disability is mentioned, the refusal of the service is usually explained with the need of the company to take risk assessments. We argue that such rejections always should give a reason that can be disputed by the person in question, as their right to have an insurance is affected by the opposing interests of the company. Another issue is that once someone gets to the stage of a non-standard risk assessment, we need to ensure that the methods and criteria of the risk assessment are not selected or applied in a way that effectively leads to a disproportional exclusion of persons with disabilities from insurances again or to generalized extremely high payment rates, thereby leading to indirect discrimination.[[5]](#footnote-5) Any measure taken therefore needs to be aware of this risk, so as to ensure real change.

##### We used this example to show in some detail the complexities of ensuring equal access to goods and services in the private sector and some of the main discussions about justifications of exclusion. The examples are however numerous, ranging from access to bill pay phone contracts to lease agreements. We therefore see an urgent need for a clear call to action to State Parties to approach this issue and guidelines on how to do this. As part of this effort we suggest to add to the General Comment on Article 5 the following additional paragraph:

##### **para 57 a)** The section on Article 12 lacks any reference to para 5 of Article 12, which mentions several of the goods and services persons with disabilities are usually excluded from in a discriminatory manner. This reference should be connected to Article 25, which deals with the right to a health and life insurance. We suggest adding the following paragraph:

##### ***State Parties are obliged to ensure the equal enjoyment of all goods and services offered in society, including, but not limited to, the goods and services listed in Article 12 para 5, which provides examples of goods persons with disabilities are especially precluded from, such as property and services connected to financial affairs, like mortgages. Article 25 lit e) mentions another service which is usually not open to persons with disabilities, namely that of life insurances and (private) health insurances. State Parties are therefore expected to take an active, comprehensive approach to ensure equal enjoyment of services and goods in the private sector. This includes a strengthening of the anti-discrimination legislation as it applies to the private sector. Cooperation with trade unions and other actors should be utilized to find partners willing to bring about change. Finally access to justice needs to be ensured and strengthened in this sector. Remedies need to be effective, readily available, and not too costly, and should include an entitlement to injunctions, elimination of obstacles and to access the service or good. The regulations regarding burden of proof need to be responsive to the especial power imbalances in the private sector by establishing rules that either provide a right to request a written reason for a refusal, which can then be disputed, or by shifting the burden of proof further to the defendant.***

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##### **para 58 a) Access to (High) Courts**

##### In order to achieve results beyond the individual case, it is of utmost importance that cases of discrimination are dealt with by courts. While we applaud the expansion of alternate settlement methods, with their less adversarial and stressful settings, we have noticed from our experience that a duty to utilize such methods leads to a lack of binding judicial decisions. Instead the same company or office participates in many individual settlements, where someone claims their rights, without changing their policies and practices. Furthermore the individuals affected have less or no access to information about similar cases, as these settlements are usually confidential. We therefore argue that a new balance has to be found between alternate settlements and court procedures so as to ensure systemic change and binding decisions.

##### Another problem arises from the strict admissibility requirements for high courts. Civil cases usually have to meet a minimum of value, looking at the amount of damages or compensation sought, which an individual discrimination case will in most cases not meet. As a consequence there is a lack of decisions with a broader, substantive, discussion of discrimination issues, as such discussions are only undertaken by high courts. While we see a huge potential for class actions here, an individual should not have to rely on this happening. We therefore request an exemption from the minimum amount of litigation costs in discrimination cases which offer new insights and problem questions of a wider impact. Such a change will lead to an initially high number of discrimination cases but should result in increased clarity in regards to equality and non-discrimination provisions

##### We therefore ask for the added paragraph 58 a) with the suggested content:

##### ***While promoting alternate forms of settlement, to spare the claimant the stress of an adversarial procedure, States Parties are obliged to ensure the existence of a guiding body of case law, to ensure legal certainty and to prevent those showing discriminatory behaviour from continuing their discriminatory practices. State Parties must furthermore ensure that cases of discrimination can be taken to high courts and assess their existing admissibility requirements, especially those regarding a minimum amount of litigation costs, for barriers to accessing this right.***

##### **section xi a)**

##### The connection between employment and access to equal retirement and social welfare options needs to be highlighted. Several State Parties of the CRPD have sheltered workshops or similar institutions of segregation, which do not fall under labour law and do not confer entitlements to unemployment benefits or retirement pensions. Persons with disabilities are also more often and for longer periods of time faced by unemployment, thereby acquiring lower rates of retirement or unemployment benefits amongst others. Women with disabilities are even more affected.[[6]](#footnote-6) We therefore see need for either further expansion on para 73 lit d) of the draft general comment (*Ensure proper transition into and out of employment for persons with disabilities in a non- discriminatory manner;*) or an added section on Article 28 CRPD to deal with this issue. Our suggested wording of this provision is as follows:

##### ***State Parties are obliged to ensure equal and effective access to benefits and entitlements, such as retirement or unemployment benefits. These entitlements must not be infringed by exclusion from employment, thereby further exacerbating the situation of exclusion. State Parties need to address the further effects of an exclusionary labour market on the right to an adequate standard of living and social protection to ensure there is no circle of exclusion and denial of rights. These measures should include, but be not limited to, revising and amending legislation to take into account the specific situation of persons with disabilities when it comes to missing contribution years for retirement, caused by time spent in sheltered workshops, interruptions based on the disability, or a late entry into the labour market.***

##### **Provisions that are of especial importance to our organization**

##### **para 32**

##### *State parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality. In this regard, States parties must refrain from any action that discriminates against persons with disabilities. In particularly States parties shall modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. The Committee has on several occasions given examples in this regard: guardianship laws and other rules infringing upon the right to legal capacity,[[7]](#footnote-7) mental health laws which legitimize forced institutionalization and forced treatment,[[8]](#footnote-8) non-consensual sterilization of women and girls with disabilities,[[9]](#footnote-9) inaccessible housing and institutionalization policy,[[10]](#footnote-10) segregated education laws and policies[[11]](#footnote-11) or election laws disenfranchising persons with disabilities.[[12]](#footnote-12)*

##### We are delighted about the clear statement and examples of discriminatory legislation and practices, which have to be amended or abolished. The examples include several practices which are in a national context usually not discussed from an anti-discrimination perspective, such as guardianship or forced treatment. We hope to use the general comment as a point of reference for future reforms and advocacy efforts.

##### **para 36 lit c)**

##### *The legal right to bring a lawsuit to court for associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality.* This provision is of especial interest to Klagsverband, as we have been advocating for the right to bring class action suit to court for a while now. This right was finally given to us and the Austrian Disability Ombudsman in October 2017. We firmly believe that this tool can help to bring about systemic change and show that discrimination is not just a singular problem. We look forward to contributing to the realization of the CRPD by utilizing this right.

##### **para 66**

##### ***Eligibility criteria and procedures for accessing support services need to be defined in a non-discriminatory, objective way, and focus on the requirements of the person rather than the impairment, following a human rights-based approach.***

##### We consider this requirement in the context of Article 19 especially relevant in the national context when it comes to new services that promote transition from segregated settings. These services are in most cases still open only to those that are consider ’ready’ or almost ready for inclusive settings. But also in the context of benefits, to name only one other example, the medical diagnosis is still used as the main point of reference, rather than the personal requirements. We are therefore looking forward to utilizing this paragraph in in future discussions over amendments of eligibility criteria.

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1. for more information on our work you can access our annual reports in English on our website <<https://www.klagsverband.at/english>> accessed 15 November 2017. [↑](#footnote-ref-1)
2. for an overview of the different models see Chapter 1 of Bolger, Kimber, Bruton, *Employment Equality Law* (Dublin, 2012); for MacKinnon see for instance Catharine MacKinnon, ’Reflections on Sex Equality under Law’ (1991) 100(5) The Yale Law Journal. [↑](#footnote-ref-2)
3. see for instance United Nations Committee on the Rights of Persons with Disabilities, ’Initial State Report of Austria to the Committee on the Rights of Persons with Disabilities’ (10 October 2011) CRPD/C/AUT/1, which translated inclusion with integration in German; or for a differing, sociological understanding of the meaning of inclusion and integration (in German language) Michael Weber, Britta Wagner, ’Inklusion, Integration und Lebensqualität in Werkstätten für behinderte Menschen’ (*Inclusion, Integration and Quality of Life in Sheltered Workshops)* (2015) 66(3) Zeitschrift für Heilpädagogik *(Journal of Special Education).* [↑](#footnote-ref-3)
4. see Article 2 para 3 CRPD. [↑](#footnote-ref-4)
5. For a summary of these concerns see a submission to the Austrian parliament - in German language - ÖAR, Stellungnahme der Österreichischen Arbeitsgemeinschaft für Rehabilitation (ÖAR), Dachorganisation der Behindertenverbände Österreichs, zum Entwurf eines Bundesgesetzes, mit dem das Versicherungsvertragsgesetz 1958 geändert wird (VersicherungsrechtsÄnderungsgesetz 2010 - VersRÄG 2010) BMJ-B10.213/0004-I 7/2010 (2010) <<https://www.parlament.gv.at/PAKT/VHG/XXIV/SNME/SNME_03756/fname_187512.pdf>> accessed 25 October 2017. [↑](#footnote-ref-5)
6. see for instance the Concluding Observations for Austria. [↑](#footnote-ref-6)
7. Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12: Equal recognition before the law, para. 26, CRPD/C/GC/1 [↑](#footnote-ref-7)
8. Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, 2015, para. 6 and 14 [↑](#footnote-ref-8)
9. Committee on the Rights of Persons with Disabilities, ### [↑](#footnote-ref-9)
10. General comment No. 5, Article 19: Right to independent living, para. ?, CRPD/C/GC/5 [↑](#footnote-ref-10)
11. Committee on the Rights of Persons with Disabilities, General comment No. 4 (2016) on the right to inclusive

education, para. 24, Accessibility, CRPD/C/GC/4 [↑](#footnote-ref-11)
12. *Bujdosó v. Hungary*, Communication adopted at 10th session (2-13 September 2013), CRPD/C/10/D/4/2011. [↑](#footnote-ref-12)