

Written submission relating to the 1st draft of the General Comment on article 5- equality and non-discrimination

29 October 2017

I. Introduction

These comments were prepared by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) in consultation with Transgender Europe (TGEU), NNID, ILGA Intersex Secretariat, and OII-Europe and supported by Hivos on behalf of the Right Here Right Now Coalition and Campaign Against Homophobia.

This document will focus on the multiple forms of discrimination based on disabilities and sexual orientation, gender identity and expression and/or sex characteristics (SOGIESC). Similarly to our previous submission on the outline of the General Comment on article 5, it will provide proposals to the Committee on the Rights of Persons with Disabilities (henceforth referred to as “the Committee”) on its first draft General Comment. These proposals will address specific experiences of lesbian, gay, bisexual, trans and intersex (LGBTI) persons.

Overall, we welcome the inclusion in the first draft of LGBTI issues, however, we feel that the Committee could go further in addressing the multiple forms of discrimination faced by persons with disabilities in marginalised groups.

While there is no precise calculation on the total number of LGBTI persons with disabilities worldwide, studies from across several countries provide some data. For instance, research conducted in Britain suggested that there were 255,000 lesbian, gay and bisexual people with disabilities in the country.¹ A Russian study estimated the number of gay and lesbian persons with disabilities at 650,000.² Research by ILGA-Europe and TGEU showed that 15.4% of trans respondents identified themselves as having a disability, which is comparable to the figures obtained from other national and European studies.³ Independent sociological research in Australia found that 27% of respondents born with atypical sex characteristics had a disability.⁴

These people face discrimination and other violations of their rights because of both their real or presumed SOGIESC and disability. For example, the Russian study showed that 66.4% of LGBT persons with disabilities experienced discrimination on the ground of disability, and 62.1% on the ground of sexual orientation.⁵ The study from the UK also showed the extensive discrimination

¹ Brothers, M. (2003). It's Not Just about Ramps and Braille: Disability and Sexual Orientation. [Re-Thinking Identity: The Challenge of Diversity](#), 51.

² Queer-Peace (2017), [Monitoring of discrimination of representatives of LGBT community with disability](#), 2.

³ Whittle, S., Turner, L., Combs, R., & Rhodes, S. (2008). [Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care](#). Brussels: ILGA-Europe, 44.

⁴ Jones, T. et al. (2016). *Intersex: Stories and Statistics from Australia*. Cambridge, UK: Open Book Publishers.

⁵ Queer-Peace (2017), 5.

faced by lesbian, gay and bisexual people with disabilities.⁶ The results of a survey of the European Union Agency for Fundamental Rights demonstrate that out of 93,079 LGBT respondents, 4% had personally felt discriminated against or harassed in the 12 months before the survey on the ground of their disability.⁷ Multiple studies show a higher rate of physical and mental health problems in groups of LGBT people compared to non-LGBT counterparts.⁸

We are encouraged by the Committee's recently published Concluding Observations for the UK which comprehensively addressed issues facing LGBTI persons with disabilities.⁹ We warmly welcome the inclusive approach the Committee has taken in a multitude of Concluding Observations and firmly believe that this approach should be taken in the new General Comment on equality and non-discrimination. This approach will ensure stronger protections for LGBTI people from different parts of the world who face multiple forms of discrimination and stigmatization because of their real or presumed SOGIESC and disability at the same time.

II. Normative Content

Comments to paragraph 21 of the draft- Article 5(2) "On the basis of disability"

The Committee's General Comment No 3 states that, 'on the basis of disability' includes persons who are presumed to have an impairment.¹⁰ In this regard, the scope of article 5(2) encompasses discrimination against those who are not disabled but are treated as if they were.

The World Health Organization's International Classification of Diseases has had "homosexuality" removed as a disease. Despite its removal, however, many lesbian, gay and bisexual individuals all over the world continue to be perceived by governments, medical professionals and society as having a mental illness, abnormality or assumed impairment.¹¹

Furthermore, trans persons and their identities are consistently pathologized and considered to have an impairment which compounds stigma and discrimination.¹² Research from Transgender Europe highlighted that 71.7% of healthcare providers and 70.7% of healthcare users, who

⁶ Brothers, M. (2003), pp. 49-67

⁷ FRA (2014). [EU LGBT survey, European Union lesbian, gay, bisexual and transgender survey: Main results](#), 28

⁸ See e.g.: Conron, K.J. et al. (2010). A Population-Based Study of Sexual Orientation Identity and Gender Differences in Adult Health. *The American Journal of Public Health*, 100(10), pp. 1953-1960; Fredriksen-Goldsen, K.I. et al. (2012). Disability Among Lesbian, Gay, and Bisexual Adults: Disparities in Prevalence and Risk. *The American Journal of Public Health*, 102(1), pp. e16-e21; Dilley, J.A. et al. (2010). Demonstrating the Importance and Feasibility of Including Sexual Orientation in Public Health Surveys: Health Disparities in the Pacific Northwest. *The American Journal of Public Health*, 100(3), pp. 460-467; Jorm, A.F. et al. (2002). Sexual orientation and mental health: results from a community survey of young and middle-aged adults. *The British Journal of Psychiatry*, 180(5), pp. 423-427; Meyer, I.H. (2003). Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence. *Psychological Bulletin*, 129(5), pp. 674-697.

⁹ See: [Concluding Observations](#) for UK, paras 10-11, 38, 40-41.

¹⁰ CPRD, '[General Comment No 3 on women and girls with disabilities](#)' (2016) CRPD/C/GC/3, para 17(c), para 53.

¹¹ See Concluding Observations for Morocco, [CRPD/C/MAR/CO/1](#), para 1.

¹² *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 28 March 2017, [A/HRC/35/21](#), para 48.

identified as trans, felt that having psychiatrically diagnosing a transgender person had a stigmatising effect.¹³

The Committee itself has previously, in its Concluding Observations on Iran and Morocco, expressed concerns on ‘discrimination against persons perceived to have a disability, including on the grounds of gender identity and sexual orientation.’¹⁴

The categorization of intersex as a medical impairment, by way of pathologizing terminology such as ‘disorders’, also makes this a point of concern for the Committee.

Therefore, we suggest the following amendments to paragraph 21 of the draft to include those *perceived* to have a disability due to their SOGIESC:

*“On the basis of disability” includes not only persons who presently have an impairment, but also who have had an impairment in the past, have a disposition to an impairment which lies in the future, and persons who are presumed to have an impairment, **such as trans persons whose self-identification is pathologized**, or those who are associated with a person with disabilities,¹⁵ the latter known as “discrimination by association”. The reason for this wide personal scope of article 5 lies in the goal of subparagraph (2) to eradicate and combat all discriminatory situations and/or discriminatory conduct that are linked to disability.*

Comments to paragraph 22 of the draft- Article 5(2) “Protection against discrimination on all grounds”

We welcome the inclusion of ‘sexual orientation’ in para 22 of the draft in the context of protection against discrimination. At the same time, it should be taken into account that, along with sexual orientation, grounds on which individuals experience discrimination because of their presumed or actual disability extends to gender identity, gender expression and sex characteristics.

Most anti-discrimination policy measures bear in mind gender as well as sex, since it is more often the social notion of gender that is the cause of discrimination. Including gender identity, gender expression and sex characteristics as separate grounds would help to include in the remit of the GC trans and gender diverse people whose gender identity or expression may be a cause of marginalisation and discrimination. Sex characteristics is mostly used as the ground of protection for intersex people.

In light of this, we suggest the following amendments to the wording of para 22:

¹³ TGEU, ‘Overdiagnosed but Under Served’ October 2017, <https://tgeu.org/healthcare/>.

¹⁴ CRPD/C/IRN/CO/1, para 12(b); CRPD/C/MAR/CO/1, paras 20-21.

¹⁵ Committee on the Rights of Persons with Disabilities, Sixth Session, Concluding observations of the Committee on the Rights of Persons with Disabilities on Spain, 2011, para. 20, CRPD/C/ESP/CO/1; Committee on the Rights of Persons with Disabilities, General comment No. 3 (2016) on women and girls with disabilities, para. 17 (c) and para. 53, CRPD/C/GC/3.

*“Protection against discrimination on all grounds” means that all possible grounds of discrimination and their intersections have to be taken into account. Possible grounds include but are not limited to: race, colour, descent, sex, pregnancy and maternity, civil, family or carer status, gender identity, sexual orientation, **gender identity, gender expression, sex characteristics**, language, religion, political... or characteristics associated with any of these grounds.*

III. Interrelation with other Articles

Comments to paragraph 42- Article 7 “Children with disabilities”

We welcome the reference to intersex children with disabilities in paragraph 42 of the draft. This is in line with the stance of Treaty Bodies, which have identified their concerns about the performance of non-consensual unnecessary surgery on intersex infants.¹⁶ However, it is also important to include here lesbian, gay, transgender and gender non-conforming boys, girls and adolescents.

We suggest the following amendments to the wording of para 42:

*Like women with disabilities, boys, girls, intersex, **trans- and gender non-conforming, lesbian and gay children and adolescents** with disabilities, often experience multiple and intersectional discrimination.*

Comments to paragraphs 63 and 64- Article 17 “Protecting the integrity of the person”

It is crucial to incorporate the systematic and institutionalised intersex genital mutilation, irreversible sex assignment, forced sterilisation, medical display and photography of the genitals, and medical experimentation on intersex individuals into the new General Comment. References of this kind are not alien to the Committee and other Treaty Bodies which have on numerous occasions condemned and made recommendations regarding the non-consented, non-urgent and unnecessary medical or surgical treatment of intersex persons during infancy or childhood.

The Committee on Bioethics of the Council of Europe has noted:

“[No clinically-accepted intersex] protocol has emerged to explain, as a matter of science, how infant surgery will be certain to coincide with the child’s actual identity, sexual interests and desires for bodily appearance.”¹⁷

¹⁶ See: Concluding Observations of Germany, [CEDAW/C/DEU/CO/7-8](#), para 24; Concluding Observations of Ireland, [CEDAW/C/IRL/CO/6-7](#), para 24; Concluding Observations of Switzerland, [CCPR/C/CHE/CO/4](#), para 24; Concluding Observations of Australia, [E/C.12/AUS/CO/5](#), para 49; Concluding Observations of Netherlands, [E/C.12/NLD/CO/6](#), para 46.

¹⁷ The Committee on Bioethics of the Council of Europe, ‘[The Rights of Children in Biomedicine](#)’ 16 January 2017.

Contrary to the opinion that children growing up with atypical genitalia leads to psychological distress, it has been argued that ‘the surgery itself can cause severe and irreversible physical harm and emotional stress.’¹⁸

These practices infringe the individual’s right to bodily autonomy and self-determination and as a result violate the integrity of the person.

Therefore, we suggest the following additions to the Article 17, “Protecting the integrity of the person” section:

“The Committee has expressed concern that practices allowing any form of forced intervention and surgery on intersex persons is a violation to the integrity of the person. State parties should strengthen safeguards and repeal regulations enabling interventions without free, prior and informed consent..”¹⁹

Comments on paragraphs 65-69- Article 19 “Living independently”

This section should address the intersectional, multi-layered challenges persons with disabilities may face. The discrimination that persons with disabilities face in the community should not be considered in a vacuum or using only a single-strand approach as specific intersectional issues may go undetected.

Access to LGBTI services and an individual’s shaping of their identity can be impacted and restricted by parents and carers.²⁰ In turn, LGBTI persons with disabilities do not have the opportunities to explore their sexual orientation or gender identity without judgement or intrusion. A respondent in a research project conducted in Scotland noted, *“Disabled people need to be accepted as sexual beings just as much as anyone else and have a right, like all people, to implement the way they want to live their lives. It is important that people who support them enable them to do so and not just do what carers want.”²¹*

Moreover, LGBTI persons with disabilities can be excluded from either or both communities. Some disabled LGBTI people may be less likely to “come out” about aspects of the SOGIESC that are not visible because of negative experiences and responses to aspects of their identity which are visible. For LGBTI persons with disabilities it could be difficult to be integrated into the community of people with disabilities because of negative attitudes towards LGBTI.

Research conducted in Russia, Germany and the UK highlights that LGBTI persons with disabilities face discrimination both in LGBTI communities and within the community of persons with

¹⁸ Surgeon Generals, Joycelyn Elders, David Satcher and Richard Carmona, ‘[Re-Thinking Genital Surgeries on Intersex Infants](#)’ Palm Center, June 2017.

¹⁹ CRPD, [Concluding Observations of UK](#), 29 August 2017, para 40-41, 1st reporting cycle, CRPD/C/GBR/CO/1.

²⁰ Equality Network, [Out to Access](#), June 2014, 15

²¹ Ibid, 16.

disabilities.²² As was noted by a respondent in research conducted in the UK, “*there are a lot of people I know in the disability movement who daren’t come out in their organization.*”²³

At the same time, LGBTI communities could be reluctant to accept persons with disabilities. Specially, exclusion of persons with disabilities could be based on widespread assumptions of unacceptability of certain types of bodies in gay club spaces or in the gay and lesbian press.²⁴

We agree that ‘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.’ In most cases some kind of assessment is carried out before a government will decide what support an individual is entitled to and can involve the assessor, who may be a complete stranger, asking intrusive questions about personal aspects of a person’s body and how it functions.

This is particularly difficult for trans people who may have dysphoria and/or feel shame about their bodies. Therefore, it is important that State structures involved in providing support or deciding over subsidies that allow independent living to accommodate also the needs of disabled trans people.

We suggest the following amendments to para 66:

*Setting up specific services for particular groups of persons with disabilities in accordance with their requirements, such as services for children, **LGBTI persons**, students, employees with disabilities, is not considered as a discriminatory violation of the Convention but rather as fulfillment of the rights under article 19.*

We suggest the following amendments to para 69:

*State parties need to ensure that all measure adopted to implement Article 19 are gender, **sex, sexual orientation, gender identity/expression, sex characteristic** and age sensitive.*

In addition, the following wording could be included in Article 19 “Living independently”:

State parties must be conscious of the way in which multiple and intersectional discrimination impacts the ability of persons with disabilities to live independently and be included in the community. Measures adopted to implement Article 19 cannot be considered in a one-size-fits all manner; for example, where a LGBTI person with a disability is included in the community of persons with disabilities, they may be discriminated against in the LGBTI community.

²² Queer-Peace, (2017), 7; BRK-Allianz (Eds.) ‘[For Independent Living, Equal Rights, Accessibility and Inclusion!](#)’ (2015) First Civil Society Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Germany, 14; M Brothers, (2003), 51.

²³ M Brothers, (2003), 56.

²⁴ Ibid.

Comments on paragraphs 70-72- Article 24 “Education”

Discrimination on the grounds of SOGIESC and/or disability seriously impedes access to education and can result in LGBTI persons with disabilities receiving a poorer level of education.

LGBTI students with disabilities may be segregated and bullied in schools or abandoned by their families. British research has shown that LGBT disabled students are more likely to experience homophobic, biphobic and transphobic bullying than non-disabled LGBT students (60 percent compared to 43 percent).²⁵

Homophobic bullying can also result in students not being tested for learning difficulties as poor performance is attributed to the effect of the bullying.

In the case of intersex students, research in Australia has shown that 18% of 272 survey respondents failed to complete secondary school compared to an average of 2% in the Australian population as a whole.²⁶

LGBTI persons with disabilities also face very specific and complex barriers, notably a lack of LGBTI awareness among British Sign Language (BSL) and other interpreters. Many interpreters will not know, or be sensitive to, the correct signs for some LGBTI terminology.²⁷

We suggest the following additions to paragraph 70:

*Equality cannot be achieved for students with disabilities as long as they continue to be segregated from mainstream education settings and so all students, including students with disabilities **and those who experience multiple discrimination such as LGBTI persons with disabilities**, must be welcomed and supported to participate in the classroom setting and school on an equal basis with others.*

New heading- Article 25 “Health”

We urge the Committee to address the omission of the Article 25 “Health” in the draft General Comment. The Committee has, in the Concluding Observations for Canada,²⁸ highlighted the lack of special measures in place to ensure persons with disabilities, including trans- and gender-diverse persons with disabilities, have equal access to health services including gender-affirming comprehensive health care.

²⁵ Stonewall, ‘[School Report: The experiences of lesbian, gay, bi and trans young people in Britain’s schools in 2017](#)’ (2017).

²⁶ Jones T, Hart B, Carpenter M, Ansara G, Leonard W, Lucke J, ‘[Intersex: Stories and Statistics from Australia](#)’ (2016, Cambridge UK Open Book Publishers)

²⁷ Equality Network (2014), 13.

²⁸ See: Concluding Observations for Canada, [CRPD/C/CAN/CO/1](#), paras 9,10, 19, 25, 46.

It is a common experience amongst D/deaf and disabled trans people that when coming into contact with a healthcare practitioner they experience either transphobia or ableism, or both types of prejudice. For example, individuals might get physiotherapy from a practitioner who understands disability but lacks any awareness of what it means to be trans. Moreover, for trans people who experience mental health issues it may be mistakenly assumed that this is because of their gender identity.

In addition, D/deaf and disabled trans people will access general healthcare where there is a good chance they will experience prejudice in relation to both aspects of their identities. In TGEU's Trans Health Survey, 50% of the trans respondents reported having delayed seeking general healthcare because of their gender identity- either due to a fear of receiving prejudice from healthcare providers or because of a lack of confidence in healthcare services.²⁹

A quarter of all trans respondents (25.1%) in the Trans Health Study felt discriminated against by a healthcare provider in general healthcare within the 12 months preceding the survey. Respondents belonging to a disability minority group, younger respondents and respondents who have great difficulty making ends meet were more likely to feel discriminated against because of their gender identity or expression by a healthcare provider in general healthcare.³⁰

The justification for medical treatment on intersex individuals often stands at odds with the treatment of transgender individuals. While intersex children are often subject to forced, non-consensual, 'sex-normalising' treatment, consenting transgender individuals are often denied gender-affirming surgeries.

In that regard, it is not medically necessary to perform surgery on intersex children without their consent when the purpose of the intervention is to make their bodies look more typically male and female.³¹

Therefore, we suggest the addition of a subsection to VII Relationship with other specific articles of the Convention, Article 25 "Health"

"Article 25 reaffirms the 'right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.' The Committee is concerned about discrimination in health care of persons with disabilities, particularly where the individual identifies as LGBTI.

LGBTI persons with disabilities are entitled to special measures of protection so as to ensure their right to health on an equal basis with others. Such measures of protection shall include proper and appropriate training for healthcare professionals and service

²⁹ TGEU, 'Overdiagnosed but Under Served' October 2017, <https://tgeu.org/healthcare/>

³⁰ Ibid.

³¹ InterACT, Understanding Intersex and Transgender Communities' <https://interactadvocates.org/wp-content/uploads/2016/05/LavLaw-Trans-and-Intersex-Fact-Sheet.pdf>.

providers, access to gender affirming healthcare for trans individuals and ensuring freedom from non-consensual medical procedures on intersex individuals.”