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Joint Submission to the Committee on Economic, Social and Cultural Rights

General Comment No 20: Non-Discrimination

15 December 2008

Human Rights Law Resource Centre Ltd

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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About PILCH

PILCH is an independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of *pro bono* legal services, and by undertaking law reform, policy work and legal education. In carrying out its mission, PILCH specifically seeks to: address disadvantage and marginalisation in the community; effect structural change to address injustice; foster a strong *pro bono* culture; and, increase the *pro bono* capacity of the legal profession.

PILCH's objectives include to:

- (a) improve access to justice and the legal system for those who are disadvantaged or marginalised;
- (b) identify matters of public interest requiring legal assistance;
- (c) seek redress in matters of public interest for those who are disadvantaged or marginalised;
- (d) refer individuals, community groups and not for profit organisations to lawyers in private practice and to others in ancillary or related fields willing to provide their services without charge;
- (e) support community organisations to pursue the interests of the communities they seek to represent; and
- (f) encourage, foster and support the work and expertise of the legal profession in *pro bono* and/or public interest law.

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CONTENTS

1.	Introduction and Summary	1
1.1	Consultation Process	1
1.2	Overview of this Submission	1
1.3	Relevant Jurisprudence and Authorities	1
1.4	Recommendations	1
2.	Systemic Discrimination	2
2.1	Introduction	2
2.2	Eliminating Systemic Discrimination	2
2.3	Positive and Negative Obligations	3
2.4	Remedies and Accountability	4
3.	Temporary Special Measures	6
3.1	Introduction	6
3.2	The Meaning of Temporary Special Measures	6
3.3	The Obligation to Implement Temporary Special Measures	7
3.4	The Duration of Temporary Special Measures	8
3.5	Structure	9
4.	Permissible Scope of Differential Treatment	10
4.1	Introduction	10
4.2	Recommendations	10
4.3	International Jurisprudence on the Principle of Proportionality	10
4.4	Balancing Competing Rights	13
5.	Prohibited Grounds of Discrimination	14
5.1	Introduction	14
5.2	Multiple Discrimination	14
5.3	Race	15
5.4	Language	16
5.5	Other Status	16
	Annexure: Revised Comment	18

1. Introduction and Summary

1.1 Consultation Process

1. During its 35th session the Committee on Economic, Social and Cultural rights (**Committee**) initiated a review of the Draft General Comment on non-discrimination under the International Covenant on Economic, Social and Cultural Rights (**General Comment**).
2. The Committee has sought comments on the General Comment from interested parties, in particular State parties to the *International Covenant on Economic, Social and Cultural Rights* (**Covenant**), UN specialised agencies and non-governmental organisations.¹

1.2 Overview of this Submission

3. This submission is made by the Human Rights Law Resource Centre (**HRLRC**) and the Public Interest Law Clearing House (**PILCH**) and addresses the following issues considered in the General Comment:
 - (a) systemic discrimination (section 2);
 - (b) temporary special measures (section 3);
 - (c) permissible limitations on the right to non-discrimination (section 4); and
 - (d) prohibited grounds of discrimination (section 5).

1.3 Relevant Jurisprudence and Authorities

4. This submission draws on the jurisprudence of the UN treaty bodies, other international human rights bodies and, to a lesser extent, the jurisprudence of domestic courts.
5. The HRLRC and PILCH consider that the jurisprudence of the Human Rights Committee (**HRC**) is particularly persuasive by virtue of the fact that through article 26 of the ICCPR, the HRC is able to consider non-discrimination in the field of economic, social and cultural rights.²

1.4 Recommendations

6. Consistent with our comments in this submission, we have prepared and set out in an Annexure a proposed revised draft of the General Comment for the Committee's consideration. The highlighted text contained in the proposed revised draft constitutes our recommendations as to changes which could be made to the General Comment.

¹ *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976)

² *Broeks v Netherlands*, No. 172/1984, ICCPR.

2. Systemic Discrimination

2.1 Introduction

7. This section considers the importance of combating the root causes of systemic discrimination to the elimination of all forms of discrimination and the realization of substantive equality. It also considers the positive and negative obligations imposed on States parties under article 2(2), including the obligation to remedy the individual and structural nature of harm caused by discriminatory treatment. This section addresses paragraphs 5 to 7, 11 to 12 and 35 to 36 of the General Comment.
8. The HRLRC and PILCH recommend that the General Comment be amended to:
- (a) address the obligations incumbent on States parties, under article 2(2), to eliminate systemic discrimination;
 - (b) make explicit that the legal obligation of non-discrimination is both negative and positive in nature; and
 - (c) emphasise that States parties are obligated, under article 2(2), to provide effective remedies that address the individual and structural nature of harm caused by discriminatory treatment.

2.2 Eliminating Systemic Discrimination

9. The General Comment confirms that States parties are obligated, under article 2(2), to eliminate de jure and de facto discrimination, and guarantee substantive equality.³ Eliminating direct and indirect forms of discrimination, and improving the de facto position of disadvantaged individuals and groups within the population, is integral to States parties' compliance with article 2(2).
10. In order to achieve substantive equality, States parties must eliminate systemic discrimination, or those forms of discrimination that have become institutionalised in laws, policies, practices and social structures. The prohibition against discrimination not only seeks to offer individual legal protection against discrimination, but also demands that attention be paid to the structural causes of discrimination. Failure by States parties to address systemic discrimination will result in socially pervasive and persistent violations of article 2(2). As the Committee on the Elimination of Discrimination against Women (**CEDAW Committee**) has explained in the context of discrimination against women:

³ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination and Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20/CRP.2 (2008), at para 6.

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and *measures adopted towards a real transformation of opportunities, institutions and systems* so that they are no longer grounded in historically determined male paradigms of power and life patterns.⁴

11. The HRLRC and PILCH respectfully submit that paragraph 6 of the General Comment should be strengthened by making explicit the obligation incumbent on States parties to address systemic discrimination. In our view, this would significantly aid States parties' future compliance with the legal obligation of non-discrimination.

2.3 Positive and Negative Obligations

12. The legal obligation of non-discrimination is both negative and positive in nature.⁵ States parties must ensure that all public authorities and institutions refrain from unlawful discrimination. Yet, in order to comply with their legal obligations under article 2(2), States parties must do more than merely refrain from discriminating against individuals and/or certain groups. They must also take positive steps (e.g. legislative, judicial and administrative measures) to protect and fulfil the right to non-discrimination, and guarantee substantive equality.⁶ It has been explained, for instance, that '[p]ositive obligations of the State under the equality provisions may require it to prevent discrimination by banning it, to extend existing measures to similar groups, to accommodate difference and to prevent discrimination in the private sphere'.⁷
13. Positive intervention by States parties is especially important in cases where certain groups have traditionally been subjected to systemic discrimination, such as in cases where prejudices and stereotypes have been institutionalized in laws, policies or practices. Positive intervention is equally as important in cases where certain groups within the population are disadvantaged with respect to the enjoyment of a particular opportunity or benefit due to an

⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc. A/59/38 (2004), at para 10 [emphasis added].

⁵ See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc. E/CN.12/2005/4 (2005), at paras 18-21; Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para 6-8; Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994), at para 5

⁶ See, e.g., *Yilmaz-Dogan v. The Netherlands*, CERD, Communication No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1988) (CERD); *Nachova v. Bulgaria*, Appl. Nos. 45377/98 and 43579/98, (European Court of Human Rights, Grand Chamber, 2005); *Moldovan v. Romania*, Appl Nos. 41139/98 and 64320/01 (European Court of Human Rights, 2005). See also Bob Hepple, "Positive Obligations to Ensure Equality," (2006) 15 *INTERIGHTS Bulletin* 114.

⁷ Kevin Kitching *et al.*, *Non-Discrimination in International Law: A Handbook Practitioners* (London: INTERIGHTS, 2005), 24.

- existing inequality.⁸ In such cases, State parties are required to adopt temporary special measures or, for example, implement longer term processes, which are designed to achieve systemic reform and ensure future compliance with article 2(2).
14. Making explicit the positive obligations to eliminate discrimination and guarantee equality in respect of economic, social and cultural rights would emphasize the need for States parties to:⁹
- (a) overcome the limitations of a formal approach to equality;
 - (b) recognise diversity and difference;
 - (c) develop coherent and inclusive laws, policies and practices rather than pursuing a fragmented approach to category-based discrimination; and
 - (d) take positive rather than reactive steps to achieve substantive equality.
15. While the HRLRC and PILCH welcome usage of the tripartite framework of state obligations (i.e. the obligation to respect, protect, and fulfil),¹⁰ in the interest of ensuring States parties' full compliance with the legal obligation of non-discrimination, it is essential that the General Comment make explicit the negative and positive obligations that are constitutive of, and essential to compliance with, article 2(2). Accordingly, we respectfully recommend inclusion in the General Comment of specific language that underscores both the negative and positive elements of this legal obligation.

2.4 Remedies and Accountability

16. The HRLRC and PILCH welcome the General Comment's emphasis of the obligation on States parties to remedy the individual and structural nature of harm caused by discriminatory treatment. Paragraph 36 of the General Comment notes that national institutions
- should be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes. The State should ensure that these measures are implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions, to the greatest extent, in ways which facilitate and promote the full protection of economic, social and cultural rights.
17. In this way, the General Comment recognizes that, in order to craft meaningful and effective remedies for violations of the right to non-discrimination, States parties must combine individual relief for past violations (e.g. reparation) with longer term processes intended to

⁸ See generally Human Rights Committee, *General Comment No 3: Implementation at the National Level*, UN Doc HRI/GEN/1/Rev.6 at 125 (1981).

⁹ Hepple, above note 6, at 116.

¹⁰ See Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, above n 3, at para 11.

achieve systemic reform and ensure future compliance with this right (e.g. educational and prevention programmes).¹¹

18. While individual relief has an important role to play, unless the underlying causes of systemic discrimination and inequality are also redressed, States parties will not fully comply with the legal obligation of non-discrimination in article 2(2). The absence of adequate measures to prevent and protect against systemic discrimination may lead to a violation of this provision. Accordingly, the rights to non-discrimination and substantive equality require States parties to eliminate the individual and structural harms of discrimination in the economic, social and cultural context.
19. Taking into account these considerations, the HRLRC and PILCH respectfully submit that the language used in paragraph 35 should be clarified and strengthened in order to make explicit that effective remedies for violations of article 2(2) are those remedies that respond to the individual and structural nature of the harm caused by discriminatory treatment.

¹¹ See, e.g., *A.T. v. Hungary*, CEDAW, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) (CEDAW).

3. Temporary Special Measures

3.1 Introduction

20. Paragraph 9 of the General Comment discusses the temporary special measures required by States parties to comply with the obligations set out in art 2(2). Temporary special measures are also discussed in section IV, in relation to national implementation.
21. Temporary special measures, also known as ‘special measures’ or ‘affirmative action’, are ‘positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life’.¹² Special measures are temporary in nature and should be discontinued once substantive equality is achieved and sustained for a period of time.¹³
22. The HRLRC and PILCH welcome the inclusion of the discussion of temporary special measures in the General Comment. In addition, we respectfully recommend that the General Comment should:
- (a) clarify the meaning of temporary special measures.
 - (b) highlight the obligation to implement temporary special measures; and
 - (c) clarify the duration for which temporary special measures are legitimate.
23. The HRLRC and PILCH also consider that paragraph 9 should be re-located within the General Comment so as to ensure that temporary special measures are not confused with limitations on equality, but are correctly seen as a means by which States parties can achieve substantive equality.

3.2 The Meaning of Temporary Special Measures

24. The General Comment provides an important opportunity for the Committee to clarify the meaning and scope of temporary special measures.
25. Confusion surrounding the definition and use of temporary special measures has led some commentators to call for a thorough discussion of ‘what is meant by discrimination and temporary special measures. There is a poor understanding of discrimination, especially past discrimination, and of how temporary special measures can be used to address

¹² Rebecca Cook in Ineke Boerefijn et al (eds), ‘Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women’, Transnational Publishers, New York, 2003, p.119.

¹³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, above n 4, paras 11 and 20.

discrimination.¹⁴ This is reflected in Concluding Observations of CEDAW on various States parties,¹⁵ which lament their lack of understanding of the purpose of, and need for, temporary special measures.

26. For example, the General Comment might note that the most commonly used types of temporary special measures are training and support, the establishment of targets, preferential treatment and use of quotas.¹⁶ The General Comment might also note that the HRC has previously approved quotas in several of its country reports, such as in relation to India, which now reserves a particular number of seats in elected local bodies for women and members of certain tribes and castes.¹⁷

3.3 The Obligation to Implement Temporary Special Measures

27. Paragraph 9 of the General Comment notes that temporary special measures '*may sometimes be needed* in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others' (emphasis added).
28. The HRLRC and PILCH consider that as soon as a person or group of persons has been identified as disadvantaged, marginalized, or otherwise unable to exercise their rights under the Covenant, then States parties are *obliged* to implement temporary special measures to rectify this inequality. This is because temporary special measures have been recognised in international jurisprudence as 'an integral part of equality'.¹⁸ This approach is consistent with paragraph 6 of the General Comment, which specifies that 'States parties *must* take steps to eliminate de facto discrimination' (emphasis added).
29. In its General Comment No 1, the Committee notes that an initial step towards the realisation of Covenant rights requires States parties to identify disadvantaged sectors of society, and make them the focus of positive state action aimed at securing the full realisation of their rights.¹⁹ Further, in its General Comment No 16, the HRC confirms that States parties may be, and in some cases are, under an obligation to adopt temporary special measures:²⁰

¹⁴ *Report of the Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation* (International Women's Rights Action Watch – Asia Pacific and Australian Human Rights Centre, University of New South Wales Faculty of Law, 2007), available at: <http://www.iwraw-ap.org/aboutus/pdf/EGM%20Report.pdf>.

¹⁵ See e.g. UN Docs CEDAW/C/TKM/CO/2 (2006), CEDAW/C/JAM/CO/5 (2006), CEDAW/C/MEX/CO/6 (2006).

¹⁶ Kitching, above n 7, 105.

¹⁷ See *ibid*; UN Doc. CCPR/C/79/Add.81 (1997), para 10.

¹⁸ Sandra Fredman in Ineke Boerefijn et al (eds), 'Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women', Transnational Publishers, New York, 2003, p.115.

¹⁹ International Women's Rights Action Watch Asia Pacific, 'Addressing Intersectional Discrimination with Temporary Special Measures', Occasional Papers Series, No. 8, p. 21, available at: <http://www.iwraw-ap.org/aboutus/pdf/OPSVIII.pdf>

²⁰ Human Rights Committee, *General Comment No 18, on Non-discrimination*, 37th session, 1989, para 10.

[T]he principle of equality sometimes *requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause, or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State *should* take specific action to correct those conditions. (emphasis added)

30. Other General Recommendations on temporary special measures have stated that temporary special measures are 'part of a necessary strategy by States parties'²¹ and that 'States parties are obliged to adopt and implement temporary special measures... if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of ... substantive equality'.²² The Inter-American Commission on Human Rights has also emphasised that the achievement of equality 'may well *require* the adoption of special measures of affirmative action'²³ (emphasis added).
31. Case law suggests that the HRC considers temporary special measures to be obligatory in the case of particularly vulnerable groups.²⁴ For instance, the HRC required the Czech Republic to take 'immediate and decisive steps to eradicate the segregation of Roma children in the education system'.²⁵
32. The HRLRC and PILCH recommend that the language of paragraph 9 be amended to highlight the obligatory nature of the requirement to implement temporary special measures to ensure substantive equality.

3.4 The Duration of Temporary Special Measures

33. Paragraph 9 of the General Comment concludes that temporary special measures are legitimate so long as they are 'terminated when *de facto* equality is achieved'. The HRLRC and PILCH consider that paragraph 9 should be amended to reflect that temporary special measures are required to continue until *de facto* equality has been achieved *and sustained for a period of time*.
34. It is important that temporary special measures continue in operation until such time as they have entrenched the *de facto* equality of the targeted group or groups, rather than stopping at the moment equality appears to have been achieved. If temporary special measures are withdrawn prior to *de facto* equality being entrenched, there is a risk of reversion back to

²¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No.25*, above at n 4, para 18.

²² *Ibid*, para 24.

²³ Inter-American Commission on Human Rights, Annual Report 1999, Chapter IV, 'Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination', available from: <http://www.cidh.org/women/Chapter6.htm>.

²⁴ See Hepple, above n 6, p.116.

²⁵ UN Doc. CCPR/CO/72/CZE (2001).

inequality. The duration of temporary special measures should be 'determined by their functional results'.²⁶

35. The CEDAW Committee has recognised that temporary special measures may in fact be required to continue for a long period of time.²⁷

3.5 Structure

36. The HRLRC and PILCH consider that the placement of paragraph 9 within the General Comment should be altered. Currently, temporary special measures are discussed at paragraph 9, which is located in between two paragraphs dealing with limitations. Temporary special measures are not a limitation on the right to non-discrimination; they are a means by which States parties must implement substantive equality. The General Comment should make this distinction clear. To achieve this, the HRLRC and PILCH suggest that the paragraph dealing with temporary special measures should be re-located so that it falls immediately after direct and indirect discrimination, and precedes the paragraph on the permissible scope of differential treatment.

²⁶ Hanna Beate Schopp-Schilling in Ineke Boerefijn et al (eds), 'Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women', Transnational Publishers, New York, 2003, p.29.

²⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No 25*, above n 4, para 20.

4. Permissible Scope of Differential Treatment

4.1 Introduction

37. Paragraphs 8 and 10 of the General Comment address the permissible scope of differential treatment under the Covenant.²⁸ The scope of permissible limitations has a significant impact on the scope of the right to non-discrimination. Without stringent controls on how the right to non-discrimination can be lawfully restricted, there is a risk that the right will be eroded and rendered ineffectual and illusory.
38. As a result, the HRLRC and PILCH consider that the discussion of permissible limitations in the General Comment should be strengthened to better protect the right to non-discrimination.

4.2 Recommendations

39. The HRLRC and PILCH welcome paragraphs 8 and 10 of the General Comment, which indicate that distinctions, exclusions, restrictions or preferences based on prohibited grounds will only be permitted if the 'criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant'.²⁹
40. However, the HRLRC and PILCH respectfully submit that these paragraphs should also emphasise that:
- (a) discriminatory treatment is only permissible if it is proportionate to the aim that it seeks to achieve (in addition to being reasonable, objective and pursuing a legitimate aim); and
 - (b) there is no hierarchy of rights and that nothing in the Covenant can be used to justify the destruction of the right to non-discrimination or to unreasonably limit that right.

4.3 International Jurisprudence on the Principle of Proportionality

41. There is substantial and settled international jurisprudence in support of the position that for a limitation on the right to non-discrimination to be considered reasonable and objective, the limitation must both pursue a legitimate aim *and* be proportionate to that aim. This section outlines the approach taken by other UN human rights bodies, the European Court of Human Rights and the Inter-American Court of Human Rights regarding the principle of proportionality.

²⁸ Paragraph 9 deals with temporary special measures, however as discussed above, the HRLRC and PILCH consider that this paragraph should precede any discussion about limitations.

²⁹ Committee on Economic Social and Cultural Rights, *General Comment No 20*, above n 3, para 10.

42. The HRLRC and PILCH submit that the General Comment should be compatible with this international jurisprudence, and thus clarify that any limitation on the right to non-discrimination must satisfy the element of proportionality. Such an approach is also harmonious with the current phrasing of the General Comment, which requires a 'reasonable and objective' justification for any limitation, as this phrase forms the basis of the principle of proportionality in international jurisprudence.

(a) UN System

43. At present, paragraph 10 of the General Comment reflects paragraph 13 of the HRC's General Comment on Non-Discrimination under the ICCPR³⁰ ('**HRC General Comment No 18**'). However, since the adoption of HRC General Comment No 18 the HRC has expanded its jurisprudence on permissible limitations.
44. In General Comment No 31, the HRC states that, where limitations or restrictions are made on rights and freedoms protected under the *ICCPR*:³¹

States must demonstrate their necessity and *only take such measures as are proportionate to the pursuance of legitimate aims* in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right (emphasis added).

45. The requirement of proportionality in General Comment No 31 reflects jurisprudential developments which have taken place since the adoption of HRC General Comment 18 in 1989 regarding permissible limitations on the right to non-discrimination. For example, in the decision of *Toonen v Australia*,³² the HRC held that the criminalization of homosexual practices in Tasmania was not justified on public health grounds (as argued by the State party) as the laws were not a 'a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV'.³³ As a result, the HRC held that the laws violated the author's right to privacy under article 17 and the right to freedom from discrimination on the ground of sex under article 2(1) of the *ICCPR*.³⁴
46. More recently, the Committee's General Comment No 14 on the right to the highest attainable standard of health, published in 2003, provides that, in line with article 5.1, limitations on rights protected by the Covenant must be proportional.³⁵ Article 5(1) provides that nothing in the

³⁰ Human Rights Committee, *General Comment No 18*, above n 5.

³¹ Human Rights Committee, *General Comment No 31*, above n 5, para 6.

³² Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

³³ *Ibid*, para 8.5.

³⁴ The State party in *Toonen v Australia* accepted that the test for determining whether the law was discriminatory involved assessing 'whether there are reasonable and objective criteria for the distinction; and whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant': *Ibid*, para 6.10.

³⁵ Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 85 (2003).

Covenant may be interpreted as implying a right to destroy a Covenant right or freedom or to limit a right or freedom to a greater extent than provided for in the Covenant.

47. The Committee on the Elimination of Racial Discrimination also requires that any limitations on the right to non-discrimination be proportionate to the aim sought to be achieved by the limitation.³⁶

(b) European System

48. The case-law of the European Court of Human Rights in this area is well-established and provides that discriminatory treatment will only have an 'objective and reasonable justification' if the difference in treatment both pursues a legitimate aim *and* has a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.³⁷

(c) Inter-American System

49. Similarly, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have held that differential treatment must be justified by reasonable and objective criteria and that '[a] distinction based on reasonable and objective criteria (1) pursues a legitimate aim and (2) employs means which are proportional to the end sought'.³⁸

(d) Scholarship

50. Various international human rights law commentators, including Sepulveda and Nowak, also confirm that a distinction will not be compatible with the principle of equality unless it also has 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.³⁹
51. The HRLRC and PILCH respectfully submit that the General Comment should be amended to reflect the emphasis on proportionality which 'is echoed through the jurisprudence of many jurisdictions'.⁴⁰

³⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation No 30: Discrimination against Non-citizens*, UN Doc CERD/C/64/Misc.11/rev.3 (2004) at para 4.

³⁷ *Case "Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium (No 2)*, (1968) 1 EHRR 252, 31. See also *Marckx v Belgium*, Application No 6833/74, Judgment of 13 June 1979, para 33; *Rasmussen v Denmark*, Application no. 8777/79, 28/11/1984, para 38; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 42, *Darby v Sweden* (1990) 13 EHRR 774, para 31; *Karlheinz Schmidt v German*, Application no. 13580/88, Judgment of 18 July 1994, para 24; *Van Raalte v the Netherlands*, Application no. 20060/92, Judgment of 21/02/1997, para 39; *Petrovic v Austria*, (1998) 33 EHRR 14, para 30.

³⁸ *Maria Eugenia Morales De Sierra v Guatemala*, Case 11.625, Report N° 28/98, IACrHR, OEA/Ser.L/V/II.95 Doc. 7 rev.at 144 (1997), para 31; *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, IACrHR (1984), para 57.

³⁹ M Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), 384. See also Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005), 47; M Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development* (1998), 163.

⁴⁰ Kitching, above n 7, para 128.

4.4 Balancing Competing Rights

52. The prioritisation of conflicting rights can present a challenge for compliance with Article 2(2). For example, a place of worship that excludes women engages both the right to non-discrimination on the basis of sex as well as the right to freedom of religion (among other rights). The HRLRC and PILCH consider it important that the General Comment reiterate article 5 of the Covenant⁴¹ and clarify that there is no hierarchy of importance of rights and that nothing in the Covenant can be used to justify the destruction of the right to non-discrimination or to unreasonably limit that right. Where the human rights of individuals are in conflict and one person's right to non-discrimination must be limited in order to protect the right or freedom of another person, this should only occur if the limitation is objective, reasonable, in pursuance of a legitimate aim and proportionate to that aim.

⁴¹ Article 5 of the Covenant provides that: (1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant; and (2) No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

5. Prohibited Grounds of Discrimination

5.1 Introduction

53. This section considers paragraphs 13 to 31 of the General Comment on grounds of discrimination. Overall, the HRLRC and PILCH consider that the General Comment provides a clear and helpful overview of the prohibited grounds of discrimination.
54. This section includes recommendations concerning multiple discrimination and discrimination on the basis of language, race and 'other status'.

5.2 Multiple Discrimination

55. The HRLRC and PILCH commend the Committee on its recognition of multiple discrimination and the corresponding requirement that States parties address this significant form of discrimination in 'law, policy and programmes'.⁴²
56. Multiple discrimination, as a distinct form of discrimination with unique impacts, is unlikely to be adequately addressed by approaches that recognise and focus on a one ground of discrimination at a time.⁴³ The HRLRC and PILCH therefore consider that it is vital that international and domestic legal regimes are able to recognise and respond to multiple discrimination.
57. International bodies and tribunals are increasingly recognising that it is necessary to acknowledging multiple, simultaneous violations. The *Convention on the Elimination of All Forms of Discrimination against Women* addresses compounded (multiple) discrimination and the CEDAW Committee has stated that:⁴⁴

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.

⁴² Committee on Economic, Social and Cultural Rights, *General Comment No 20*, above n3, para 15.

⁴³ See, generally, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, Discussion Paper, Ontario Human Rights Commission, available at: http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtns/pdf

⁴⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No 25*, above n 22, para 12.

58. The HRC has also acknowledged multiple discrimination stating that:⁴⁵

Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

59. The *Convention of the Rights of Persons with Disabilities* considers women with disabilities and children with disabilities in articles 6 and 7 respectively.

60. The Committee on the Elimination of Racial Discrimination also considered this issue in its General Comment on the gender-related dimensions of racial discrimination, stating:⁴⁶

Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

61. The issue of multiple discrimination also received particular attention at the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in 2001 in South Africa.

62. In recognition of the need for States parties to adequately recognise and remedy multiple discrimination, the HRLRC and PILCH recommend that the Committee emphasise that multiple discrimination is more than an accumulation of separate instances of discrimination, but is rather a unique and distinct form of discrimination that needs to be considered and remedied as such.

5.3 Race

63. The HRLRC and PILCH welcome the Committee's rejection of 'theories and practices that determine the existence of separate human races'. In the interest of clarity, it would be helpful if the Committee provided further explanation on the distinction between 'race' and 'racial discrimination' identified in paragraph 16 of the General Comment.

⁴⁵ Human Rights Committee, *General Comment No 28: Equality of Rights Between Men and Women*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003), para 30.

⁴⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation 25: Gender Related Dimensions of Racial Discrimination* (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000).

5.4 Language

64. The final sentence in paragraph 18 has been sectioned in square brackets. The sentence reads '[e]qually, access to basic health services, good and facilities should not be prohibited due to lack of understanding of the official language(s) of States parties'.
65. The HRLRC and PILCH emphasises that article 2(2) applies to all the rights in the Covenant, including the right to health. The Committee has already recognised States parties' obligation to eliminate discrimination in area of health care in its General Comment No 14 which states:

By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of ... language... which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.

66. The proposed language contained in paragraph 18 of the General Comment provides a useful substance to the principle already confirmed in General Comment No 14 and the HRLRC and PILCH recommend that it be retained in the final version of the General Comment.

5.5 Other Status

67. The HRLRC and PILCH support the inclusion of each of the examples contained in the General Comment's section on 'other status' and notes the ample jurisprudential support for the express inclusion of disability;⁴⁷ age;⁴⁸ nationality;⁴⁹ marital and family status;⁵⁰ sexual orientation;⁵¹ health status;⁵² place of residence;⁵³ and civil, cultural, economic, political or social status.⁵⁴
68. In particular, the HRLRC and PILCH commend the Committee on their articulation of States parties obligation to ensure equality for 'people living in poverty or being homeless'. On this issue the HRLRC and PILCH endorses the submissions made to the Committee by the Homeless Persons' Legal Clinic.

⁴⁷ Committee on Economic, Cultural and Social Rights, *General Comment No. 5: Persons with Disabilities* (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995); *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. Doc. A/61/49 (2006) (entered into force 3 May, 2008).

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons* (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996), U.N. Doc. HRI/GEN/1/Rev.6 at 34 (2003); *Love v Australia* (No. 983/2001, ICCPR)

⁴⁹ *Gueye v France* (855/99) Human Rights Committee.

⁵⁰ *Sahin v Germany* (No. 30943/96, 11/10/2001) European Court of Human Rights

⁵¹ *Young v Australia* (No. 941/2000, ICCPR).

⁵² Resolution 1995/21 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

⁵³ *Lindgren et al v Sweden* (298-9/88) Human Rights Committee.

⁵⁴ *Cavalcanti Araujo-Jongens v Netherlands* (418/90).

69. The HRLRC and PILCH respectfully submit that paragraph 27 of the General Comment be amended to include reference to 'all relationship regarded as family relationships under the legislation and practice of particular States'. This is important given that many jurisdictions afford legal recognition to certain relationships regardless of whether or not the couple is married.⁵⁵
70. More generally, the HRLRC and PILCH support the Committee's recognition that 'a flexible approach to the ground of 'other status' is essential since the nature of differential treatment in the exercise of Covenant rights varies according to context and evolves over time.'⁵⁶ The HRLRC and PILCH consider that it would be helpful if the Committee would provide further clarification on the breadth of attributes that may fall under the umbrella of 'other status' in addition to those expressly mentioned.
71. According to Nowak, '[i]n the final analysis, every conceivable distinction that cannot be objectively justified constitutes discrimination ... a determination can only be made on a case by case basis and is ultimately dependent on value judgements and historical experiences.'⁵⁷
72. The HRLRC and PILCH recommends that the Committee include in the General Comment a statement regarding the general principles upon which it relies when determining what grounds of discrimination may fall under 'other status'. This can be done alongside an acknowledgement that the Committee will make determinations on a case by case basis. Wording may be drawn from the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* which prohibits discrimination on the basis of 'any other ground causes or perpetuates systemic disadvantage; undermines human freedom; or adversely affects the equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.'⁵⁸

⁵⁵ Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), U.N. Doc. HRI/GEN/1/Rev.6 at 142 (2003), para 5; Human Rights Committee, *General Comment No 19: Article 23* (Thirty-ninth session, 1990), U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003), para 2.

⁵⁶ Committee on Economic, Social and Cultural Rights, *General Comment No 20*, above n 3, para 13.

⁵⁷ Nowak, above n 39, 47.

⁵⁸ *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*, s.1(1)(xxii)(b)

Annexure: Revised Comment

The proposed revised text of the draft Comment is set out in a separate document following this cover sheet.