

## Eilinoir Flynn Panel 4

Thank you Mr/Ms Moderator for your kind introduction, and also to the Secretariat of the Bureau for the invitation to present to you today. Since my experience comes from disability rights work, I will use my time today to address the issue of discrimination from this perspective – with a view to informing further discussion on how these lessons could be applied to the rights of older people, acknowledging of course that there are important differences between the two communities, but that both seek access to the same universal human rights.

Prior to the adoption of the CRPD, persons with disabilities, as is currently the case with older persons, were covered by universal international human rights norms, including the rights set out in the UDHR, ICCPR and ICESCR. Protection against discrimination was guaranteed to both older persons and persons with disabilities in these instruments under the category of ‘other status.’ Recognition of the need for explicit protection for the human rights of these groups emerged in the mid-90s, when the CESCR produced 2 GCs, no. 5 on the escr of pwd in 1994 and no. 6 on the rights of older persons a year later in 1995.

GC 5 makes some important points which are useful to consider in the context of ageing. First, it recognized the importance of articulating explicitly the application of the prohibition on discrimination to persons with disabilities, rather than leaving this as something to be inferred from the text. It provides a strong obligation on States to secure escr rights, by interpreting the term ‘progressive realisation’ to mean ‘to the maximum of available resources.’ An expansive account of disability-based discrimination is also provided: ‘any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.’ This was the first time that the term reasonable accommodation had been used in IHRL in this way – and it is important to note that the absence of re also recommended that ‘In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.’

Despite this great advance, and the fact that new treaties drafter after the ICESCR and ICCPR had more explicitly recognized the rights of persons with disabilities (e.g. Art 23 CRC), this did not lead to more consistent protection of the human rights of persons with disabilities. A report commissioned by OHCHR and authored by Quinn and Degener in 2002, 8 years after the publication of GC 5, found that less than half of the State Party reports to the CESCR examined by the authors contained any reference to measures taken to improve the inclusion and participation of persons with disabilities. The term ‘rights’ was rarely used in

State Reports to the Committee in the context of disability, and inappropriate, outdated language was often used to describe persons with disabilities. In addition, the Committee rarely included questions about persons with disabilities in the list of issues, or in concluding observations to State Parties.

Without a strong statement in the text of a core treaty to prohibit disability-based discrimination, many harmful human rights violations continued to occur. In the context of work, for example, which is the thematic issue for this panel, many persons with disabilities continued to be regarded as incapable of working on the open labour market, and were segregated into sheltered workshops, where they did not have access to basic employee rights, fair wages, or adequate working conditions. Others were openly discriminated against when they did work on the open labour market, and their requests for reasonable accommodation in the workplace – such as flexible working hours, physically accessible workplaces, or assistive technology, were ignored, or refused.

Even after countries introduced anti-discrimination legislation, (many did so inspired by the ADA in 1990), the impact of this law beyond the employment sphere was often limited. Persons with disabilities continued to be discriminated against in many contexts, with laws which denied them the right to marry and found a family, the right to vote, and laws which denied their legal capacity – failing to recognise that persons with disabilities should be treated as equal citizens before the law, with legal agency and legal standing.

This experience reflects a broader trend identified in Quinn and Degener's report, which examined the protection of the rights of persons with disabilities under 6 different UN treaties, and concluded that the 'invisibility' and lack of explicit reference to persons with disabilities in most of these international human rights instruments had a detrimental effect on efforts to ensure consistent protection against discrimination for this group. A number of possible options were outlined by the authors to remedy this issue, including making better use of the existing treaties and monitoring mechanisms, maximizing civil society involvement in the UN system, and strengthening NHRIs. However, ultimately the recommendation followed was the option to draft a treaty specifically designed to recognise explicitly the rights of persons with disabilities.

The CRPD has been a key turning point for persons with disabilities in the battle against discrimination. Not just the text of the Convention, which overcomes the invisibility of pwd in IHRL instruments, but the whole process of negotiating and adopting the treaty, which has been described by many, including Kayess and French, as the most inclusive, empowering and participatory process, involving the highest number of civil society organizations ever in the process of treaty development.

The CRPD includes of course, a prohibition on discrimination in its text – and although the definition provided is very similar to what was set out in GC 5, this is now part of the text of a core HR instrument, rather than an interpretation of an article provided by a treaty monitoring body, and this has greatly increased States Parties compliance with the discrimination provision and due to their reporting to the CRPD Committee. In addition, the treaty contains an innovative

provision regarding domestic monitoring and focal points, which I do not have time to discuss in detail today, but which has been instrumental in keeping the Convention a live issue at domestic level in member states, and helping to improve compliance with its provisions at grassroots level.

The provision of an explicit prohibition on disability-based discrimination in the text of the CRPD has been key to overcoming some of the insidious forms of discrimination which continued to be perpetrated against persons with disabilities, such as the examples I provided earlier, in the context of work, and other escr rights, but also, in the context of c&p rights, such as the right to legal capacity. This is not to suggest that persons with disabilities now experience no human rights violations since the adoption of the CRPD, but rather that the entry into force of this new Convention has brought these rights violations to light, acknowledged that the concerns of pwd are in fact, human rights issues, and provided a vital advocacy tool for domestic actors seeking reform.

To make an analogy with the ageing context, older persons too have had to contend that the prohibition of discrimination on grounds of 'any other status' applies to them – in the same way that persons with disabilities did prior to the adoption of the CRPD. This reliance on inclusion under the generic term of 'other status' has not, as we see from the experience of persons with disabilities, yielded positive results. The rights of OP have also been mentioned in a number of GCs, including GC 6 CDESCR, as I discussed previously. However, even when comparing GC 5 and GC 6, the comment on OP seems to me somewhat weaker, stating as follows: 'it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited.' Given this context, it is perhaps even more important to have an explicit prohibition of discrimination against older persons, and a concrete articulation of what this means which can be applied across the board to all human rights articulated in the core UN treaties.

The way in which this was done in the CRPD may prove to be a helpful example, as this Convention did not create new rights, but merely provided clarity on the application of existing rights to persons with disabilities. In the context of discrimination, this meant recognizing that failure to provide reasonable accommodation itself constituted discrimination. Some aspects of the application of the prohibition on discrimination to older people could include, in the context of work, for example, the removal of mandatory retirement ages, among other issues. I will end my remarks there due to time, but am happy to provide further insight during the question and answer session, if available.