

15 February 2013

To: United Nations Committee on the Rights of Persons with disabilities
crpd@ohchr.org

Women Enabled, Inc. writes with respect to the urgent need for the inclusion of issues of concern to women and girls with disabilities with respect to the urgent issues of violence against women and access to justice, as the Committee on the Rights of Persons with Disabilities (CRPD Committee) embarks on a General Discussion on the rights of women and girls with disabilities at its 7th Session in April 2013. Despite the implications for more than 500 million women with disabilities and their families, issues concerning women with disabilities receive only limited, or even invisible, coverage in efforts to amend and modify laws, policies and practices on access to justice for women. As the CRPD Committee embarks on the elaboration of a General Recommendation on the Rights of women with disabilities, we encourage a focus on violence against women with disabilities and access to Justice, thereby contributing to a more inclusive, effective and vibrant discussion for all women by addressing issues concerning access to justice for women with disabilities. Coincidentally, the Committee on the Elimination of Discrimination Against Women just this week has held a General Discussion on Access to Justice for Women.

CEDAW and CRPD. Two crucial elements of human rights, legal capacity and access to justice, are incorporated in both the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). In the CRPD, Articles 12 and 13 address these issues, and in the CEDAW, Article 15 addresses equality before the law. The CRPD draws heavily on the approach taken in the CEDAW and rejects the narrower approach taken in the International Covenant on Civil and Political Rights (ICCPR). Interpretations of ICCPR Article 16 make it abundantly clear that this provision only contemplates one aspect of this right—that every person is a subject, and not an object, of the law. This provision does not guarantee that a person has the legal capacity to act. On the other hand, the approach used in the CRPD utilizes wording similar to that used in paragraph two of CEDAW Article 15, which focuses on ensuring women’s legal autonomy and self-determination. It confirms women’s equality with men before the law and also requires States to guarantee equal rights in areas of civil law where women have traditionally suffered discrimination. Comparably, Articles 3 and 5 of the CRPD emphasize and assure the legal rights of persons with disabilities and of men and women. Article 15 of the CEDAW guarantees women equal “legal capacity” with men and the same opportunities to “exercise that capacity.” Each individual is presumed to be able to make life choices and to act independently, clearly incorporating both concepts of “capacity to be a person before the law” and “legal capacity to act.”

Drawing on the core principle of “Nothing About Us Without Us,” an intrinsic element of the drafting of the CRPD, women with disabilities should be part of the processes of determining viable policy on access to justice for women. We discuss below the urgent need for the inclusion of a discussion of access to justice for women with disabilities in the elaboration of this General Recommendation; provide some general discussion of the situation of women with disabilities globally; then focus on some specific issues concerning access to justice for women with disabilities; and explore the international legal basis for the requirement of inclusion of women with disabilities in this work and processes. Greater detail on these issues can be found in the Ortoleva and Lewis paper referenced below.

Rationale for the Inclusion of Women with Disabilities in Legal Reform Efforts. Women with disabilities are a part of all societies. They need to be an active part of the advancement of the human rights of all and shaping how societies affect their lives. The justifications for inclusion are numerous. Representation and fairness are the most obvious: women account for more than half of the world’s population. There are approximately one billion persons with disabilities, 15 percent of the global population. The World Health Organization (WHO) and the World Bank’s (WB) 9 June 2011 ground-breaking report entitled “World Report on Disability,” notes a dramatic increase in estimates of the number of persons with disabilities worldwide, stating: About 15% of the world’s population lives with some form of disability. There are significant differences in the prevalence of disability between men and women in both developing and more developed countries: male disability prevalence rate is 12% and female disability prevalence rate is 19.2%. Although significant progress has been made in bringing awareness of and attention to the issues of women in human rights treaties, and in intergovernmental outcomes, the United Nations has recognized that more attention needs to be directed to the situation of specific groups of women, including women with disabilities.

More than 80% of women with disabilities in rural areas of many countries have no independent means of livelihood, and are thus totally dependent on others for their very existence. The myriad of issues that confront women with disabilities are significantly more pronounced than for women in general, due to inaccessible environments and lack of services, lack of information, awareness, education, income, and contact resulting in extreme isolation and invisibility. Given how greatly women with disabilities are affected by the double discrimination and gender and disability stereotyping they face because of both gender and disability, they deserve to be heard. The 2011 Report of the United Nations Special Rapporteur on Violence Against Women focused on the multiple and intersecting forms of discrimination that contribute to and exacerbate discrimination and violence against women with disabilities, noting that factors such as ability, age, access to resources, race/ethnicity, language, religion, sexual orientation and class

can exacerbate the discrimination and violence women with disabilities experience.

Legal and Policy Basis for Inclusion. The recommendation for the inclusion of issues of concern to women with disabilities in legal reform work focused on addressing access to justice for women is drawn from and is consistent with the gender-sensitive, disability-inclusive approaches outlined in the United Nations Charter, and consistent with the provisions of the CRPD, especially Article 6 on Women with Disabilities, the CEDAW, especially Article 14 and the Convention on the Rights of the Child (CRC), as well as the 1995 Beijing Declaration and the 2000 Special Session of the United Nations General Assembly, reviewing the progress of the outcomes of the Fourth World Conference on Women.

The United Nations General Assembly has issued a series of resolutions, A/65/186 and A/64/131, calling for the mainstreaming of persons with disabilities in development, and specifically calls on Governments to promote gender equality and empowerment of women with disabilities.

Violence Against Women with Disabilities and the Justice System. Violence against women with disabilities occurs in various spheres – in the home, and in the community, and is perpetrated and/or condoned by the State and private actors within public and private institutions and in the transnational sphere. The forms of violence to which women with disabilities are subjected are varied; physical, psychological, sexual or financial violence, neglect, entrapment, degradation, and forced sterilization and psychiatric treatment. Women with disabilities are twice or three times as likely to experience domestic and other forms of gender-based and sexual violence as non-disabled women, and are likely to experience abuse over a longer period and to suffer more severe injuries as a result of the violence. Their abuser may also be their caregiver, someone that the individual is reliant on for personal care or mobility, frequently they do not report the violence, often lack access to legal protection, law enforcement officials are ill-equipped to address the violence and they are not privy to the same information available to non-disabled women. Sexual and gender-based violence contributes to the incidence of disability among women. At this juncture, it is important to note that the literature on violence against women frequently uses the term “domestic violence” as a “catch-all” term for this violence. However, the use of this term can have devastating effects on women with disabilities because it ignores several important aspects of the lives of women with disabilities – it does not cover those living in institutions or residential care facilities, those living with others who are not family members but with whom they live for care or support, Those who have people come to their home regularly, whether paid or unpaid, for care and support, etc. Incorporating this understanding into the terminology of violence against women recognizes the diversity and different life experiences and situations of women’s lives.

Some other issues which exacerbate violence against women with disabilities, include the following: women with disabilities are the poorest among the poor because of discriminatory employment practices; they are denied educational opportunities and have shockingly low literacy rates because education was not provided for girls, or school facilities were not accessible to them and programs were not designed to meet their needs; they are unable to travel from place to place because of the dangers of violence, which cannot be mitigated because they cannot afford assistive devices like wheelchairs or access transportation systems; they are often the last in the family to receive food because they are viewed as useless, and because they may be too indigent to afford food; they are more likely than men with disabilities or women without disabilities to experience violence and other forms of discrimination, and are unaware of helpful services, or such services are not accessible to them; they are not able to receive health care services, including sexual and reproductive health care services, because these services are not in accessible locations (due to the fact that the availability of these services are communicated in ways that are not accessible to them), and because health care providers cannot communicate with them or believe they are asexual; they are unable to access the justice system, especially for sexual violence cases, either because the police and judges cannot communicate with them or do not find their testimony credible, because officials in the justice system do not have the expertise to address their legal concerns, because they have no information on how to access the justice system because the buildings of the justice system are inaccessible to them.

Role of the Justice System. In various ways the justice system itself (and therefore the State) perpetrates and/or condones the violence experienced by women with disabilities. Justice systems, and the law itself may be both a source of liberation and a source of oppression, may remedy inequality and discrimination and perpetuate inequality and discrimination. This is the character of the interaction of women with disabilities with the justice system. Many of the factors in the above section on violence against women relate to the denials of access to justice women with disabilities experience. Some of the ways in which the legal system denies access to justice to women with disabilities are outlined below.

Physical Access to the Institutions of the Justice System. One of the most obvious and egregious barriers to access to justice for persons with disabilities are the physical barriers to courthouses and other institutions of the justice system. Inaccessibility of courthouses includes inaccessible witness chairs and jury boxes, lack of technology to enable persons with disabilities to understand the proceedings, lack of wheelchair lifts, and other elements of inaccessible courthouse design. Another barrier is the failure to provide reasonable accommodations such as sign language interpreters, materials in alternative formats for women who are blind, and use simplified language for women with learning disabilities.

CRPD Article 9 requires accessibility, including in the justice system. Further, domestic courts have addressed these issues. In 2004, the U.S. Supreme Court addressed physical access to the courthouse in *Tennessee v. Lane*. Citizens with disabilities who could not access the upper floors in state courthouses sued the state, arguing that Tennessee was denying them public services because of their disabilities under Title II of the Americans with Disabilities Act (ADA), under which no one can be denied access to public services due to his or her disability. Thereafter, the U.S. Access Board Courthouse Access Advisory Committee issued a report in 2006 which illustrated how the design of courthouses impeded the physical access to justice for people with disabilities. Additionally, In September 2004, the South African Equality Court reached a final settlement in which the government acknowledged that they had failed to provide proper wheelchair access and that this was a form of unfair discrimination against the complainant and other people with similar accessibility needs. Obviously, if women with

disabilities cannot enter the institutions of the justice system, they cannot vindicate their rights.

Women with Disabilities as Witnesses. The justice system often fails to see women with disabilities as competent witnesses. Abuse cases involving a complainant with learning disabilities rarely go to court and the complainant frequently does not serve as sole witness against the accused. Not only are women with disabilities excluded as witnesses because they may have difficulty communicating with the police, but stereotypes about women with disabilities operate to exclude or discount their testimony. The sexual nature of certain crimes and the general failure for society to see people with disabilities as sexual beings may result in judges and juries discounting the witnesses' testimony in sexual assault cases. This tendency to essentially "infantilize" women with mental disabilities contributes to discounting their testimony. On the other hand, society may view some women with mental disabilities as hypersexual and lacking self-control, leading to the disregard of their complaints.

Law enforcement and legal agencies may see women with disabilities who require assistive communication or accommodations, or women with psycho-social and intellectual disabilities, as lacking credibility. Some judges may require more corroborating evidence of an assault in cases involving women with disabilities than in other cases, and evidence about prior mental health treatment may be used to discredit their testimony. Women with cognitive disabilities may have more difficulty with long term memory or remembering the sequence of events, which may make them appear less credible. Overly paternalistic attitudes towards women with disabilities may cause various players in the judicial system to view them as too fragile to withstand the rigors of examination. Exclusion is particularly problematic in gender-based violence and sexual assault cases, where testimony of parties and credibility of witnesses are exceptionally important, placing them at even greater risk, because perpetrators may be more likely to attack them because they know that their complaints may be taken less seriously. If prior complaints have been dismissed women with disabilities are less likely to report abuse in the future, perpetuating the violence.

Access to Attorneys who Understand the Needs of Women with Disabilities. Women with disabilities face similar problems with legal representation and protection as others who are economically disadvantaged (Availability, affordability, and adequacy). However both gender and disability stereotyping further exacerbate the disadvantages women with disabilities experience. They must rely on the increasingly scarce free or low-cost legal services and therefore have less choice in who represents them, and generally have less understanding of and access to the legal system. Providing free or low cost attorneys to women with disabilities may be necessary to ensure that they can vindicate their rights. Attorneys who do not have much experience interacting with people with disabilities may not fully understand their needs and may not be aware of appropriate "disability etiquette". Few law schools require or provide training in working with clients with disabilities or any courses on disability law generally. Lawyers may not always provide information in Braille or other accessible forms of communication or provide sign language interpretation. Additionally, there are few members of the legal profession who are persons with disabilities and even fewer women with disabilities. Research of Carrie Basas notes that many women with disabilities indicated that the combination of being a woman and having a disability served to further compound the view that women are the "weaker sex" and therefore put them at a double disadvantage. As a result, many feel pressure to "cover up" the fact they have a disability in part to avoid this double stigma. For women with visible disabilities, they may also feel like they have to perform much better than their colleagues to be viewed as equally competent. Until the legal field becomes more inclusive and accepting of its own members with disabilities, clients with disabilities will continue to face a lack of understanding and barriers in accessing legal assistance.

Access to Information on the Justice System. Information on human rights, the legal system, and how to vindicate those rights are rarely available to women with disabilities in accessible formats, in user-friendly formats nor in plain language.

Women with Disabilities Denied the Right to Serve as Jurors. The responsibility to serve on juries is a fundamental right in most countries. When women with disabilities are denied this right they are denied the opportunity to serve their communities. Although some of the legal barriers to jury service have been removed in some countries, other barriers still exist. When barriers to jury service for persons with disabilities are combined with the barriers imposed on women generally, this deprives women with disabilities with the opportunity for their legal cases to be heard by a jury of their peers. Natasha Azava's article asserts: "People with disabilities have long been denied the right to be on a jury." Until recently, in the United States, state laws describing jury qualifications "entirely excluded people with disabilities." Barriers such as: "inaccessible courtrooms, difficulty in obtaining transportation to court, and a lack of reasonable accommodations such as sign interpreters or assistive communication devices," made participation in jury service impractical.

Although outright prohibitions are now illegal in the United States, often a peremptory challenge is utilized, that is, "one exercised without a reason stated, without inquiry and without being subject to the court's control." "... [P]arties can remove a potential juror even though she qualifies to serve under the statute." She further notes that peremptory challenges based on disability are still constitutional in the United States, and the use of such challenges is based on ignorance and unwillingness to evaluate the individual situation.

Forced Sterilization. There is a long and disturbing history of socially- and legally- sanctioned forced and non-consensual sterilization of women with disabilities. The CRPD identifies coerced sterilization as a violation of human rights and states that persons with disabilities have the right to retain fertility on an equal basis with others. Guidelines from the International Federation of Gynecology and Obstetrics state that only women themselves can give ethically valid consent to their own sterilization and sterilization cannot be made a condition of access to medical care or other benefit.

Despite legal prohibitions in some states, there are many cases of involuntary sterilization used to restrict the fertility of some persons with disabilities, particularly those with intellectual disabilities. Other States do not have laws prohibiting involuntary sterilization and this has been challenged before international tribunals. Sterilization also has been used as a technique for menstrual management, but it is rarely the only option. Involuntary sterilization is contrary to international human rights standards. Women with disabilities must have access to voluntary sterilization on an equal basis with others but not forced to undergo sterilization.

Forced Institutionalization and Psychiatric Treatment. Forced institutionalization or medical treatment violates the CRPD's article 12 on Legal Capacity. Additionally, medical treatments of an intrusive and irreversible nature, enforced or administered

without the free and informed consent of the person concerned, that are aimed at correcting or alleviating a disability or that lack a therapeutic purpose, may constitute torture or ill-treatment. Such actions include: forced psychiatric interventions, involuntary commitment to institutions, and forced or “unmodified” electroshock (electro-convulsive therapy). Deprivation of the legal capacity to make one’s own decisions facilitates coerced treatments and violence, and may constitute torture and ill-treatment in itself, as it can amount to a denial of full personhood. In institutional settings, women with disabilities are subjected to the forced intake of psychotropic drugs or other forced psychiatric treatment. Furthermore, forced institutionalization itself constitutes a form of violence. People with mental health conditions and intellectual disabilities are sometimes subject to arbitrary detention in long-stay institutions with no right of appeal, in contravention of human rights law.

Women Prisoners with Disabilities. Countries are imprisoning more women and the rate is rising faster than that for men. British studies found that 20 – 30% of offenders have learning disabilities or difficulties that interfere with the ability to cope in the criminal justice system. Higher incidence of disability overlaps with higher rates of imprisonment.”

Female prisoners are five times more likely to have a mental disability than the general population, and as many as 80% of female jail detainees have a psychiatric disability. Jails may house more persons with psycho-social disabilities than all of a country’s psychiatric hospitals. They are often overlooked by prison officials and by outside groups seeking reform. There appears to be a link between domestic violence and women’s incarceration, often for crimes directly related to domestic abuse. Women in prison face risks that “include ...sexual violence,” from other female prisoners, male prisoners, and correctional officers. “[U]nder international law, the rape of a woman in custody by an agent of the State may constitute torture for which the State is held directly responsible.” Despite the United Nations Standard Minimum Rules for the Treatment of Prisoners prohibition on the use of male staff in facilities with female prisoners, many countries still employ men in these jobs, thus male law officers are the leading source of the abuse of female prisoners. Rape carries not only physical, emotional, and psychological harms, and the possibility of pregnancy, exacerbated by poor prison health resources, and the possibility that the woman is punished by jailers for it. Under harsh medical protocols “pregnant women are routinely shackled.”

Risks inherent in the incarceration of women are magnified for those who have a disability. In the United States, it is estimated that at least 13% of inmates have been sexually assaulted; many have experienced repeated assaults. The United Nations recognizes that “[w]omen prisoners with disabilities are at a particularly high risk of manipulation, violence, sexual abuse and rape” and they may be actively targeted based on their disabilities or their special needs are neglected. Most prison staff are not adequately trained to prevent or respond to inmate sexual assaults and prison rape often goes unreported and untreated. Incarceration of persons with disabilities without accommodations is illegal and degrading treatment and may violate the International Covenant on Civil and Political Rights.

The United Nations noted that “[d]ue to the limited accommodation available for female prisoners, they are housed in security levels not justified by a risk assessment on admission.” “[t]his is *prima facie* direct discrimination on the basis of disability.” It is further compounded by the lack of facilities able to house women with “impairments,” meaning that “[b]ecause of these access and support issues, it would appear that female prisoners with certain physical, mental health or intellectual disabilities are much less likely to be located in one of the low security facilities compared to women without a disability.” Scarcity of prison facilities for women often results in incarceration far from home, making family visits impractical and costly.

Women with disabilities may face significant difficulties in accessing prison services and recreational and other prison programs that fail to account for their disabilities and “[They] can be routinely denied participation in work programmes, sometimes significantly lengthening periods of imprisonment.” If they participate in work programs they are often paid lower wages for the work or may not be able to meet the requirements of existing programs tailored for prisoners without disabilities. Those determining the appropriateness of early release consider the ability of a prisoner to adapt to life outside, especially for women with disabilities who may have specific needs that the board may not consider. This problem is exacerbated by the misclassification of women with disabilities as higher risk prisoners, making it much more difficult to secure early release.

Discriminatory Termination of Parental Rights. Stereotypical views of women with disabilities may result in termination of parental rights. Though disability laws may prohibit discrimination in social services, such laws do not always extend to child custody and protection proceedings. Parents with disabilities are no more likely to maltreat their children than are parents without disabilities; however, sociocultural ambivalence towards women with disabilities becoming parents persists. Women with a psychosocial, intellectual or physical disability have also found that their disability raises issues during child custody battles. Due to a wide-ranging list of prejudices, and the stereotypical notion that disabled women are unfit mothers, many women have lost custody and even visitation rights with their children during divorce trials and are often forced to relinquish their children from their custody by social welfare agencies. Although society’s fear that women with disabilities will raise so-called “defective” children is for the most part groundless, nonetheless, these erroneous concerns have resulted in discrimination against women with disabilities who wish to become pregnant or have children. Women with disabilities are severely restricted, or negatively viewed, in regards to their reproductive rights. The removal of children or denials of custody may occur in two main situations: in divorce and child custody proceedings; and by social service agencies in parental rights termination.

Women with disabilities may lose child custody in divorce proceedings with a non-disabled spouse. Unfortunately, it is relatively common for everyday stereotypes and deeply rooted beliefs about women with disabilities to be legitimized in family court and used against them in a divorce hearing or custody trial. Many women with disabilities are well aware of the critical, judgmental and ill-informed scrutiny they undergo as mothers. The fear of being perceived as an unfit mother by a court on the basis of their disability and the breakdown of their relationship has frequently discouraged mothers from separating from an abusive partner and obtaining the legal advice or assistance that may be in their best interest. The result of this longstanding exclusion of women with disabilities as mothers is that society has adopted a negative attitude toward disabled women having legitimate legal capacity or authority over a non-disabled child conceived with a non-disabled father. In many countries, statutes on child custody and divorce may use outdated notions of disability and disability status. Thus, divorce proceedings and child custody hearings may focus on the mother’s disability as opposed to her parenting behavior. In the United States, thirty-

seven of fifty states include disability-related grounds for termination of parental rights. The state codes use unclear definitions and terminology that emphasize disability status rather than behavior. Of the remaining states, each includes language for termination based on neglectful parenting behavior that may be disproportionately influenced by the mother's disability status. Given existing prejudices about the parenting capabilities of women with disabilities, they may experience greater regulation and prejudice by social service agencies than women without disabilities. Statutes that include disability as a possible cause for termination of parental rights may implicitly equate parental disability with parental unfitness. In many cases, the child's "best interests" are seen as primary to and at odds with maternal rights of women with disabilities. Women with a psychosocial, developmental, or intellectual disability may be at particular risk of parental rights termination and litigation may reaffirm these pre-existing prejudices.

In order to prevent disability discrimination in the termination of parental rights, key principles for statutes include: freedom from discriminatory language; explicitly affirm that no part of the statute be used for anti-disability discrimination; acknowledge that successful parenting can occur with accommodations; and require multidisciplinary approaches to address this situation.

Therefore, the above selected examples of limitations on access to justice for women with disabilities and the ways in which the justice system itself violates their human rights demonstrates how actual experiences contrasts with the human rights guaranteed by the international legal normative framework, highlighting the urgent need to include issues regarding access to justice as the CRPD Committee elaborates this General Recommendation. Women Enabled, Inc. looks forward to providing any assistance or resources as the elaboration of this General recommendation proceeds. Please contact Ms. Ortoleva at +1.202.359.3045 or WomenEnabled@gmail.com.

Stephanie Ortoleva

Stephanie Ortoleva, Esq., President, Women Enabled, Inc. www.WomenEnabled.org

RESOURCES. Resources for a General Recommendation on Women and Girls with disabilities.

Stephanie Ortoleva and Hope Lewis, *Forgotten Sisters - A Report on Violence Against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences* (August 21, 2012). Northeastern University School of Law Research Paper No. 104-2012. Available at SSRN: <http://ssrn.com/abstract=2133332>.

Rashida Manjoo, *Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report on Violence Against Women with Disabilities*, U.N. Doc. A/67/227 (August 3, 2012) available at: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F67%2F227+&Submit=Search&Lang=ES Stephanie Ortoleva, "Inaccessible Justice: Persons with Disabilities and the Legal System," *International Law Society of America, Journal of International and Comparative Law*, 17 ILSA J. Int'l & Comp. L. 281 (Spring 2011), available at: <http://ssrn.com/author=1875099>.