

**Submission to the CRPD Consultation for a General Comment on Article 27**

**Center for the Human Rights of Users and Survivors of Psychiatry**

Executive Summary

This submission begins with preliminary remarks about terminology, requesting the Committee to use the stand-alone phrase ‘persons with persons with psychosocial disabilities’ and avoiding grouping this constituency together with persons with intellectual disabilities, which sets both groups apart from the remainder of the disability sector.

Part II addresses the need for a substantive equality approach to Article 27, recommending a thorough review and consultative process at the national level to uncover and uproot the causes of disadvantage of persons with disabilities in the context of the right to work and employment and freedom from forced labor. It addresses issues that arise in employment applications forms and hiring processes, disability pension and social protection schemes, reasonable accommodation processes, and contextual forms of discrimination that affect the right to work and employment and the freedom from forced labor of people with psychosocial disabilities.

Part III addresses discriminatory health and safety standards, drawing on experience with the discriminatory ‘direct threat’ defense to a disability non-discrimination claim under the Americans with Disabilities Act.

Part IV rejects the use of ‘supported employment’ as an option targeted for persons with psychosocial disabilities and advocates instead that any person with a disability who needs extra support in relation to employment, linked to their disability needs, should be offered such support as a form of personal assistance rather than as a categorically different form of employment mediated by service providers.

1. Preliminary remarks about terminology

The Committee’s use of the phrase ‘persons with intellectual and/or psychosocial disabilities’ is misleading from the point of view of those two distinct groups of persons and is confusing to national actors charged with implementation.

This wording cannot be justified as a means of saving on word space or as an acknowledgment that some persons may experience both intellectual and psychosocial disability. As these are the only two groups of persons with disabilities singled out in this phrasing, it suggests that they are both similar to each other and set apart from all other persons with disabilities. We reject the implication that there any such separation beyond our own self-identification and self-constitution as a movement of and by persons with psychosocial disabilities.

Secondly, CHRUSP uses the term ‘persons with psychosocial disabilities’ as a matter of convenience in the context of global human rights advocacy. Our own organizational name refers to ‘users and survivors of psychiatry’. As I explained to the Committee in my written statement submitted for the opening day of the current session, the term ‘users and survivors of psychiatry’ comes from the World Network of Users and Survivors of Psychiatry and is intended to refer to that group of persons as defined in the WNUSP statutes:

A user or survivor of psychiatry … is self-defined as a person who has experienced madness and/or mental health problems and/or has used or survived psychiatry / mental health services.

WNUSP, which promoted the terminology ‘persons with psychosocial disabilities’ during the development of the Convention and before this Committee, always intended it to refer to the same persons as ‘users and survivors of psychiatry’, as demonstrated in its statement from 2008 that was originally included in an IDA CRPD Forum submission to OHCHR for its thematic study on legislation to implement and ratify the Convention.[[1]](#footnote-1) CHRUSP follows that approach.

CHRUSP has also on occasion varied its terminology in an attempt to more closely approximate the diverse ways individuals that are part of our constituency identify ourselves. We will continue to do so as needed. We emphasize that individuals who are part of the constituency do not all have the same experiences or understand those experiences in the same way. Some relevant identities include mad, neurodiverse, mental health service users, mental health consumers, survivors of psychiatric assault, persons with mental disabilities, persons with mental health conditions, persons with psychosocial disabilities and persons disabled by psychosocial norms.

We urge the Committee to sensitize itself to diverse identities held by those understood in the Committee’s language as persons with psychosocial disabilities, to refer to us in a stand-alone manner not grouped with persons with intellectual disabilities, and to continue to refer to ‘actual and perceived’ psychosocial disabilities when that emphasis is needed. We further urge the Committee to promote better understanding of this constituency and its diverse identities among all stakeholders and to ensure that all the norms of the Convention are applied irrespective of individual identities; for example, that there is no separate standard applied to persons with actual or perceived mental health conditions, and that persons with psychosocial disabilities is the umbrella term in the human rights context.

CHRUSP would be happy to collaborate with the Committee and with other DPOs of our constituency active at the global level to ensure that our representation is accurate and respects our diverse identities.

1. Substantive equality: Sections 2.a.ii, 2.a.iii, 2.a.xi, 3.b.I, 3.b.II, 4

CHRUSP advocates a substantive equality approach to the right to work and employment and freedom from forced labor in order to ensure a comprehensive investigation into the root causes of disadvantage in this area for people with diverse types of disabilities, so that they may be remedied. It is important that thorough consultation be done in every country with DPOs and independent activists with disabilities, along with a comprehensive review of law and policy undertaken by jointly by legal experts, DPOs and independent activists. The direct experience of persons with disabilities can often reveal the discriminatory impact of laws and policies that may not at first glance appear to target persons with disabilities or to be disadvantageous.

Particular areas to examine for unintended bias related to the right to work and employment and freedom from forced labor include:

* Employment application forms and hiring processes
* Disability pension and social protection schemes
* Processes for reasonable accommodation
* Contextual forms of discrimination
1. Employment application forms and hiring processes

Employment application forms and hiring processes should be prohibited from asking questions about the existence of a past or present disability or a history of mental health hospitalization or institutionalization. They should similarly be prohibited from imposing any physical or mental qualifications for employment that are unrelated to the core requirements of a position or that are based in negative stereotyping. For example, psychiatric evaluation is traumatic for survivors of psychiatric assault (involuntary psychiatric interventions) and is based on hegemonic medicalizing practices that are contested by a social model of psychosocial disability.

Screening by psychiatric or psychological evaluation constitutes a barrier that tends to screen out persons with psychosocial disabilities who may nevertheless be qualified to perform the requirements of a position. It should be always made possible for individuals to demonstrate their fitness for a position without requiring them to submit themselves to medicalization of personality strengths and weaknesses. This should be available as an option to all persons rather than requiring anyone to specifically request it as a reasonable accommodation.

A related issue is employer questions about history of criminal arrest and conviction. This affects persons with psychosocial disabilities, especially those who are multiply marginalized due to poverty and race/ethnicity, and who may experience institutionalization in both the psychiatric system and the penal system as their conduct is both criminalized and medicalized. Similar to questions about disability, criminal arrest and conviction do not reliably indicate a person’s ability or fitness to perform a particular job. Especially where police and criminal justice systems are known to be structurally biased, such questions cannot serve as a proxy for a history of dishonest or wrongful conduct.

In the United States, there is an increasingly successful campaign to prohibit employers from asking about criminal history at the stage of the initial application, and some go further,[[2]](#footnote-2) but none go far enough to remove the disadvantage or its impact on multiply marginalized persons with disabilities. The Committee should promote standards for fair qualification and evaluation that do not rely on either criminalization or medicalization, and that allow employers to obtain information that is relevant and not prejudicial.

1. Disability pension and social protection schemes

Disability pension and social protection schemes vary widely throughout the world but are rarely sufficient to lift individuals out of poverty or (in conjunction with housing costs that the state has not adequately controlled) to enable them to obtain housing. These schemes often have requirements that constitute barriers to persons with psychosocial disabilities becoming employed. For example, they may withdraw benefits immediately upon an individual’s starting to work, leaving her in a state of precarity if it does not work out and her employment is terminated. Or they may require that the person be incapacitated and placed under guardianship, leaving her ineligible to contract employment. Individual’s work in the informal sector while obtaining government benefits may be penalized and criminalized despite the necessity of supplementing the meager amount provided by the state. These and similar barriers in law and policy to the enjoyment of the right to work and gain a living by persons with disabilities should be identified and removed.

It should be emphasized that the implementation of Article 27 with regard to eliminating barriers found in disability pension and social protection schemes must center persons with disabilities as rights holders and reject any claims by the state that social protection in itself constitutes a barrier to persons with disabilities seeking employment. Such claims are offensive towards persons with disabilities and towards working persons in general. The human rights framework, recalling the Universal Declaration which speaks of our rights and duties towards one another, needs to be increasingly proactive in promoting the equalization and equitable sharing of resources at the national and global levels, to eliminate poverty and apparent scarcity. Disability pension and social protection schemes need to be fully funded and allow those who rely on them to live in dignity and to move into paid employment that they freely accept. Anti-corruption measures should not target those with low incomes, which criminalizes poverty as well as disability and other factors that limit employment opportunities due to persistent bias and other forms of discrimination.

1. Reasonable accommodation processes

Persons with psychosocial disabilities who need reasonable accommodation are placed in the position of disclosing a disability that remains highly stigmatized. Where the law allows employers to terminate an individual’s employment at any time without showing just cause (‘at-will employment’), the burden is on the terminated employee to prove unlawful discrimination. Disclosing a stigmatized disability means risking employer bias that can manifest in termination for which there may be no objective evidence to substantiate a discrimination claim, or in micro-aggressions in the workplace that similarly may be difficult to rely on for a non-discrimination claim. (In any case, the aim of workers is not to win lawsuits but to find and maintain decent and satisfying employment.)

The Committee should promote an approach to requesting reasonable accommodation that 1) avoids medicalization, i.e. does not require psychiatric diagnosis or other medical documentation for psychosocial disability, 2) is needs-based rather than disability-based, i.e. allows the employee to request simple accommodations without specifying the reason (since reasonable accommodation can apply in areas beyond disability, it may be useful to take a comprehensive universalizing approach in this regard), 3) allows the employee to describe needs in their own terms and exercise their own choices about disclosure and non-disclosure, and in this way to work out accommodations in a cooperative and non-adversarial process with the employer.

1. Contextual forms of discrimination

Contextual forms of discrimination that shape the lives of persons with psychosocial disabilities, in particular involuntary hospitalization and other institutionalization, and legal incapacitation and guardianship, need to be addressed in the General Comment insofar as they have a detrimental impact on the right to work and employment and the freedom from forced labor. I will note here briefly that forced labor is the rule in many psychiatric institutions and that persons with psychosocial disabilities have been targeted by human trafficking schemes.

Long-term institutionalization, repeated instances of short-term involuntary hospitalization, and the widespread phenomenon of community mental health programs that amount to institutionalization through group residences, day treatment programs, sheltered workshops, and related programs all provided and coordinated through mental health services, keep people segregated and impoverished. When community mental health programs coordinate job training or supported employment, they often merely interpose another layer of service providers between persons with disabilities and the community, which is counterproductive to inclusion and elimination of discrimination.

As CHRUSP will be promoting in the regional consultations on deinstitutionalization, a comprehensive reparations approach is needed to eliminate all institutional, carceral and medicalizing practices towards persons with psychosocial disabilities and to promote and practice mutual understanding, acceptance and accommodation of all persons in their diversity throughout the community, including in workplaces. Both common tasks and unique talents need to be recognized as capabilities of persons with psychosocial disabilities, taking into consideration Article 30.2 of the Convention which states,

States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

1. Discriminatory health and safety standards: Section 2.a.iv

A concern has arisen in the United States context where ‘direct threat’ posed by a person with a disability to oneself or others, because of their disability, has been deemed to be a defense to a claim of employment discrimination.

The Committee will recognize that this is similar to the standard of ‘danger to oneself or others’ that the Committee has condemned as a component of mental health involuntary hospitalization laws.

While the ‘direct threat’ defense under the Americans with Disabilities Act is both broader and narrower than its counterpart in mental health legislation – it applies to persons with all types of disabilities and it requires a higher evidentiary standard – it is applied prejudicially to reinforce the medicalization of persons with psychosocial disabilities, the conflation of medicalization and criminalization, and the discipline of persons with psychosocial disabilities by stereotyping them as violent and penalizing them disproportionately and unfairly for conflicts they have with other persons.

By medicalization I mean in particular the use of medical evidence such as psychiatric diagnosis, opinions and predictions, both generalized and those based on evaluation of the person concerned, to substantiate a claim that an individual poses a ‘direct threat’ to self or others.

The ‘direct threat’ defense is both unnecessary and prejudicial to employees with disabilities in general. To the extent that any employee cannot operate machinery safely, it does not matter if this inability to meet safety standards is related to an impairment or any other reason. Similarly, employers are not obligated to tolerate violent conduct by anyone in the workplace. Objective health and safety standards that neither medicalize psychosocial disability nor stereotype such disability as being linked to propensity towards violence should be created and applied according to the principle of inclusive equality, taking into account the needs and subjectivities of persons with all types of disabilities, including those who are multiply marginalized, alongside the needs and subjectivities of other marginalized persons.

CHRUSP does not condone claims of discrimination based on the application to a person with a disability of general standards upholding civility and decency towards others in the workplace, so long as the standards are in fact universally applied and persons with disabilities are not individually or as a group singled out. We view workplace conflicts and any wrongful behavior by or towards a person with disability similarly to the question of criminal responsibility and conflicts anywhere in the community, and consider that restorative justice approaches, that refrain from any medicalization or paternalism, including any requirement to undergo mental health treatment or counseling, may be appropriate if employer and employee wish to pursue better mutual understanding.

Multiple marginalization and intersecting forms of discrimination need to be considered alongside disability in relation to workplace conflicts and accusations of wrongful conduct. In particular, the differential forms of emotional labor commonly expected of women compared with men (e.g. expectation to continually exhibit a pleasant smile) should be contested as sex-based stereotyping. Persons with psychosocial disabilities may fall disproportionately into conflicts over such stereotypes and similar hierarchical social conventions, or conversely a person’s conflicts with such conventions may be labeled as psychosocial disability. The Committee should take an intersectional approach to restorative justice both in the workplace and in general, that supports an uprooting of systemic discrimination as part of the justice due to all parties.

1. Affirmative action and ‘supported employment’: Section 2.a.x

CHRUSP disagrees with the Outline of the General Comment with respect to both the grouping of persons with psychosocial disabilities alongside persons with intellectual disabilities, apart from other groups of persons with disabilities, and the purported value of supported employment for persons with psychosocial disabilities.

In our view, persons with psychosocial disabilities need welcoming workplaces, inclusivity and accommodation that does not require stigmatizing disclosures or medicalization, and access to confidential advice and support (such as a resource officer) to discuss any problems that arise. Persons who have been out of work for a long period of time for any reason, especially those who have been subjected to long-term institutionalization, need extra support, and some people may need support for their access to employment that is a form of personal assistance for their disability needs. But this cannot be treated as a categorically different kind of employment such as ‘supported employment’, which in our view turns employment into a program intervention rather than allowing persons with disabilities the right and dignity simply to work and gain their living, develop their potential and contribute to benefit themselves and society.

1. Recommendations
* States should take a substantive equality approach to identify and remove barriers to the full and equal enjoyment of the right to work and employment and the freedom from forced labor of all persons with disabilities. They should undertake comprehensive, open and thorough consultations with DPOs and independent activists with disabilities, throughout the country, including persons with all types of disabilities and including persons who are multiply marginalized based on sex, race, ethnicity, class, rural/urban divide, sexual orientation, gender identity, religion, political opinion, and any other relevant factors of social identities. The consultation process needs to ensure that outreach is done through the networks that are capable of reaching all these diverse constituencies.
* States should eliminate any medicalization of psychosocial disability in the employment context, particularly as it pertains to employment applications, evaluation and screening for ability and fitness, requests for reasonable accommodation, health and safety standards, or claims of disability-based discrimination. Ability and fitness for employment should be capable of being demonstrated through performance, references, trial periods, in-depth interviews over time, and other means that allow employers and employees to determine suitability for a position.
* States should eliminate barriers in employment application forms and processes, including questions about the existence of a past or present disability, history of involuntary hospitalization or institutionalization, or history of criminal arrest or conviction. They should eliminate any requirement to account for one’s entire work history or life trajectory and should allow applicants to demonstrate their competence and qualifications by various means without prejudice for taking non-conventional options.
* States should ensure that disability pension and social protection schemes do not penalize persons with disabilities for pursuing employment. They must not camouflage austerity measures cutting back on disability pension and social protection schemes as manifesting a policy to eliminate disincentives for persons with disabilities to work. Social protection and disability pensions are required to comply with the right to an adequate standard of living and should overlap with persons with disabilities’ periods of employment with sufficient grace periods and easy access to resumption of benefits as needed, in order to avoid precarity. No one should be penalized for informal labor to supplement social protection and pension schemes that are inadequate to obtain decent housing and other basic needs.
* Reasonable accommodation processes should be needs-based and refrain from requiring disclosures of particular disability or details of the reason in the case of simple requests. Even for those that are more complex, employees should be allowed to describe the need in their own terms, refrain from any unwanted disclosures, and collaborate with the employer to come up with a solution.
* States parties must eliminate all regimes of involuntary hospitalization, institutionalization, legal incapacitation and guardianship; this must be reiterated in the context of Article 27 as those regimes impoverish persons with disabilities and constitute significant barriers to their equal enjoyment of the right to work and employment and freedom from forced labor. All forms of institutionalization, including long-term placement, repeated instances of involuntary hospitalization, and the totalizing effect of community mental health programs that encompass all areas of a person’s life, make people with psychosocial disabilities more vulnerable to economic precarity, impoverishment, and segregation from community life. A reparations approach is needed that includes the right to work and employment to earn a living and to develop one’s potential for one’s own benefit and that of the community. Reparations towards persons with disabilities entails an examination of deep-rooted social and economic inequalities at the national and global levels and making a clear commitment to redress and to and equalized and equitable distribution of resources.
* Workplace health and safety standards must not single out persons with disabilities for risk assessment. Objective and reasonable standards related to the workplace environment as a whole and the tasks to be performed should be created and applied taking an inclusive equality approach informed by the needs and subjectivities of persons with all types of disabilities and those who are multiply marginalized by disability in combination with intersectional factors such as sex, race, class, sexual orientation, gender identity, etc.
* Conflict in the workplace must not be medicalized or equated with violent conduct as a threat to safety. Employers are not obligated to tolerate violent conduct by anyone, and they (and those who monitor workplace health and safety) also must be attentive to ensure that persons with disabilities, and those who are marginalized based on sex, race, class, etc., or who are multiply marginalized, are not being perceived as violent based on conduct that is not so perceived when exhibited by others. Restorative justice may be useful in the workplace so long as it is welcomed by all parties, is fair to all and does not entail medicalization or paternalism.
* Workplaces must be made welcoming and inclusive, and any personal support needed in relation to performance of a job should be provided as personal assistance rather than instituting supported employment as a categorically distinct relationship to the workplace mediated by service providers.

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1. <http://wnusp.net/documents/2012/Psychosocial_disability.docx>. [↑](#footnote-ref-1)
2. ‘More jurisdictions are also adopting policies that do more than “ban the box” by removing the conviction history question from job applications. Many incorporate the best practices set forth in the [2012 U.S. Equal Employment Opportunity Commission (EEOC) guidance](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) on the use of arrest and conviction records in employment decisions. Others adopt innovative strategies such as [targeted hiring](http://www.nelp.org/publication/community-hiring-model-language-need-work/). Robust [fair-chance hiring laws](http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/) delay records-related inquiries until after a [conditional offer](http://www.nelp.org/publication/fair-chance-hiring-best-practice-delaying-inquiries-until-conditional-offer/) of employment and ensure a fairer decision-making process by requiring employers to consider the job-relatedness of a conviction, time passed, and mitigating circumstances or rehabilitation evidence.’ Information at <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. [↑](#footnote-ref-2)