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## Chapter 20

### Oral history as empirical corrective: Including women’s experiences in international law

**Kim Rubenstein and Anne Isaac**

#### INTRODUCTION

Over twenty five years ago, Karen Knop argued that ‘international law has ignored what is actually happening in the international legal community, who the actors really are, and what each does.’<sup>1</sup> In the growing scholarship on gender and international law since, the process of revealing the actors involved has begun to provide what Knop referred to as an ‘empirical corrective’ to both the traditionally inflexible inter-State relations framework of international law<sup>2</sup> and also more broadly to our thinking about how international law has developed in practice both domestically and internationally.

This chapter adds to that empirical corrective by drawing directly from a larger oral history project that has feminist underpinnings resonating with this collection’s focus on women’s engagement in international law. From 2010 onwards, over fifty ‘whole of life’,<sup>3</sup> oral histories have been recorded with Australian ‘trailblazing women lawyers,’<sup>4</sup> identified through an elaborate and broad process where over 300 individuals, ranging from regions all around Australia, practicing law in myriad ways, or being active in non-traditional non-legal pursuits in the public sphere, from a range of different backgrounds, age and other forms of diversity, were nominated as potential interviewees.

These recordings have been deposited into the database and collection of the Oral History and Folklore section of the National Library of Australia and are now part of a national

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<sup>1</sup> Karen Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ (1993) 3 TLCP 293, 335.

<sup>2</sup> Ibid.

<sup>3</sup> Whole of life interviews are literally that, in that they do not just cover the professional aspects of these individuals, but all manner of things about their life and memories that they choose to share. The minimum length of interview in this project was 7 hours in total, and some even went up to 20-30 hours, recorded over several sessions.

<sup>4</sup> The term trailblazing women lawyers is not without its tensions, but it is being used in this context to identify women who were in the ‘pool’ of first women to undertake certain aspects of legal practice or legal activity, or activity in which they benefitted from a legal education. To be a women lawyer for our project meant having obtained a law degree or qualification, but the project did not only concentrate on legal practice per se, but all forms of ‘active citizenship’.

(indeed international)<sup>5</sup> resource, that ultimately, long term, and in some cases immediately, will be available for the public.<sup>6</sup> Moreover, information about all the women nominated as potential interviewees has been gathered into an online exhibition on *Australian Women lawyers as Active Citizens*.<sup>7</sup>

Considering the actual experience of women's lives working in the public sphere, both domestically, and in the international environment, assists us in expanding our thinking about the potential for both domestic and international law to respond more thoughtfully to the needs of all people. In doing so, it engages with the question of what the individual biographical approach adds to understanding the exercise of power, which so often focuses on institutional structures, rather than individuals. One version of this inquiry was developed in another collection on Gender and Public law, concentrating on the oral history of Erika Feller, an Australian lawyer who rose to the rank of Assistant High Commissioner for Protection in the United Nations High Commission for Refugees (UNHCR).<sup>8</sup> That analysis of Erika Feller's interview drew upon six specific extracts that reflected on the sexist experiences she had encountered, the influence of her own family background, her adjustments to working in a mainly male environment, and the careful balancing of her life as a parent within her working place.<sup>9</sup>

This chapter proceeds to enlarge that research initiative of looking at the life experiences of women working in international law, by drawing upon one further interview conducted with Rosemary Kayess. The choice of concentrating on this one interview is threefold. First, Rosemary<sup>10</sup> agreed for her interview to be made available to the world through the worldwide web, so this enables anyone whose interest in Rosemary's life is aroused by this chapter to go and dip into her interview beyond the extracts included here.<sup>11</sup> Second, Rosemary's engagement with international law is valuable because of her contribution to the drafting of the UN Convention on the Rights of Persons with Disabilities (CRPD),<sup>12</sup> an aspect of

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<sup>5</sup> It is international in scope by virtue of those women lawyers interviewed who had some international law activity, but practically, also, for those women who have enabled their interviews to be immediately accessible online, their material can be accessed by anyone who has access to the internet, wherever they are in the world.

<sup>6</sup> The terms of the release of the interviews are determined by the interviewee herself. See further at <[www.womenaustralia.info/lawyers/browse\\_oralhistories.html](http://www.womenaustralia.info/lawyers/browse_oralhistories.html)> where all the links to the catalogue entries on the National Library of Australia website are available, including those which are available to listen to directly, online.

<sup>7</sup> See <[www.womenaustralia.info/lawyers/index.html](http://www.womenaustralia.info/lawyers/index.html)>

<sup>8</sup> See Kim Rubenstein, 'In Her Own Voice: Oral (Legal) History's Insights on Gender and Spheres of Public Law', in Kim Rubenstein and Katharine Young (eds), *The Public law of Gender: From the Local to the Global* (CUP, 2016) 246.

<sup>9</sup> Ibid 266-268.

<sup>10</sup> We considered repeating Rosemary Kayess's name in full, as a way of affirming the gendered nature of her life. However, we have chosen to mainly use her first name as repetition of her full name would have been cumbersome, just as we think we would have, had the subject of this chapter been a male.

<sup>11</sup> See <<http://catalogue.nla.gov.au/Record/6774757>>

<sup>12</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) were adopted on 13 December 2006 at the United Nations Headquarters in New York. When they opened for signature on 30 March 2007, there were 82 signatories to the

international law not otherwise dealt with in this collection. Thirdly, her experience is not only mediated through being a woman, but a woman who sustained a spinal injury, and this intersectionality of experience is another important aspect of the value of oral history in filling out an appreciation of women's engagement with international law, which is not only mediated through gender, but through all aspects of a person's identity and life experience.

## I. BIOGRAPHICAL INTRODUCTION AND CONTEXT

It is valuable to give a snapshot biography of Rosemary's life, to provide some context to her identification as a trailblazer.

Rosemary has devoted her career to the study and promotion of human rights and discrimination law in Australia and internationally. When she was nineteen, Rosemary was in a serious car accident in which she sustained a spinal injury. The event set her on the path to her subsequent career. From 1989 to 1995, Rosemary Kayess was Director of Spinal Cord Injuries Australia while also serving on the Ethics Committee at the Benevolent Society of New South Wales and as Director of the Physical Disability Council of New South Wales. Since 1995 she has been Chairperson of the Australian Centre for Disability Law (formerly called the Disability Discrimination Legal Centre). The Centre promotes the human and legal rights of people with disabilities by providing them with access to legal advocacy. Rosemary Kayess was subsequently appointed to the Disability Council of New South Wales in 1996, serving until 2000.

From that local stage she soon moved to participating in the international sphere. Between June 2003 and August of 2006, Rosemary participated in the eight sessions of the United Nations General Assembly Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, as a member of the Australian Government Delegation. Indeed, Rosemary was the only Australian on the working group that developed the draft CRPD text that was then negotiated from May 2004. Her involvement with the CRPD continued in various ways, including as a part of the Non-Governmental Delegation to the Committee on the Rights of Persons with Disabilities at its Tenth Session at the United Nations in Geneva, September, 2013, at the 1st Periodic Review of Australia, and as a Delegate to the Conference of States Parties of the Convention on the Rights of Persons with Disabilities in the United Nations in New York in June 2015. She was also the Head of Delegation for the Youth with Disabilities, Conference of States Parties of the Convention on the Rights of Persons with Disabilities at the United Nations in New York June 2014. She then participated as a non-governmental delegate at the Twenty-Third Session of the Human Rights Council's Universal Periodic Review (UPR) Working Group in Geneva, in November 2015. In recognition of her contribution to international disability law, in December 2017, Rosemary Kayess was nominated as a candidate to the United Nations Committee on the Rights of

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Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention, the highest number of signatories in history to a UN Convention on its opening day. The CRPD is itself trailblazing, being the first comprehensive human rights convention of the present century and the first human rights treaty open for signature by regional integration organizations. As at January 19, 2018, there were 160 signatories to the Convention and 92 to the Optional Protocol. For further information about the Convention, see the UN Website at [www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html](http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html)

Persons with Disabilities (UNCRPD) for 2019-2022. The elections for the UNCRPD will take place in New York on 12 June 2018.<sup>13</sup>

Returning from the world stage to the national stage, Rosemary has also played a key role in national public policy as a member of the Disability Reference Group to the Department of Foreign Affairs and Trade (DFAT) Australia from 2008 – 2016, as a member of the Advisory Group for the Inquiry into Equality, Capacity and Disability in Commonwealth Laws for the Australian Law Reform Commission in 2014, as a member of the Disability Policy Research Working Group Steering Committee of the Council of Australian Government (COAG) between 2010 and 2014 and as a member of the Core Reference Group to the National Seclusion and Restraint Project for the National Mental Health Commission, which began in 2013 and is continuing. In 2010 Rosemary was appointed Director of the Human Rights and Disability Project at the Australian Human Rights Centre at UNSW Law and became Senior Research Fellow at the Social Policy Research Centre at UNSW in 2011. Her academic post continues in the Faculty of Law at the University of New South Wales (UNSW), where she is currently a Visiting Fellow.

That formal description above of her contributions locally, nationally and internationally, however, does not tell us much about Rosemary's motivations, values and formative experiences; nor does it give us much insight into her human rights approach to disability law which influenced the drafting of the CRPD. By comparison, her oral history interview gives us greater insight into her fight for disability to be valued ‘“as simply a part of the human condition”’<sup>14</sup> and her goal of a society in which disabled people are not ‘included’, but rather acknowledged as already belonging.<sup>15</sup>

Three further points need to be made to contextualize the writing that follows. The first is that one of the authors of this chapter, Kim Rubenstein, interviewed Rosemary for the Trailblazing Women and the Law Oral History Project at Rosemary's home in Sydney over the first three days of 2015. Second, Rosemary's story, through her oral history and in this chapter, is mediated in the first instance by Kim's experience as another woman lawyer and interviewer. This is no doubt common to all research projects in that in one way or another, all researchers are inherently influenced by their own life experience and perspective.<sup>16</sup> Further, Anne Isaac came to the interview with a particular interest in linguistics and analysis of the voices<sup>17</sup> in oral and written texts, without having met Rosemary. Highlighting each of our perspectives as authors of this chapter is also relevant to the theme of this piece, in emphasizing that the more diverse a range of individuals are included in the international law

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<sup>13</sup> See [https://foreignminister.gov.au/releases/Pages/2017/jb\\_mr\\_171203.aspx](https://foreignminister.gov.au/releases/Pages/2017/jb_mr_171203.aspx)

<sup>14</sup> See Hastings in Nikki Henningham, ‘“Part of the Human Condition”: Women in the Australian Disability Rights Movement’, in Joy Damousi and Kim Rubenstein and Mary Tomsic (eds), *Diversity in Leadership: Australian Women, Past and Present* (ANU Press 2014) 149,152.

<sup>15</sup> Ibid 152.

<sup>16</sup> This is discussed in more detail in Kim Rubenstein, ‘Alive in the Telling: Trailblazing Women Lawyers Lives, Lived with Law’ in L/T/C (2016) 66, and in particular see also Valerie Yow, ‘Do I like them too much? Effects of the Oral History Interview on the Interviewer and Vice Versa’ in Robert Perks and Alistair Thomson (eds) *The Oral History Reader* (2<sup>nd</sup> edn, Routledge 2006) 54.

<sup>17</sup> ‘Voice’ is simply defined here as the linguistic means by which language users express their identities and negotiate their relationship with their audience in spoken and written discourse. See Anne Isaac, ‘Modelling voice as Appraisal and Involvement resources’ (PhD thesis, The University of Canberra 2012).

making project, the more responsive it will be to the needs and perspectives of all bound by the laws themselves. Moreover, the dual legal and discourse analysis of Rosemary Kayess's oral history adds to a growing body of interdisciplinary, and particularly, linguistic, approaches to research that has the potential to enrich international legal scholarship.<sup>18</sup>

The second point is that writing about disability entails the particular challenge of 'recognising and resolving that tension between honouring individual achievement and foregrounding the barriers that make that achievement so remarkable'.<sup>19</sup> In her analysis of women's leadership in the Australian Disability Rights Movement (ADRM) since 1981 (the International Year of the Disabled), Henningham discusses the ambivalence she encountered in the narratives of women with disabilities: while acknowledging that they can inspire others with disabilities, these women are wary that their 'stories of courage against the odds' can further marginalize those who are unable to 'defy the odds' to overcome their disabilities, as the onus may be placed on their attitude rather than 'the social structures that discriminate against them'.<sup>20</sup> Accordingly, disabled women activists 'don't want their stories be used to justify any argument that the social order doesn't need changing'.<sup>21</sup> Key to changing the social and cultural construction of disability is the need to convince others, both non-disabled and disabled, that '... disability is not always a tragedy, a hardship or a lack, but offers much of value.'<sup>22</sup>

Rosemary Kayess shares this conviction. She expresses her frustration with patronizing attitudes to people with disabilities in relating an encounter with a woman in a London hotel, and how she resorts to humour to deal with similar situations.

**Rosemary Kayess:** ... I'd come down for breakfast and ... I went over to the buffet area. ... there was this woman beside me and ... she turned around and ... gushingly told me ... "I think you're such an inspiration." Now at this stage I hadn't said a word so she didn't know I was Australian, ... 15000 kilometres ... away from home. She didn't know that I'd been ... the last two weeks in Ireland teaching a summer school on international human rights law and the Convention on the Rights of People with Disabilities. So ... my immediate reaction is to say, "What, because I'm considering the baked beans?" It, it just came out of nowhere. I mean I wouldn't have minded so much if she had suggested, you know, "I'm really impressed with your work or what you do." ... but she didn't know any of that. She was just inspired that I was sitting at the buffet thinking, "Will I have baked beans?" ... It's not overtly inspirational.

**Kim Rubenstein:** But ... the notion of being able to live a regular life as a person who isn't fully abled, you find ... patronizing ...

**Rosemary Kayess:** It's incredibly patronizing. ...

**Kim Rubenstein:** Yeah and ... we started ... [talking about] the ways in which you deal with that either with humour ...

**Rosemary Kayess:** Well, but it also belittles other people that are doing significant stuff. So if everybody in a wheelchair's inspirational, well what do you say to the people that ... do ... fabulous stuff. What, what do you say about Stella Young?

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<sup>18</sup> See Benedikt Pirker and Jennifer Smolka, 'Making Interpretations More Explicit: International Law and Pragmatics' (2017) 86(2) Nord J Intl L 228.

<sup>19</sup> Henningham, (n 12) 152.

<sup>20</sup> Ibid 151.

<sup>21</sup> Ibid 152.

<sup>22</sup> Kudlick in Henningham, ibid 152.

**Kim Rubenstein:** Yeah, yeah.

**Rosemary Kayess:** It just becomes so trite and meaningless. ... And a bit insulting. So yeah, sorry.

**Kim Rubenstein:** No it's absolutely fine.

**Rosemary Kayess:** Humour, yes, humour definitely.

**Kim Rubenstein:** Is a key, yeah.

**Rosemary Kayess:** You have to. Well for me it is, yeah.

**Kim Rubenstein:** Keeps you sane in those sorts of situations too.<sup>23</sup>

Given the strength of Rosemary's feelings, this chapter, in drawing from Rosemary's life, seeks to remain faithful to her refusal to be defined by her disability: 'I don't want to have to live, eat and breathe disability.'<sup>24</sup> Moreover, it is her involvement in the drafting of the CRPD that is central to our choice of her as the subject for this chapter. In highlighting her achievements and aspirations for legal and social reform around the rights of the disabled, we also draw out the broader point that all people's life experiences shape the way they engage with law, and in this case, international law. This further responds to Karen Knop's argument that 'international law has ignored ... who the actors really are, and what each does.'<sup>25</sup>

## II. FORMATIVE INFLUENCES

Rosemary's journey began in a semi-rural, 'village'<sup>26</sup> upbringing within a family that was and remains very close-knit and supportive. Highlighted among her recollections of this period is her family's non-adherence to traditional gendered roles: '... we weren't spared because of our gender',<sup>27</sup> 'you got in, you did'.<sup>28</sup> She recalled that she 'tagged along'<sup>29</sup> with her three older brothers, even wanting to join the scouts with them, mowed lawns and climbed rooves to clean out gutters with her father. This 'can do' ethos undoubtedly contributed to Rosemary's problem-solving pragmatism. Likewise, she sees the freedom she and her siblings enjoyed to express opinions around the family dinner table as having played a crucial role in the development of her political awareness and of her ability to voice her 'rights, will and preference'.<sup>30</sup> Rosemary describes her mother, Nola, as a strong and 'very significant' person in her life.<sup>31</sup>

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<sup>23</sup> Interview with Dr Rosemary Kayess, lawyer, Faculty of Law, The University of New South Wales (Sydney, Australia, 1-3 January 2015), Session 5, 46 minutes, 27 seconds. Sound files from the interview can be searched and listened to at <<http://catalogue.nla.gov.au/Record/6774757>>

<sup>24</sup> Ibid Session 3, 20 minutes, 2 seconds.

<sup>25</sup> Knop (n1) 335.

<sup>26</sup> Interview with Dr Rosemary Kayess (n23) Session 1, 2 minutes, 5 seconds.

<sup>27</sup> Ibid Session 1, 23 minutes, 51 seconds.

<sup>28</sup> Ibid Session 1, 22 minutes, 35 seconds.

<sup>29</sup> Ibid Session 1, 22 minutes, 7 seconds.

<sup>30</sup> Ibid Session 4, 1 hour, 22 minutes, 37 seconds.

<sup>31</sup> Ibid Session 1, 4 minutes, 40 seconds.

Nola's decision to have her daughter move to a group home after her accident rather than living with her family felt harsh at the time, but was pivotal in Rosemary's journey from her parochial roots to the public sphere nationally, and eventually, internationally. Her retelling of the episode is particularly poignant:

**Rosemary Kayess:** ... my mum understood people. She was a great person, people person. Um and I suppose that's why she could be brutally honest. I mean she, she told my brother David when it was time to move out of home. And she told me she ... didn't want me coming back and living at home after my accident. I had lived out of home and um when I had the accident ... there was talk about me moving back home and my mum said "No" and so I moved into a group home in Maroubra. ... that was really hard to take. That ... felt beyond the point of being brutally honest.<sup>32</sup>

...

**Kim Rubenstein:** ... can I articulate how I understand it? ... was it, it was her way of saying to you ... "This is not going to change your independence from us"?

**Rosemary Kayess:** "No, it's not going to change your independence from us". ... being an incredibly independent child most of my life um as mother said, "... You weaned yourself. Um you decided when you were going to dress yourself". ... but it was more a case of she didn't want to become my nurse and I suppose she sensed that ... is what would happen. That I would seek comfort in the family ... And that I needed to accept support and ... physical care from others ...

**Kim Rubenstein:** And ... as it panned out that ... was a gift to you as well in the sense ...

**Rosemary Kayess:** Yeah it was. ... I mean the group home wasn't the greatest ... place to be living, but it wasn't the worst either. It was one of the original ... specialist group homes for ... people with um physical disabilities. It was run on a fairly good emerging rights-based ethic ...

Kim Rubenstein: Yep.

**Rosemary Kayess:** And ... constraints of money and all the rest of it meant that it was most probably more numbers than you would want and had ... the potential to institutionalize people. But for all of that um it had the right approach and the right ethic. I mean my principles now say that there should be not any congregate care for people with disability in any way, shape or form. But ... the early to mid-eighties this was really quite transitional, quite new stuff. We know so, so differently now.<sup>33</sup>

Rosemary's mother's intuition proved correct in the long term and her decision had a formative influence on Rosemary's personal and professional trajectory. While her disability forced her to depend on others, moving to the group home 'Ashton' with its community based ideology, took her beyond her parochial roots into the public sphere of disability advocacy, university study and teaching and eventually, law. Through Ellie Mayhew, who had been running 'Ashton' for the Australian Quadriplegic Association (AQA), she met other disability advocates, initially Jenny Chapman, then the training officer at AQA; Robin Banks, then the director of the Disability Discrimination Legal Centre (DDLC) and later the Tasmanian Anti-Discrimination Commissioner; and Jenny Green, then the state manager of Disability Services for TAFE. These women – and later, Phillip French, a lawyer with the DDLC, and currently Director of the Australian Centre for Disability Law (ACDL) and Therese Sands, originally a policy specialist at the Human Rights Commission lawyer and

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<sup>32</sup> Ibid Session 1, 29 minutes, 44 seconds.

<sup>33</sup> Ibid Session 1, 32 minutes, 28 seconds.

now Director of Disabled People's Organisations Australia (DPOA) – became her steadfast friends, mentors and colleagues, recognising her intelligence, pragmatism, determination and fortitude and encouraging and enabling her to express the best of what she has to offer.

These predominantly female, core connections formed the basis of an enduring, co-constructive professional network that continued to expand as Rosemary undertook her first steps of active citizenship in the disability advocacy field and academia, where she completed undergraduate and graduate studies and began teaching in social sciences, and then law, and they influenced her approach, as she moved into the domain of international law, through to her style of participation in the drafting of the CRPD.

### III. ROSEMARY'S INTERACTION WITH LAW

Rosemary Kayess's transition into law was largely inspired by her interest in legal frameworks during her Social Policy studies and through her collaboration with Robin Banks, who invited her to join the DDLC management committee in 1995:

**Rosemary Kayess:** Yeah ... also being on the management committee of the Disability Discrimination Legal Centre ... and working on submissions with Robin. Robin was studying law at that stage. ... I love nothing better than puzzling through a legal puzzle with Robin Banks. ...

**Kim Rubenstein:** Hah it's the stimulation, that exhilaration ...

**Rosemary Kayess:** Yeah it's great, yeah and Robin and I do it so well. ... I just really, really, really enjoy doing it with Robin because she really challenges me.<sup>34</sup>

Like her accident, moving into law was a major catalyst in Rosemary's life. But while the accident shattered the life she might otherwise have lived, Rosemary describes the movement into law as 'solidifying'<sup>35</sup>, a term that reflects its foundational role in her 'rebuilding'.

**Rosemary Kayess:** ... it just felt like another stage. I mean I don't know whether I felt I was achieving anything. Um it was really nice once I got my law degree. This is going to sound really, really stupid. ... when I had to say what I did for a living ... I could actually say, "Well I'm a lawyer. I'm, I'm qualified as a lawyer." ... It was something tangible that I could write on a piece of paper.<sup>36</sup>

Moreover, law appeals to Rosemary on a number of levels, both personally and professionally which also give us insight into the way she utilises law and her legal skills in her role in drafting the CRPD.

#### A. Law as a logical, problem-solving tool

Rosemary regards logic as her 'defining element',<sup>37</sup> so law appeals to her pragmatism, a quality that is reflected in her privileging of 'core' (neutral) and 'subject-core' (specialized terms that are neutral within specific disciplines) over 'non-core' vocabulary word choices, such as figurative language or metaphor, that are more expressive of the individual. This

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<sup>34</sup> Ibid Session 2, 57 minutes, 39 seconds.

<sup>35</sup> Ibid Session 2, 53 minutes, 42 seconds.

<sup>36</sup> Ibid Session 3, 26 minutes, 42 seconds.

<sup>37</sup> Ibid Session 4, 54 minutes, 33 seconds.

differentiation in language choice is central to Carter's model of three vocabularies and degrees of 'coreness'.<sup>38</sup>

**Rosemary Kayess:** ... things have to be logical for me. ... I'm about trying to find logical solutions that I'm happy with. Not that I find the law always logical. I don't find the judiciary always logical ... But there are elements of the law that can be very logical.<sup>39</sup>

A legal training is to be valued because it teaches the skills required to find logical solutions to problems:

**Rosemary Kayess:** ... the process of law teaches you to tease things ... to think about problem solving.<sup>40</sup> ... lawyers have one really good skill ... if they're taught properly ... and it's about problem solving and it's about looking at ... how words matter, how words can change things ...<sup>41</sup>

Rosemary illustrates the importance of words in legal problem solving as she relates with humour how in finalising the CRPD, she and other members of the Australian delegation addressed the risk that many disabled people would be excluded by a proposal to define disability in physical terms only:

**Rosemary Kayess:** ... Oh so yeah, huge gap in terms of intellectual disability and psychosocial disability. ... So um what we did — and this was a particular stroke of genius of Matt Minogue's ... he proposed that we incorporate um a scoping of the people covered by the Convention in the purpose of the Convention. So in Article 1 there's just ... an indication of who's covered. And so between that and the preamble ... you get a, a definition by default, but there is no binding definition.

**Kim Rubenstein:** ... And so ... in essence even though um you're reasonably happy with it, that was something that was not originally on your plan in the terms ...

**Rosemary Kayess:** No, no it wasn't on our plan but you know um we were happy to move with that because we were able to come up with a, a solution to the problem. And I gave my all to um that process because ... you know about seven thirty on the Thursday night, I turn around to Ben Wallace. I said, "Oh, I think this might work better if we stuck it 'all' in there." So I said, "Look." I said to the meeting, "Um I think at the second paragraph should have, where it's got people with disability, 'all people with disability' just to reemphasize the fact that it's a non-exhaustive list". And so I gave my 'all' to the Convention.

[Laughs]

**Kim Rubenstein:** Oh ... very nice Rosemary.

[Laughs]<sup>42</sup>

Article 1 is worth replicating at this point as we hear Rosemary's voice in it: 'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all persons with disabilities*, and to promote respect for their inherent dignity.'

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<sup>38</sup> Ronald Carter, 'Vocabulary, Cloze and Discourse', in Ronald Carter and Michael McCarthy (eds), *Vocabulary and Language Teaching* (Longman 1988) 161, 171-76.

<sup>39</sup> Interview with Rosemary Kayess (n23) Session 3, 53 minutes, 42 seconds.

<sup>40</sup> Ibid Session 5, 1 hour, 2 minutes, 15 seconds.

<sup>41</sup> Ibid, Session 2, 1 hour, 8 minutes, 39 seconds.

<sup>42</sup> Ibid Session 4, 14 minutes, 32 seconds.

Moreover, it continues, ‘Persons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ (emphasis added).<sup>43</sup>

This inclusive definition is a powerful tool for ensuring and encouraging a form of active citizenship which mirrors Rosemary’s own life experience and motivation.

## B. Law as a tool for achieving social reform

Rosemary Kayess’s pragmatism and her heartfelt disillusionment with politics stemming from her early experience within certain disability organizations has contributed to her viewing law, despite its imperfections, as being a more effective instrument than politics for bringing about change and empowering the disabled. This again is relevant to what she brought to the table in the drafting of the CRPD.

**Rosemary Kayess:** I didn't like the infighting. ... that wasn't what I enjoyed. The challenge for me was something different. ... I suppose that's why I'm ... so disillusioned about politics ... Politics in general now is very much a display of professional politicians that are there for the political game rather than the actual problem solving of social management and ... I don't see either side displaying any of that problem solving. It's more the political competition. And I just find that so, so, so disheartening ...to the point of nearly heart-breaking.

**Kim Rubenstein:** Yeah ... You lose any sense of hope.

Rosemary Kayess: Yeah, yeah.

**Kim Rubenstein:** But does it then ...make you value what you're doing even more because ... the political can often ... thwart the ... legislative attempts, but ultimately, does it empower you also ... that the choice that you've made of this ... path gives you more potential for change?

**Rosemary Kayess:** Look I'm still optimistic that there are opportunities ...

**Kim Rubenstein:** But it takes us to that issue of legislative power over ...

Rosemary Kayess: Yes ...

**Kim Rubenstein:** ... Yes, so there's no guarantee by what you're doing, you're going to effect change, but there is ...

**Rosemary Kayess:** No, no. And there's that hope and ... look, ... You have to have a realistic faith in justice. I mean we know the justice system is, is flawed. And ah it's why we don't have a death penalty. It's so flawed ... you couldn't have a death penalty. Yes, there are circumstances where you think, “Surely we could have a death penalty”. Well, no you can't. You have it for one, you've got to have it for others. The system's flawed. ... And you know so you've got to be realistic that it can't be everything. But you still got to have faith that it's got a role. And so yeah ... I have a faith that it's got a role. ... and I suppose ... the DDA,<sup>44</sup> in some respects, and the Convention's restored a little bit of faith.<sup>45</sup>

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<sup>43</sup> See the full Convention at <[www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html](http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html)>

<sup>44</sup> The Disability Discrimination Act 1992 (Cth) a law passed by the Australian Federal Parliament in 1992, is designed to provide protection for all citizens against discrimination based on disability. See <[www.humanrights.gov.au/dda-guide-whats-it-all-about](http://www.humanrights.gov.au/dda-guide-whats-it-all-about)>

<sup>45</sup> Interview with Rosemary Kayess (n23) Session 2, 1 hour, 10 minutes, 6 seconds.

### C. Law as an authorising, status-conferring tool

From a professional perspective, as well as being a problem-solving tool, law ‘authorizes’ her to be active in the public sphere; it gives her the status and power required to influence disability reform and effect change, as she did in her role in the drafting of the CRPD:

**Kim Rubenstein:** ... back to my own ... specific research interests here in terms of how being a lawyer has enabled you to be active citizen. The strong theme has been the value of logic ... and we covered it a bit in terms of status ... you know there's an authority that comes with being a lawyer.

**Rosemary Kayess:** Well, I think the law gives you skills to be able to ... engage and be an active citizen in that respect. I mean I suppose ... it gives you a ... level of credibility and authority.<sup>46</sup>

In addition, the authority and credibility attached to law fulfils a deeply felt need to redress the balance on a personal level: in contrast to her physical disempowerment, identifying as a lawyer is empowering; it enables her to be defined in terms of her ability rather than disability. She explains this with characteristic self-deprecating humility:

**Kim Rubenstein:** ... the comment that you made about being able to say, “Well, I am a lawyer”. That's quite interesting too, because being a lawyer has a certain status too in society.

**Rosemary Kayess:** Oh yeah ... I think in a perverse sort of way it did a lot for me in terms of um my disability. You know it was that pretentious thing I could drop when people were treating me like a child because I was in a wheelchair. And, as I said, ... I have some good behaviour reactions to how people treat me and I have some bad behaviour reactions. And dropping the fact that I'm a lawyer is one of my bad ones ...

**Kim Rubenstein:** And why do you characterize that as a bad one? ...

**Rosemary Kayess:** Oh it's a bit pretentious and I don't think lawyers are anything special.

**Kim Rubenstein:** Yeah, but it immediately creates an impression ... for the other person of your capacity.

**Rosemary Kayess:** Yeah and saying you're a social scientist means absolutely nothing. And saying, “I've got you know a couple of university degrees” doesn't mean much either. But if you say you're a lawyer, anybody can grasp what that means. And everybody has an inflated sense about how you know clever and intelligent lawyers are supposed to be, especially lawyers.

**Kim Rubenstein:** But it's interesting because you went into it also partly from your experience ... in that um activist world ...

**Rosemary Kayess:** Where everybody ... deferred to ... the lawyers ...

**Kim Rubenstein:** ... So ... there is that element of um ... reinforcing what you'd experienced on others, yeah?

**Rosemary Kayess:** Yes ... See, I told you it was bad behaviour.

[Laughs]

**Kim Rubenstein:** But you're doing it from a totally authentic position, because you've achieved it and you have your own personal perspective to bring to bear on it. ... It's about ... a certain power I guess, isn't it? It's ... a recognition that, that you're being forced to assert your power because of ... the imbalance that the person's creating by a virtue of their assumption of

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<sup>46</sup> Ibid Session 5, 1 hour, 2 minutes, 15 seconds.

your lack of power. It's ... very interesting.<sup>47</sup>

#### IV. THE SPECIAL APPEAL OF LAW REFORM AND INTERNATIONAL LAW

Rosemary realised that it would be possible to effect legal reform by harnessing the validating power of law to her understanding of disability, disability activism and policy studies.

**Kim Rubenstein:** .... But in terms of your consciousness of that ... law is a valuable tool. ... I'm just wanting to tease that out a bit more that, that practical experience more than the intellectual was what was compelling you. ... would that be fair to say or ... Or is that a mix?

**Rosemary Kayess:** It's a mix, though it became very clear to me when I was doing policy studies, and more when I was teaching policy studies, the relationship between law reform and policy. And you know ... one of my greatest frustrations was being a person with a disability engaged in the policy discourse. They're sitting around this table and lawyers by default were deferred to ... I mean, yes, they might know the statute but they don't know the implications for the person at the other end. And I just, I was always gobsmacked that lawyers were somehow by default the, the holders of all knowledge. ...

**Kim Rubenstein:** ... Yet it was that realisation that then propelled you to say, "Well, I can combine the two".

**Rosemary Kayess:** Yeah, I can combine the two, because I think the two go really well together.<sup>48</sup>

Along with her interest in problem solving, Rosemary's ability to abstract and take a 'metaview' of law and social policy issues drew her to international law reform.

**Rosemary Kayess:** ... I do think lots of people go into law to be litigators. I quite consciously went into law not wanting to be a litigator. I have—well have an interest in it—but I don't have any desire to be a litigator.

**Kim Rubenstein:** And by that, do you mean being in the courtroom?

**Rosemary Kayess:** Being in the courtrooms or, or even um being a solicitor in a big firm that's you know preparing cases .... Just ... didn't interest me.

**Kim Rubenstein:** So your desire was the policy law reform?

**Rosemary Kayess:** Yeah, yeah it was the policy law reform, definitely the law reform. And I suppose ... my advocacy work drove a lot of that. ... But I also think my Social Science degree drove a lot of that. Um it wasn't disability specific driven. My interest was in international law um and bigger picture stuff. ... I'm a ... strategic, conceptual person. ... don't come to me for attention to detail. I'm not your person. I'm a big picture person, blue sky person and I can deal with that stuff really well. ... my attention to detail is not all that brilliant.<sup>49</sup>

**Rosemary Kayess:** ... international law is in the interpretation. All law is in the interpretation but international law, slightly more fluid. The exhilarating thing about it was, you know, thinking on your feet where you've got to think about how it works in different jurisdictions ... at the abstract level and then try and translate it down to the policy level. So that was the exciting stuff about it.<sup>50</sup>

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<sup>47</sup> Ibid Session 3, 29 minutes, 50 seconds.

<sup>48</sup> Ibid Session 2, 1 hour, 7 minutes, 0 seconds.

<sup>49</sup> Ibid Session 3, 2 minutes, 10 seconds.

<sup>50</sup> Ibid Session 4, 17 minutes, 4 seconds.

Viewed from a legal perspective, Rosemary's succinct description encapsulates features that make international law distinctive, complex and compelling. All legal texts are prescriptive in the sense that there is a high degree of verbal explicitness in their formulation and in the norms that govern their interpretation. However, international legal texts are drafted, approved and ratified by a group of authors who, despite working towards a 'collective intention', draw on differing 'cognitive environments' and background knowledge and bring 'differing individual intentions' to their communication, which is 'often temporally and spatially deferred ...'.<sup>51</sup> To a greater extent than with legal texts in general, the content of international legal texts 'has to carry over to times, places, and conditions distant from the time/place/conditions of origin'.<sup>52</sup> Consequently, the interpretation of international legal texts is more dependent than other legal texts on meanings inferred from the context (pragmatic meanings) rather than the literal or semantic meaning of terms. This interpretive process has been described as 'a broadening or loosening',<sup>53</sup> or 'pragmatic enrichment',<sup>54</sup> of the linguistic content encoded in a term, rendering the use of the rules of interpretation of international law less 'fully transparent or explicit'<sup>55</sup> or 'more fluid',<sup>56</sup> in Rosemary's words. Hence, a particular challenge in drafting international law is that lawyers need to bear in mind, whether the content will be effective, as Rosemary says, 'in different jurisdictions',<sup>57</sup> both in theory and in practice.

Viewed from a linguistic perspective, Rosemary's comments on international law are noteworthy, because they contrast with her more characteristic core and subject-core vocabulary choices, as previously explained. Instead, her attraction to international law is expressed through intensified expressions of affect ('exhilarating',<sup>58</sup> 'exciting',<sup>59</sup>), and metaphors and figurative meanings ('big picture person',<sup>60</sup> 'blue sky person',<sup>61</sup> 'exciting stuff'<sup>62</sup> and perhaps most powerfully, given her disability, 'thinking on your feet').<sup>63</sup> It is as though her very involvement in international law is enabling, injecting her with dynamism and with the deftness required to engage in the linguistic 'dance' that is the interpretation process. These 'non-core' lexical choices are palpable expressions of her individual identity and her passion for international law. And they also are reflected in her particular standpoint in her role in the drafting of the CRPD.

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<sup>51</sup> Pirker and Smolka (n17) 12.

<sup>52</sup> Carston in Pirker and Smolka (n17) 15.

<sup>53</sup> Pirker and Smolka (n17) 19.

<sup>54</sup> Ibid 18.

<sup>55</sup> Ibid 2.

<sup>56</sup> Interview with Rosemary Kayess (n23) Session 4, 17 minutes, 13 seconds.

<sup>57</sup> Ibid Session 4, 17 minutes, 21 seconds.

<sup>58</sup> Ibid Session 4, 17 minutes, 15 seconds.

<sup>59</sup> Ibid Session 4, 17 minutes, 30 seconds.

<sup>60</sup> Ibid Session 3, 3 minutes, 22 seconds.

<sup>61</sup> Ibid Session 3, 3 minutes, 24 seconds.

<sup>62</sup> Ibid Session 4, 17 minutes, 30 seconds.

<sup>63</sup> Ibid Session 4, 17 minutes, 18 seconds.

## V. ROSEMARY'S CONTRIBUTION TO INTERNATIONAL LAW

Rosemary's unique, trailblazing contribution to the field of international disability law and to national disability policy was born of her abilities (intelligence, pragmatism, logic and determination), her lived experience as a disabled woman, particularly her experience of 'institutionalization' in congregate care, her skills as a disability advocate, her social policy studies background and legal knowledge. In her own words:

**Rosemary Kayess:** ... I have this social science background. I had the law background and I had the personal experience. And so it was the combination of those three things that sort of put me in the right place at the right time.<sup>64</sup>

**Rosemary Kayess:** Well ... there are several skills that I suppose that I've gathered along the way ... the language of um what's the best way ... of saying it. The discipline around a social theory of disability. I don't believe there's a ... social theory of disability, but there is, you know, the social model — for ... want of a, a better label — um a social perspective, a human rights perspective, ... having the language behind that, um having an appreciation of how the law and legal construction works. And yeah ... [my] overweening logic ...<sup>65</sup>

Rosemary's vision for a socially inclusive, human rights perspective on disability evolved from this coalescence of factors. Her ability to convince other disability advocates, and later, other Australian delegates to adopt this vision and her instrumental role in the drafting of the CRPD represent her most enduring achievements to date in the domain of international law.

In June 2003, when she was in the final stages of her law degree, Rosemary travelled to New York to attend the second Ad Hoc Committee meeting of the Convention. Her fellow disability advocates, Phillip French (representing the DDLC) and Darren Fitler (from Vision Australia), nominated her as an ally to the Non-Government Organization (NGO) Steering Committee on Disability. In contrast to the initial Ad Hoc meeting in June 2002, when the Australian government had taken a backseat role in the Convention proceedings, the participation of Rosemary, her fellow Australian disability advocate, Australian international lawyer, Andrew Byrnes (who played a role as an expert and then adviser to the Asia Pacific Forum of National Human Rights Institutions during the process), resulted in the Australian participants being 'part of the shining lights'<sup>66</sup>:

**Rosemary Kayess:** ... we were engaged in a lot of corridor conversation with the Australian delegation. And ... in one corridor conversation ... I was saying to them ... "What you're failing to understand is, you're wanting to annex those two ... declarations" – the '71 and '75 Declarations on Mental Retardation and Disabled Persons were part of the problem. You know they, they were the paternalistic, institutionalized construction of disability that we needed to move on from. "And what you want them to do is annex them to the International Bill of Human Rights". And it was just ... like this dawning realization to them ... I said, "Go back. Have a look at those declarations. See what they say to you. Is that what you want to embed as the international norms and standards, legal standards for people with disability in the 2000s?"<sup>67</sup>

Towards the end of her first international disability meeting in 2003, Rosemary was asked to chair a caucus meeting regarding the representation of NGOs on the Ad Hoc Committee's

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<sup>64</sup> Ibid Session 3, 54 minutes, 21 seconds.

<sup>65</sup> Ibid Session 3, 52 minutes, 30 seconds.

<sup>66</sup> Ibid Session 3, 47 minutes, 34 seconds.

<sup>67</sup> Ibid Session 3, 50 minutes, 52 seconds.

drafting group. Her recollection of this meeting – in the present and past tenses combined – is ‘alive in the telling’<sup>68</sup> and foregrounds Rosemary’s leadership, but equally, her exhilaration, both at the time and 10 years later:

**Rosemary Kayess:** So we were basically in caucus all of the day trying to hash out ... what we would put forward to the member states in terms of um representation on the drafting group. Now I don't know if you could conceive this but ... the room would have been about 6 metres by about 15 metres ...and you've got about 80 people in there.

Kim Rubenstein: Gee.

**Rosemary Kayess:** ... in one corner a group of young Korean girls and in the other corner a group of young Japanese girls and ... so they're translating what you're saying into Japanese and Korean for the delegates that are in the room that are Japanese or Korean with the various ear pieces in. You then have people kneeling beside people in wheelchairs whispering in Spanish and Arabic and um people who are beside people who are blind whispering in Spanish and Arabic what I'm saying or what anybody else is saying from English to Arabic or English to Spanish. You've got an American sign language interpreter, a Finnish sign language interpreter, a deaf blind interpreter ... and a court reporter person doing CART, um real time captioning, as well for what I was saying. So I've got all this interpretation going on. I've got people putting their hands up, people who are blind um just jumping ... in the middle of everything and it was just absolute chaos and absolute pandemonium.

**Kim Rubenstein:** And you're chairing?

**Rosemary Kayess:** And I was chairing. And we came, we came to a conclusion. We ... said we wanted ten spots on the [drafting group], that we'd have five for the IDA group and five for the regions.

**Kim Rubenstein:** And IDA is the ...

**Rosemary Kayess:** Ah International Disability Alliance so it's ... World Federation of the Deaf, World Blind Union ... Inclusion International, the ones that I mentioned before.

Kim Rubenstein: Yeah.

**Rosemary Kayess:** Now that took us all ... day to get agreement on ... the proposal we were going to take to um the Ad Hoc Committee.

**Kim Rubenstein:** And can I ask you ... is there any formality to the chairing or is it literally your choice as to how you conduct and manage?

**Rosemary Kayess:** Oh it was just the way I conducted it and managed it. ... I don't know that I did anything special, but at the end of that day people stood and applauded. The first people to stand and applaud were the interpreters.

Kim Rubenstein: Wow!

**Rosemary Kayess:** And everybody just asked me if I'd come back and chair tomorrow.

Kim Rubenstein: Fantastic.

**Rosemary Kayess:** So I did ... I don't know if I've got particularly good chairing skills. I don't know if it's because I'm reasonably articulate ... I really don't know what was behind it. I obviously impressed people. People still to this day turn to me about that meeting and are in, so

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<sup>68</sup> Kirin Narayan, *Alive in the Telling, Crafting Ethnography in the Company of Chekov* (The University of Chicago Press 2012).

in awe of my chairing of that meeting. ... I personally don't think I did anything special. It was a hard, long day but we got through it. ...

**Kim Rubenstein:** ... Maybe do you think that that experience [as chair of the Australian Centre for Disability Law] would have played into it ...?

**Rosemary Kayess:** ... well yes, yes it would have. It would have given me ... that innate sense of what ... formal requirements I had to engage in. And I suppose yes, all that practice of making sure that I um summarize what someone said to make sure everybody's ... in agreement that that's what's been said and that's what we're discussing. Um and yeah so I suppose yeah it did ...

**Kim Rubenstein:** ... and were you exhausted by the end of the day?

**Rosemary Kayess:** Oh God yes. ... And kind of exhilarated too ... I mean that's the exciting thing ... It's that thinking on your feet that's always such fun.<sup>69</sup>

In recognition of her ability and skills, Rosemary Kayess was subsequently nominated to be the NGO representative on the Australian government delegation and in January 2004 became the Australian representative on the drafting committee of the Open-Ended Working Group drafting the Convention, a position that she filled until the end of the negotiations in 2006. In particular, Rosemary played a very important role as the facilitator for the drafting of Article 24 on the right of disabled people to education.<sup>70</sup> A particularly contentious issue during the drafting of this Article concerned the question of whether people with disabilities should be entitled to special or mainstream education or have the right to choose between both. Theresa Degener largely credits Rosemary Kayess, 'an eminent international lawyer and disability rights activist from Australia' for the final text, qualifying it as 'a true compromise and in my opinion a masterpiece'.<sup>71</sup> The wording of the relevant paragraph demonstrates Rosemary's ability to perform a lithe linguistic dance between the two positions in the debate, thereby allowing for a more 'fluid' interpretation, which is precisely what is required in the drafting and interpretation of international law, as discussed in Section VI above:

(1)...States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to: ...

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.<sup>72</sup>

## VI. IMPLEMENTING THE CONVENTION

The interview with Rosemary records her efforts to promote the Convention through her teaching and mentorship in Australia and overseas and to implement it at the national level through her ongoing work with the Australian Human Rights Centre and her participation in

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<sup>69</sup> Interview with Rosemary Kayess (n23) Session 3, 1 hour, 3 minutes, 30 seconds.

<sup>70</sup> We would like to thank Andrew Byrnes for bringing this point to our attention and for his comments and suggestions generally on the draft of this chapter.

<sup>71</sup> Theresa Degener, 'Disability in a Human Rights Context' (2016) 5(3) Laws 35, 11.

<sup>72</sup> Art. 24 CRPD (3)(a) and (b)).

the now disbanded Council of Australian Governments (COAG) Disability Policy Working Group. She additionally elaborates on her long term goal of bringing disability into the mainstream by changing mindsets within the disability sector and the broader community. This reconceptualization involves ‘making some quantum leaps’,<sup>73</sup> to move beyond the so-called ‘inclusion’ policy, a view that echoes the position of other Australian disability advocates cited at the beginning of this chapter. Again metaphor – ‘embedding disability in that bigger picture’,<sup>74</sup> – and figurative expressions of physical processes – ‘quantum leaps’<sup>75</sup> – stand out in this section, underscoring Rosemary’s individuality and suggesting the strength of her intellectual and emotional commitment to her vision.

**Rosemary Kayess:** And a lot of the stuff I work on now is about embedding disability in that bigger picture instead of having it something separate to the bigger picture.<sup>76</sup>

**Rosemary Kayess:** ... it's still really hard to get people beyond care, protection and treatment. ... And this is going to be the measure of the success of the Convention I think. The, the point that we can get people past care and protection and treatment and you know to truly recognize disability as part of human diversity. And ... it's tricky. It's about making some quantum leaps. ... I mean I gave ... the 2014 Matt Laffan oration. Um and I was saying that the experience with people with disability is one of separated and segregated. And that ... comes about even when we're trying to include. So ... there's separate little parking spaces off the side and separate for people with disability. So disability is you know, you know identified and segregated as other over there with the blue spots.

Kim Rubenstein: Yep.

**Rosemary Kayess:** Whereas everybody could benefit from having slightly wider spaces, with there being a designated space between every second car. You know it, everybody would benefit—aged people, people with prams, people with small kids—everybody would benefit. You would have a far more accessible you know car park ... for everybody. You wouldn't have to segregate people in terms of their characteristics. Mums with prams, people with disabilities, aged people ... that's not what inclusion is about. That's, that's the minority politics you know, minority identity um accommodation, tolerance type stuff. It's not about inclusion. ...

**Kim Rubenstein:** Yeah ... that's an example that you could replicate in so many different contexts.

**Rosemary Kayess:** Yeah ... I mean that's why ... even when they're trying to include, we exclude and we discriminate. So there's still a lot the Convention has to do. And I don't think people can see, you know, they see “Oh but we're ... providing all these, these great things”. But they don't see that whilst you continue to label it as different and other, then that's not inclusion.<sup>77</sup>

Despite her frustration that the realization of this vision is being impeded by inadequate funding of research,<sup>78</sup> Rosemary’s confidence that mainstreaming of disability will happen is striking and inspiring.

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<sup>73</sup> Interview with Rosemary Kayess (n23) Session 4, 1 hour, 13 minutes, 52 seconds.

<sup>74</sup> Ibid Session 3, 21 minutes, 15 seconds.

<sup>75</sup> Ibid Session 4, 1 hour, 13 minutes, 52 seconds.

<sup>76</sup> Ibid Session 3, 21 minutes, 12 seconds.

<sup>77</sup> Ibid Session 4, 1 hour, 13 minutes, 21 seconds.

<sup>78</sup> Ibid Session 4, 1 hour, 11 minutes, 32 seconds.

**Kim Rubenstein:** Do you think though that there's an element a little bit like when we were discussing the um group living and the moving to the next stage, that you ... were sort of at a point where, with the Convention ... that you need to have got to here before you can then make the next jump that you're now making?

**Rosemary Kayess:** There's going to be lots of stuff that has to be done in terms of transition. ... I mean with legal capacity especially ... lots of the nuance that we're dealing with now and governments are struggling with now won't be a problem in fifty years' time because people with disability will have much different support net-, networks. They will have natural, organic support networks because they will grow up in families, they will live in the community. They won't be isolated and have no natural ... supporting, trusting networks that we all use to make decisions. ...

**Kim Rubenstein:** Yeah. It's been a longstanding aspect really to your life, hasn't it? I mean in terms of that group experience to what you've just said now, ... it's about how you are brought into the mainstream in a whole range of different contexts, isn't it?

**Rosemary Kayess:** Yeah it's funny. Um I never ever link my own ...

Kim Rubenstein: Personal ...

**Rosemary Kayess:** Well, especially in terms of legal capacity, because I've never ever considered that at any point um my rights, will and preference weren't, weren't able to be articulated. Whether they were met, well that's a different kettle of fish.<sup>79</sup>

Rosemary emphasizes that building legal capacity is fundamental to 'true' inclusion of disabled people, and that transitioning to this stage requires inclusive research, affirmative action and building understanding, for example, by exposing the judiciary to disability.

**Rosemary Kayess:** ... this is why I see inclusive research as so important, because without the voice of people with disability, without people with disability engaging in the policy discourse which incorporates ... the law reform discourse as well ...

**Rosemary Kayess:** You know people with disability have been locked away from that conversation for so long. And so we're not in academia. We're not, we're not in the public service, embarrassingly so. Worse and worse figures every year. We're just getting further and further behind. So we're not in the senior levels of public service. We have one person with disability in the South Australian state parliament. And so research then becomes, if the voice of people with disability isn't coming through in the research, how do you build capacity with the decision makers not to be prejudiced?

How do you influence the judiciary not to be prejudiced?

Kim Rubenstein: Yep, yep.

**Rosemary Kayess:** Not to be ignorant of the experience of disability. And you see in judgements that they ... misunderstand what disability is all about.

**Kim Rubenstein:** That makes me think Rosemary, you know there's the National Judicial College where they, and I know that historically they've had gender training. Has there been any move to have some ...

**Rosemary Kayess:** No, but it, God it needs doing. ...

**Kim Rubenstein:** ... Mmm, particularly in light of your comments on various decisions of the courts and the lack of understanding of ... those issues, that if, if the courts are one avenue for asserting rights, you need the court to be, the judges [to be trained]. Which adds into the notion of the experience of disability adding into the life experience of judges. I mean you need judges

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<sup>79</sup> Ibid Session 4, I hour, 19 minutes, 32 seconds.

with disabilities too ...<sup>80</sup>

## VII. ORAL HISTORY AS A CONTINUING PROJECT FOR THE FUTURE OF FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW

Rosemary Kayess was ‘a powerful advocate’ for a human-rights based approach to the drafting of the convention, was ‘influential in persuading governments’ to this perspective and played a significant role ‘in relation to a number of provisions, especially the right to education.<sup>81</sup> Her distinctive contribution of a human rights perspective to the drafting of international disability law was born of her innate ability, her lived experience as a woman who is also disabled, her skills gained as a disability advocate, and her professional expertise as a social policy analyst and lawyer. Making available this perspective is, we believe, at the heart of the future of feminist engagements with international law. Why? Because it is born of the essential feminist principle that recognizes the ‘personal is political’ and that the lived experience of women is fundamental to understanding the exercise of power in society and remedying the many inequalities that continue to exist in all facets of society.

The more lived experiences of women like Rosemary recorded through oral histories and made available to the public, the more people will be interested in improving the way power is exercised in society, including ‘world society’ through the institutions of international law, the more likely there will be a recognition of and growing critique of the best way for international law to serve the communities it is seeking to protect. This chapter also recognizes that gender is not only about sex, but is experienced differently by virtue of other differences in women’s lives such as race, ethnicity and nation, class, age and other different social experiences such as living with a disability.

The combined legal and linguistic analysis of this oral history has made clearer those factors that have influenced and enabled Rosemary Kayess to exercise her power as an active citizen in her interaction with international law. This ‘fleshing out’ of aspects of identity, formative experiences, motivations, values and vision of the individual actor, as well as a first-hand account, in this chapter, of Rosemary’s role in the drafting of the CRPD, reminds us of the possibilities for feminist engagement with international law both in its development directly through treaties, and also through our thinking about institutional design and reform. Moreover, it offers encouragement and inspiration to other lawyers who may face challenges, be they physical, as in Rosemary’s case, or other, that their life stories are similarly significant in the way they are further lived frameworks from which we can all think about reforming international law’s institutions and practices. In this sense, oral histories may complement traditional scholarly publications on international law. Thus, the interview with Rosemary Kayess ‘rounds out the picture’<sup>82</sup> of her contribution to international law provided by her published work on the CRPD.<sup>83</sup>

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<sup>80</sup> Ibid Session 5, 1 hour, 4 minutes, 21 seconds.

<sup>81</sup> We again thank Andrew Byrnes, in this instance for his characterization of Rosemary Kayess’s contribution to international law.

<sup>82</sup> We again thank Andrew Byrnes for this comment and his suggestions.

<sup>83</sup> See <https://research.unsw.edu.au/people/ms-rosemary-jane-kayess/publications>

### VIII. CONCLUSION

There are many insights to be derived from Rosemary's oral history, but in the context of this collection, her story powerfully reminds us of her move from the local to the global and of her empowerment and active citizenship through her lawyering, which had a direct impact on the drafting of the CRPD. It affirms the pressing need for the inclusion of diversity of experience in all law-making institutions. Rosemary's life experience as a woman with a disability enabled her to make a unique and significant contribution to the public sphere and, more specifically, to reform in the realm of international law, which would be all the more diminished without her contributions. Her philosophy of 'truly recogniz[ing] disability as part of human diversity'<sup>84</sup> can be seen through the language used on the UN Website describing the Convention itself, which of course is not only about Rosemary Kayess, but others with similar life experiences brought to the table:

The Convention follows decades of work by the United Nations to change attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.<sup>85</sup>

This 'process of revealing the actors'<sup>86</sup> through Rosemary's oral history sheds a particular, and new, light on the development of the CRPD and overall practices in international law. It also affirms the value of a commitment to broaden the range of actors to ensure that international law's ongoing development is as inclusive of as wide a range of experience as possible. In addition, while Rosemary Kayess's contribution to the drafting of the CRPD was unique, many people with disabilities participated in its development. Their stories may not be the subject of public retelling and analysis, but they nevertheless highlight the potential of people of all backgrounds to play a role in shaping international law.<sup>87</sup>

Finally, the dual legal and discourse analytic perspectives employed in this chapter add to the growing body of interdisciplinary, and linguistic, approaches to research that has the potential to enrich international legal scholarship, as demonstrated for example by Pirker and Smolka.<sup>88</sup> In this instance, the CRPD can be understood and interpreted from a richer frame, which then continues to impact on the lives of all people subject to its reach.

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<sup>84</sup> Interview with Rosemary Kayess (n23) Session 4, 1 hour, 13 minutes, 46 seconds.

<sup>85</sup> <[www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html](http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html)> accessed 7 December 2017.

<sup>86</sup> Knop, (n1) 335.

<sup>87</sup> We thank Andrew Byrnes for pointing this out.

<sup>88</sup> Pirker and Smolka, (n17)