

The Role of National Human Rights Institutions and Organizations of Persons with Disabilities in the National Monitoring of the CRPD

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The Role of National Human Rights Institutions and Organisations of Persons with Disabilities in the National Monitoring of the CRPD

Colin Caughey, Hanxu Liu

1. Introduction

When the UN Convention on the Rights of Persons with Disabilities (hereinafter CRPD or Convention) was opened for signature it was anticipated that it would lead to procedural innovation at the domestic level resulting in the establishment of institutional architecture for the implementation of the CRPD which would act as an engine for law reform (Quinn, 2009, pp. 47–48; UNCRPD, 2007). This architecture is constructed around three pillars consisting of a government focal point, a reinvigorated civil society and an independent monitoring framework.

Some fifteen years since the Convention was opened for signature it seems to be an appropriate time to take stock of how this architecture has been developed in practice and whether the promise of innovation has been delivered. This chapter will focus on the latter two pillars considering how States have complied with the obligation to establish an independent monitoring framework and the opportunities which this presents to civil society. The chapter highlights that central to the success of both pillars is the relationship between National Human Rights Institutions (hereinafter NHRIs), designated within a monitoring framework and civil society organisations, particularly Organisations of Persons with Disabilities (hereinafter OPDs).

During the negotiation of the CRPD civil society organisations and NHRIs collaborated effectively to influence the development of both the substantive and procedural articles within the Convention. Echoing the international disability movement's mantra of 'nothing about us without us', the CRPD places general and specific obligations on the state to involve civil society in the implementation of the Convention (UNCRPD, 2007, Article 4.3, 33.3 and 32.1).

NHRIs are '*State-mandated bodies, independent of government, with a broad constitutional or legal mandate to protect and promote human rights at the national level*' (Paris Principles, 1994). NHRIs are accredited by the Global Alliance of NHRIs (hereinafter, GANHRI) on the basis of their compliance with the Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights (hereinafter the Paris Principles). The Paris Principles are referred to within Article 33(2) which puts in place a requirement on State Parties to establish a framework, including an independent mechanism to monitor the implementation of the Convention (Degener, 2016, p. 31; Quinn, 2009b, pp. 47–48). The Office of the United Nations High Commissioner for Human Rights (hereinafter OHCHR) stated that NHRIs are the "*natural core entities of the monitoring framework at the national level*" (OHCHR, 2009, para. 78). As we will set out below in practice NHRIs are the

presumptive nominee as the independent mechanism. In practice many independent monitoring frameworks are single entity frameworks. NHRIs designated as the independent monitoring mechanism therefore also effectively make up the entirety of the monitoring framework.

This chapter aims to consider the legal aspects of the national monitoring mechanisms as required by the CRPD, and investigate States' obligations, civil society's role under such mechanisms and some current issues in practice. With a focus on the national monitoring mechanism, this chapter considers how civil society organisations, especially OPDs, can collaborate with NHRIs designated as the independent mechanism to bring about change. We introduce an overall discussion, rather than a comprehensive reflection on the current practice of CRPD monitoring among the States, drawing on existing studies and documents from online database¹ of the Committee on the Rights of Persons with Disabilities (hereinafter CRPD Committee or Committee).

The following discussion is developed in four sections. First, Section 2 provides an insight into the normative frameworks under the CRPD regarding national monitoring mechanisms and the participation of civil society, especially OPDs. Section 3 looks into the implementation of such mechanisms among States, and then discusses the effective collaboration between the NHRIs and civil society organisations in Section 4. The last section provides some concluding remarks.

2. International normative framework: national monitoring and civil society's participation

The OHCHR (2009) published a thematic study on the structure and role of national mechanisms for the implementation and monitoring of the CRPD, followed by a guidance document in 2014 (Conference of States Parties to the Convention on the Rights of Persons with Disabilities). Guidance issued by the CRPD Committee by way of its concluding observations and general comments have been more prescriptive of the form and function of independent monitoring frameworks (CRPD Committee, 2018d). The CRPD Committee have also issued specific guidelines on the independent monitoring frameworks and their participation in the work of the Committee (CRPD Committee, 2016). Despite these additional sources of guidance a number of ambiguities remain relating to independent mechanisms which we will seek to address in this section.

The CRPD was negotiated at a time at which the effectiveness of the Treaty Body system was under scrutiny and consideration was being given to adapting practices and procedures regulating treaty body examinations to make them more effective (Pillay, 2012, as cited in Guernsey 2018). During the negotiation of the CRPD a number of proposals for innovating the international examination process were put forward. However, as the negotiations progressed it became clear that States were unwilling to subscribe to new methods of international monitoring (Stein & Lord, 2010, p. 689, as cited in Combrinck, 2018, p. 1066). The negotiations focused on developing innovative arrangements at the domestic rather than at the international level (Raley, 2016, p. 138). As a result the CRPD represents '*a clear improvement for human rights implementation*' at the domestic level (Marianne Schulze, 2013, p. 209). The CRPD puts in place a dual approach to oversight, with responsibility for international oversight resting with the Committee and responsibility for domestic oversight with the independent monitoring framework (Ferrajolo, 2017, p. 610). We would add to this

¹ See https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en.

assessment that the CRPD improves human rights at the domestic level through requiring States to ensure the participation of persons with disabilities in the implementation process and to support their participation in the monitoring framework.

The CRPD Article 4(3) places a specific obligation on Governments to ‘closely consult and actively involve’ persons with disabilities including children, and their representative organisations in ‘decision-making processes concerning issues related to persons with disabilities’. This obligation is closely related to the right to political and public life protected by Article 29 of the CRPD. Article 29 (b) emphasises the value of participating through NGOs and associations, especially OPDs that represent people with disabilities at international, national, regional, and local levels.

OPDs should be systematically and openly consulted and involved in decision-making processes related to monitoring the CRPD, in a ‘meaningful and timely manner’, which requires States to ensure accessibility and provide reasonable accommodations in relation to information, communications, the physical environment, and national funds (CRPD Committee, 2018d, para. 22). By way of general comment the CRPD Committee have elaborated on the requirements of Article 4(3). The CRPD Committee have made clear that OPDs should be systematically and openly consulted and involved in the development of CRPD implementation measures, in a ‘meaningful and timely manner’, which requires States to ensure accessibility and provide reasonable accommodations in relation to information, communications, the physical environment, and national funds (CRPD Committee, 2018d, para. 22).

The CRPD at article 33(2) makes provision for the establishment of an independent monitoring framework, it provides:

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

From initial observation, this provision requires a State to have regard to the Paris Principles when designating the independent monitoring mechanism. The OHCHR stated that NHRIs are the “*natural core entities of the monitoring framework at the national level*” (OHCHR, 2009, para. 78).

The text of Article 33(2) is not prescriptive as to the role, powers and composition of the framework (Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 2014, para. 8). States have broad discretion to establish an independent monitoring framework in line with their domestic arrangements (Lorion, 2019, pp. 234–258). Article 33(3) also places a specific obligation on States to ensure “*civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process*”. The precise form this participation should take is somewhat unclear (Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 2014, para. 8). Some commentators have suggested that the Article 33(3) obligation mirrors the general obligation contained in Article 4(3) (Quinn, 2009a, p. 252). However the CRPD Committee by way of its general comment have made clear that Article 33(3) is more extensive than Article 4(3) amounting to an obligation to ‘*ensure their effective*

participation in the processes of the independent monitoring frameworks' (CRPD Committee, 2018d, para. 39). This is clearly greater than the Article 4(3) obligation which is focused around the government's consultation exercises (CRPD Committee, 2018d, para. 21).

2.1. Composition of the framework

The OHCHR has made clear that article 33(2) does not *'prescribe a unique organisational form for the monitoring framework'* (Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 2014, para. 19). In practice many independent frameworks are single entity frameworks. In such contexts the terms framework and mechanisms are often used interchangeably (Murray & Johnson, 2013, p. 110).²

The CRPD Committee have not set out its preferred composition of an independent monitoring framework. However, it is notable that in its concluding observation on Spain and New Zealand the Committee commended the State for its monitoring mechanism. In both States the Independent Framework is composed of an A status NHRI and an OPD. The Committee noted that Spain was *'in full compliance with Article 33(2)'* (CRPD Committee, 2019d, para. 6). However within the General Comment No. 7 the Committee did not suggest that States were required to designate an OPD as part of the independent framework. The General Comment acknowledges that NHRIs *'play a key role in the monitoring process of the Convention'* (CRPD Committee, 2018b, para. 36). Indeed the CRPD Committee in their concluding observations have consistently emphasised that within a monitoring framework a State Party, *'must have an institution that is in compliance with'* the Paris Principles (CRPD Committee, 2014a). As set out above the OHCHR consider that NHRIs are best placed to perform this role. Academic scholars similarly have put forward the view that the inclusion of a NHRI is best practice (The Centre for Disability Law and Policy, 2016, p. 13). The Committee in general appear content for the framework to be composed solely of an NHRI, for instance in its concluding observations on the Czech Republic the Committee recommended that *"the office of Ombudsman should be entrusted with the mandate as the independent national monitoring mechanism"* (CRPD Committee, 2015a). Similarly the Committee recommended that the Canadian Government *"formally appoint the Canadian Human Rights Commission as the independent monitoring mechanism"*, a recommendation supported by OPDs in Canada (CRPD Committee, 2017b, para. 55(b)). Whilst they are content for a NHRI to be solely designated, the Committee have consistently recommended that independent frameworks should be required to ensure the *"full involvement of organisations of persons with disabilities in its monitoring tasks under the Convention"* (CRPD Committee, 2017b, para. 55(b)). Therefore whilst a State may choose not to designate an OPD within the independent monitoring framework it must still facilitate their involvement in other ways.

2.2. Independence of the framework

The wording of Article 33(2) is ambiguous as to whether the requirements of independence relate to the entirety of the framework or to the independent mechanism alone. It has been suggested that all bodies within the framework *"need to be compliant with the Paris principles"* (Mental Disability Advocacy Center, 2011). However Quinn and Crowther (as cited in (Mental Disability Advocacy Center, 2011, p. 63) in a guidance document produced

² Also see the General Comment No.7, where the CRPD Committee refers to the national structure under Article 33(2) as 'independent monitoring frameworks'.

for the Asia Pacific Forum have, in our view correctly set out that, *'the best interpretation is that while the designated independent mechanism must comply with the Paris Principles, the other entities in the framework have to exhibit some functional independence from the executive in order to be effective'*. This view reflects the established approach of the CRPD Committee which has recommended the removal of state bodies from the Independent Framework when they are considered to lack independence (CRPD Committee, 2015c).

In their concluding observations the CRPD Committee have consistently highlighted that compliance with the Paris Principles is the key test of an independent mechanism's independence (CRPD Committee, 2019e). In the case of Belgium the Committee specifically recommended that the State ensure the accreditation of the Interfederal Centre for Equal Opportunities as an A status NHRI (CRPD Committee, 2014a).

The CRPD Committee have emphasised the need to ensure separation between independent monitoring and implementation activities stating that *'representatives of departments and units involved in the implementation of the Convention'* should not be involved in the monitoring framework (Committee on the Rights of Persons with Disabilities, 2018b, para. 20).

Whilst there is a need for a clear separation between implementation and monitoring, effective monitoring will inevitably involve extensive engagement with the State and monitoring frameworks will draw on the state's own data collection systems (Aichele, 2018, p. 1000). Conversely an effective plan for implementing the CRPD will incorporate extensive monitoring by the state. For instance, a state must monitor uptake of programmes to support persons with disabilities. The independent monitoring framework may advise the State on its monitoring arrangements and it may input to its analysis. However, in doing so it should maintain a 'cordon sanitaire' between independent monitoring and implementation (Quinn, 2008, as cited in Aichele, 2018, p. 984). Contributing to State efforts to monitor implementation should not hinder or undermine the capacity of the independent monitoring framework to engage in its own independent monitoring activities.

2.3. Designation of an independent mechanism

Article 33 requires States to formally designate an independent mechanism. However this designation is not a pre-requisite for ratification. Some States have ratified the CRPD without establishing an independent mechanism (Birtha, 2013; UN Human Rights Council, 2016). An analysis of concluding observations issued by the CRPD Committee suggest that around a third of all States examined were yet to have designated an independent mechanism.³

Upon ratifying the CRPD the Zambian Government implied that the Zambian Human Rights Commission had been designated as its independent mechanism. However no formal designation had taken place. In her mission report on Zambia the UN Special Rapporteur on the rights of persons with disabilities (hereinafter Special Rapporteur) made clear that the official designation of the Zambian Human Rights Commission was required (UN Human Rights Council, 2016, para. 26). This example underscores need for a formal process of designation.

The Committee have made clear that the monitoring framework must have *'a stable institutional basis that allows it to operate properly over time and that it is appropriately*

³ 34 of 91 concluding observations issued include a recommendation that the State designate an independent mechanism or framework in line with Article 33(2).

funded and resourced' (CRPD Committee, 2019d, para. 54). The Committee have not set out in detail the steps which a State should take in designating an independent mechanism.

NHRIs must be vested with competence to promote and protect human rights and should be given as '*broad a mandate as possible*' (UNGA, 1994, paras 1–2). The Paris principles requires that a NHRIs mandate is "*clearly set forth in a constitutional or legislative text*". This suggests that all accredited NHRIs should have a sufficient mandate to protect and promote the CRPD. However in practice an NHRI's mandate may be constrained by the domestic legal framework (Murray & Johnson, 2013, p. 93). In a number of cases the Committee have recommended that a NHRI designated as the independent mechanism be provided with a clear mandate and with sufficient authority to perform its role (Committee on the Rights of Persons with Disabilities, 2018a, para. 60). Whilst the Committee has on occasion recommended that the founding legislation of a NHRI be amended to reflect its role as an independent mechanism, this has not been a consistent recommendation (CRPD Committee, 2017a, para. 63). In practice many NHRIs have been designated as an independent mechanism without amendments being made to their legal basis (Gauthier de Beco, 2011, p. 42).

2.4. Resourcing of independent mechanisms

Aichele points out that, '*the CRPD Committee has indefatigably claimed that the framework must include adequate resources*' (Aichele, 2018). The CRPD Committee have consistently recommended that State Parties '*provide adequate funding for the functioning of an independent mechanism*' (CRPD Committee, 2017b, para. 58). Within their Guidelines the Committee provide that the State Party must, '*further equip them with additional and adequate budgetary and skilled human resources to appropriately discharge their mandate under Article 33(2) of the Convention*' (CRPD Committee, 2016b, para. 15). The Committee increasingly consider whether an NHRI designated as the independent mechanism have sufficient resources to carry out the role. For instance, the Committee recommended that the Rwandan Government '*allocate human, technical and financial resources that are sufficient in both quality and quantity to the National Commission for Human Rights to enable it to effectively perform its mandate*' (CRPD Committee, 2019b).

In practice research by the OHCHR Europe Office indicate that, "*The independent mechanisms generally received no additional funding to promote, protect and monitor the implementation of CRPD. No budget has been provided following their designation*" (Gauthier de Beco, 2011, p. 42). The Danish Institute of Human Rights was provided with additional funding on its designation as the independent mechanism and continues to receive specific funding for monitoring the CRPD which has facilitated the development of a specific CRPD unit within the Institute (Gauthier de Beco, 2011, p. 42).

Within General Comment no.7 the CRPD Committee have specifically emphasised the need for OPDs to receive funding to facilitate their participation in the independent monitoring framework (CRPD Committee, 2018d, para. 39). This funding should presumably be administered by the State.

2.5. Role of independent mechanisms

Reflecting the language of the Paris principles Article 33(2) sets out that the role of an independent mechanism is '*to promote, protect and monitor implementation of the Convention*'. Within the Committee's Guidelines on independent monitoring frameworks it is

set out that promotional activities include awareness raising, provision of advice on legislation, research and reporting including to the UN system. The Guidelines emphasise that independent monitoring frameworks should be able to issue reports ‘at their own initiative’ (CRPD Committee, 2016b). The protection activities include complaints handling, investigations and participating in court proceedings. The monitoring role of the independent mechanism includes the ‘*development of a system to assess the impact of the implementation of legislation and policies*’, including the development of indicators and databases. The Paris principles do not specifically address the monitoring activities of a NHRI. The focus of NHRI monitoring activities has tended to be on the identification of violations. The monitoring activities envisaged for independent monitoring frameworks appears to be more broad based and more closely linked to the policy process (Quinn, 2009a, p. 227). The performance of this more expansive monitoring role is likely to require additional financial and human resources.

2.6. Relationship with OPDs

The CRPD Committee have made clear that the independent monitoring framework must “*ensure the full involvement and participation of persons with disabilities through their representative organizations in all areas of its work*” (CRPD Committee, 2016b, para. 18).

Within General Comment Number 7 the CRPD Committee has elaborated that Independent frameworks should ensure the participation of persons with disabilities and their representative groups, “*through formal mechanisms, ensuring that their voices are heard and recognized in its reports and the analysis undertaken*”. Since the publication of General Comment Number 7 the Committee has become more prescriptive in their recommendations relating to Article 33. The Committee have consistently recommended that NHRIs designated as independent mechanisms adopt formal procedures to facilitate the participation of persons with disabilities in their monitoring activities (CRPD Committee, 2019d). The Committee has also more consistently emphasised the obligation on the State to provide OPDs with the necessary funding to ensure their participation (CRPD Committee, 2018c, para. 56).

3. Current situation of national CRPD monitoring

At the time of writing the CRPD Committee have issued concluding observations relating to 91 States. In all but one set of concluding observations the Committee has considered the independent mechanisms. Through reviewing the CRPD Committee’s concluding observations, the reports of the Special Rapporteur’s country visit procedures and previous independent studies a number of trends can be identified in the composition of independent monitoring frameworks.

There is a notable trend of designating an NHRI either solely or jointly as the independent monitoring framework. The designation of an NHRI as the independent mechanism is clearly seen by the Committee as way of guaranteeing its effectiveness. Before considering the essential features of an independent monitoring framework we will briefly consider the features of an NHRI which makes them suitable to this role.

The key feature of an NHRI is its independence from the State. A body is only recognised as a NHRI when it has been accredited by an independent UN system which assess the body against the Paris Principles and provide it with a grading depending on its level of compliance (GANHRI, 2017). Once initially examined a NHRI is subject to a quinquennial review and may have its status downgraded. Whilst the accreditation system has been subject

to criticism it provides an open internationally recognised procedural check on the independence of a NHRI which reviews its legal framework, its budget and its activities.

GANHRI, in particular through its Sub-Committee on Accreditation (hereinafter, SCA), provides NHRIs support and assistance in safeguarding its independence. The OHCHR emphasises that independence is guaranteed through legal safeguards and also through organisational culture (OHCHR, 2009). NHRIs foster a culture of independent thinking and analysis which safeguards them against being co-opted from the State.

As a State institution with a defined legal mandate an NHRI brings permanence to human rights monitoring. Disability Rights Promotion International highlights that durable human rights monitoring *'is not a snapshot but an on-going video'*.⁴ NHRIs have the capacity to establish monitoring tools which track human rights developments in the long term. For instance a number of NHRIs have established innovative human rights tracker tools which track implementation of the Treaty Body recommendations.⁵

An NHRI has a range of statutory powers which facilitate its monitoring activities. Firstly a NHRI will often have powers to request information from Government Departments and to interview Government officials.⁶ These powers can guarantee access to information necessary to determine if human rights violations have taken place.

A key challenge for human rights monitors is ensuring that their reports receive attention once they are published. The Paris Principles (1993) requires that an NHRI be empowered to raise matters of concern with Government. As such the designation of an NHRI as the dedicated mechanism ensures that monitoring reports relating to the CRPD receive appropriate Government attention.

The designation of an NHRI also brings significant expertise to the monitoring of the CRPD. The expertise which an NHRI has can be placed into three categories; technical; policy; and process.

An NHRI and its staff have technical expertise in human rights law generally. As set out above NHRIs are required to have as broad a mandate as possible. As a consequence, NHRIs have developed expertise in advising on and monitoring compliance with the full range of international and domestic human rights protections. The CRPD sits alongside other international treaties and domestic protections, monitoring compliance with the CRPD requires broad technical expertise in human rights law. NHRIs with broad expertise in domestic and international human rights standards are well positioned to monitor the implementation of the CRPD.

The development of policy and law reform measures which bring about the implementation of the CRPD is a complex task. Monitoring the development of reforms and their implementation will require extensive policy expertise (Waldschmidt, 2009, p. 9). Policy expertise refers to *'knowledge of the range of policies and instruments, proposed and enacted, governing a particular policy area as well as knowledge of how they work'* (Page, 2010, p. 271). The range of policies which impact on persons with disabilities is vast. There is a risk that *'disability policy'* will be defined restrictively to include only those social welfare and health policies designed specifically for persons with disabilities. NHRIs through

⁴ Disability Rights Promotion International Available at: <http://drpidisability.apps01.yorku.ca/resources/DRPIProgRep/Chapter1>

⁵ See for instance the New Zealand Human Rights Tracker available at : <https://rightstracker.org/en/country/NZL>

⁶ See for example the NI Human Rights Commission Northern Ireland Act 1998

their broad policy expertise can play a key role in ensuring the rights of persons with disabilities are mainstreamed throughout all relevant policies.

The third category of expertise which a NHRI brings can be classed as process expertise. Process expertise refers to “*knowledge of the complex processes that have to be followed to ensure a proposal can be put into effect*” (Page, 2010, p. 271). Through its role as an advisor of Government and other State bodies on human rights compliance an NHRI accumulates expertise on the processes of policy making. The importance of human rights monitors being attentive to political priorities and bureaucratic cultures was recently acknowledged in a review of the impact of the office of the Special Rapporteur (Crowther & Priestley, 2020). NHRIs have extensive experience of presenting human rights in a credible way that resonates with domestic priorities and cultures. This expertise is valuable when developing observations on the human rights situation and when developing plans for the implementation of recommendations emerging from the CRPD Committee.

Having now considered the specific features of a NHRI which make them suitable for inclusion in the monitoring framework we will now consider how monitoring frameworks have been developed in practice.

3.1. Monitoring frameworks not including NHRIs

Where frameworks have been developed without the inclusion of an NHRI these have been shown to lack resources, capacity and most significantly the independence required to perform their duties effectively (Aleksandra Tabaj & Cveto Uršič, 2013; CRPD Committee, 2012, 2016a, 2018a; Ferrajolo, 2017). In the case of Kenya the Committee expressed concern that the framework did not comply with the Paris Principles and specifically recommended that the Kenya National Commission on Human Rights be included to address this (CRPD Committee, 2015b). Similarly the Committee found that the designation of a Chief Commissioner for Persons with Disabilities along with State commissioners as the Indian independent mechanism was insufficient to guarantee independence and recommended the inclusion of the NHRI within the framework (CRPD Committee, 2019f, para. 69).

Austria initially established an independent framework composed of a monitoring committee under the Federal Disability Council, which was responsible for advising the Minister for Social Affairs. Whilst the monitoring committee included a strong representative from civil society, when the CRPD Committee examined Austria, it raised concerns about the lack of independence of the monitoring committee and the absence of a designated budget. The Committee recommended that it should be brought into compliance with the Paris Principles (CRPD Committee, 2019a). Noting these concerns, the Austrian Government has developed new regulations to guarantee independence and budget for the Independent Monitoring Committee in 2018 (Austrian Monitoring Body, 2018, p. 30). As Austria is undergoing the second cycle of country review, whether the Committee is satisfied with this adjustment and the framework’s compliance to Article 33(2) is yet to be known.⁷

In Spain the Spanish Committee of Representatives of Persons with Disabilities was initially solely designated as the independent monitoring framework. However in light of concerns relating to the lack of statutory powers the Spanish Government included the Spanish A

⁷ There is no question on article 33 in the List of issues prior to submission of the combined second and third periodic reports of Austria. See UN Doc CRPD/C/AUT/QPR/2-3.

status NHRI within the monitoring framework (The Centre for Disability Law and Policy, 2016, p. 22).

Overall it appears that independent monitoring frameworks which do not include an NHRI have been found to be inadequate by the CRPD Committee. Frameworks designed around OPDs, State bodies with thematic responsibility for disability and even bespoke bodies have not proven to be effective or compliant with Article 33(2).

3.2. Monitoring frameworks composed of NHRIs and OPDs

Whilst it was initially presumed that States would include OPDs within the independent monitoring framework in reality there are limited examples of this in practice. (De Beco & Hoefmans, 2013, p. 30) There are two examples known to the authors of frameworks in which an NHRI has been designated alongside an OPD, which we will now consider.

The New Zealand Human Rights Commission is designated as the independent mechanism alongside the Ombudsman, who handles complaints, and the Disabled People's Organisations' Coalition, a body composed of representatives from seven OPDs. Reflecting its new role the composition of the New Zealand Human Rights Commission was reformed to include a designated disability commissioner. Commissioners are appointed by the New Zealand Government but can be nominated by interest groups such as OPDs (Ministry of Justice New Zealand Government, 2020).

The New Zealand Independent Mechanism operates as one entity in how it goes about engagement and in the production of reports.⁸ The Mechanism meets twice yearly with relevant Ministers to share its views and press for change. However, it noted, "*engagement does not necessarily translate to commitments to integrate accommodation and inclusion meaningfully, or to make the large-scale shifts in systems-level policy required in education, justice, housing or employment*" (Independent Monitoring Mechanism NZ, 2020).

New Zealand was examined by the CRPD Committee in 2014 and the Committee commended New Zealand for establishing a framework in compliance with Article 33(2). However, the framework itself notes that there is room for improvement. In a recent report, the Mechanism noted that it does "*not always have as diverse representation as that envisaged by General Comment 7*" (Independent Monitoring Mechanism NZ, 2020).

In Spain, the independent framework is composed of an OPD, the Spanish Committee of Representatives of Persons with Disabilities, and the Spanish NHRI. The Spanish Committee is an umbrella organisation representing over 600 organisations (The Centre for Disability Law and Policy, 2016, p. 22). In its initial examination of Spain, the CRPD Committee recorded that Spain was '*in full compliance with Article 33(2)*' (CRPD Committee, 2019c, para. 6). Reflecting the importance of State resourcing a subsequent review of Spain in 2019 recommended that the State Party '*strengthen the capacity of the Spanish Committee of Representatives of Persons with Disabilities*' (CRPD Committee, 2019c).

In a research report to inform the development of the independent mechanism in Ireland, the NUIG Centre for Disability Law and Policy noted that the Spanish framework was an attractive model. However, they acknowledged that few States hosted an umbrella OPD analogous to the Spanish Committee of Representatives (The Centre for Disability Law and

⁸ See <https://www.hrc.co.nz/our-work/people-disabilities/making-disability-rights-real/>.

Policy, 2016). In light of the emphasis which the CRPD Committee have placed on the establishment of an umbrella organisation, this may lead to a growth in their number, potentially facilitating the adoption of similar models.

3.3. Monitoring frameworks including NHRIs alongside other statutory bodies

A number of states have designated an NHRI alongside other relevant public authorities.

The Danish Government designated the Danish Institute for Human rights, the Danish Disability Council, and the Danish Parliamentary Ombudsman as the independent framework.⁹ The Danish Institute, in line with the Paris Principles, is responsible for protecting, promoting, and monitoring the Convention. The Parliamentary Ombudsman is the national equality body, principally handling complaints. The Danish Disability Council is a seventeen person council composed of representatives of civil society organisations and government bodies including five OPDs (CRPD Committee, 2014b, para. 383). The Danish Disability Council has specific responsibility for *'discussing and assessing developments in society for persons with disabilities'* (CRPD Committee, 2014b, para. 383). The Council, therefore, provides a link with OPDs to allow the lived experience of persons with disabilities. In addition to these arrangements, the founding statute of the Danish Institute was amended to provide for its board to include a member nominated by OPDs.

3.4. Monitoring frameworks solely designated NHRIs

As set out above the CRPD Committee have been broadly content for NHRIs to be solely designated as the independent mechanism. In recent examinations the Committee has considered in more detail how an NHRI is including persons with disabilities in its monitoring activities. In its concluding observations on the Phillipines the Committee specifically raised concerns at the, *'lack of specific mechanisms within the Commission on Human Rights of the Phillipines to engage and ensure the participation of persons with disabilities, through their representative organizations, in monitoring the Convention at the national and local levels'* (CRPD Committee, 2018b).

NHRIs who have been designated more recently as independent mechanisms have tended to give detailed consideration to the inclusion of persons with disabilities within their structures (The Centre for Disability Law and Policy, 2016). Upon ratification of the CRPD, the Irish Government designated its NHRI the Irish Human Rights and Equality Commission as its independent mechanism. Since its designation, the Commission has established a Disability Advisory Committee or DAC to advise the Commission on its role as the independent monitoring framework. The members of the DAC were appointed following an open recruitment process and are appointed on an individual basis (Irish Human Rights and Equality Commission, 2019). Whilst many members of the DAC are involved in or employed by OPDs, they are appointed in their individual capacity rather than to represent the views of particular organisations. Ireland has not yet been examined by the CRPD Committee.

In Australia, the Australian Human Rights Commission or AHDC, which is also the national equality body, is solely designated as the independent monitoring framework. The AHRC reflects the Commission model of NHRI (Australian Human Rights Commission, 2020). The

⁹ Parliamentary Decision B 15 of 17 December 2010

AHRC is led by a Chief Commissioner along with seven Commissioners. Each Commissioner has a specific remit, including a Disability Discrimination Commissioner.

The Disability Discrimination Commissioner is appointed by the Government. The Disability Commissioner engages in national consultations with persons with disabilities and draws on their expertise by way of a number of expert reference groups on specific projects (CRPD Committee, 2019a, para. 111). Despite these efforts in a shadow report to the CRPD Committee in advance of the second examination of Australia the OPD Disability Rights Now expressed concern at the lack of formal engagement mechanisms within the AHRC to engage with OPDs (Disabled People's Organisations Australia, 2017). In its concluding observations, the CRPD Committee recalled these concerns and recommended the State Party *“establish a formal mechanism and ensure sustainable and adequate funding for the meaningful engagement of persons with disabilities and their representative organisations in the implementation and monitoring of the Convention”* (CRPD Committee, 2019a, para. 62).

This recommendation reflects the emphasis which the CRPD Committee place on the involvement of persons with disabilities through their representative groups, who will reflect the diversity of views of persons with disabilities. It appears that the inclusion of persons with disabilities on advisory boards or even within decision making bodies will be insufficient to meet the requirements of Article 33(2).

Since the publication of General Comment No. 7 a number of NHRIs solely designated as an independent mechanism have revised their internal arrangements for engaging with persons with disabilities and their representative groups. For instance, the Northern Ireland Human Rights Commission or NIHRC, which is jointly designated with the national equality body as the independent mechanism for Northern Ireland. Following the publication of the General Comment No. 7 the NIHRC has proposed the development of a disability forum. The forum will be composed of OPDs, civil society organisations and persons with disabilities. The forum will advise the independent mechanism on its work providing insight into the lived experience of persons with disabilities.¹⁰ In determining the composition of OPDs and civil society organisations to be represented on the forum the NIHRC must ensure the selected members are reflective of all persons with disabilities in Northern Ireland.

The South African NHRI has both a Commissioner specifically responsible for disability and an advisory committee on disability issues.¹¹ The advisory committee includes both civil society organizations and individual experts who advise the Commission. The composition of an advisory committee is determined at the discretion of the South African NHRI. OPDs have raised concerns that their views have not been taken into consideration by the South African NHRI (CRPD Committee, 2011; Mahomed et al., 2019, p. 356). The designation of the South African NHRI as the Independent Mechanism has not yet taken place (South African Human Rights Commission, 2020).

As set out above many NHRIs have been designated as the independent mechanism without amendments being made to their legal mandate. Of the examples discussed only in Denmark do we see the state adjusting the composition of the NHRI to provide for the inclusion of an additional member of their governing body, to be nominated by OPDs. In the absence of states amending or reviewing the NHRIs mandate to ensure its suitability for the role of an

¹⁰ Independent Mechanism for NI, IMNI Disability Forum.

¹¹ See <https://www.sahrc.org.za/index.php/focus-areas/disability-older-persons>.

independent mechanism the onus is placed on the NHRI itself to consider how it includes persons with disabilities and their representative groups in its activities.

Quinn and Crowther (2017) highlight that, ‘*Some NHRIs have expressed concern about the impact of involving persons with disabilities on their ‘de facto’ independence as required by the Paris Principles*’. Whilst it is accepted that the independence of a NHRI can be encroached by civil society organisations just as it can by State bodies, through careful management such risks can be addressed (Aichele, 2018).¹² Indeed in addition to requiring that NHRIs are independent the Paris Principles require that they be pluralistic. To be effective NHRIs must be pluralistic and reflect prevailing social forces in society, including CSOs. The Paris Principles (1994, para.3) acknowledge “*the fundamental role played by the non-governmental organizations*”. The SCA suggest that pluralism can be guaranteed in a number of ways including through procedural mechanisms such as advisory committees, networks or public forums. The SCA recommends that NHRIs develop constructive and systematic working relationships with NGOs and other bodies. It further suggests that these relationships be formalised through ‘*public memoranda of understanding*’ (GANHRI, 2017, p. 11). The involvement of OPDs within an advisory committees or a formal mechanism established by an NHRI is therefore in fact recommended by the SCA and rather than impinging upon the independence of the NHRI should instead strengthen its capacity.

The inclusion of civil society and OPDs can significantly strengthen the capacity of a NHRI to perform its role as the independent monitoring mechanism.

4. Effective collaboration between independent monitoring frameworks and civil society organisations

Collaboration between NHRIs and OPDs in monitoring the implementation of the CRPD will be mutually reinforcing. Now, we will consider what opportunities the designation of an NHRI as an independent mechanism opens up to OPDs. We will set out four opportunities which the designation of an NHRI as an independent mechanism presents to OPDs.

4.1. Collection of data

The OHCHR identifies one of the five purposes of monitoring to be the creation of new partnerships (OHCHR, 2012b, p. 19). In addition to developing its own independent monitoring activities, a key role for an independent monitoring mechanism is to develop new partnerships between the state and civil society in developing monitoring data systems to inform and track implementation.

For the first time in a human rights treaty, the CRPD in Article 31 requires that ‘*states parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention*’.

When formulating Article 31 negotiators suggested that a reference to data collection be included within Article 33 (UN Enable, 2004). Whilst this proposal was not adopted it continues to be acknowledged that robust data collection is essential both for effective policy-making and effective monitoring by the independent mechanism. As Pederson has highlighted, “*the work of the monitoring bodies in assessing implementation through the use*

¹² Aichele has highlighted that for NHRIs, ‘*the principle of independence requires equidistance from the state and any civil forces*’.

of statistics and research data depends in large on the quality of the data collected by states parties” (Pedersen & Ferretti, 2018).

The development of Article 31 was influenced by the need to reform data collection systems which tended to focus on the measurement of impairment rather than the identification and measurement of disabling barriers (Lawson & Priestly, 2015). States need to develop data collection processes which identify previously hidden impediments to the full participation of persons with disabilities in society.

The CRPD Committee and disability advocates emphasise the importance of including OPDs and their accounts of the lived experience of persons with disabilities within processes of knowledge production (Normand Boucher & David Fiset, 2015, p. 128). In contrast to this approach states have increasingly moved towards evidence-based policy-making processes. Such processes tend to privilege objective evidence which is scientifically rigorous over lived experience or experiential knowledge (Smith-Merry, 2020, pp. 305–316).

Disability advocates emphasise the need to develop emancipatory processes of evidence production through the establishment of workable dialogue between persons with disabilities and those responsible for research (Barnes, 1992, p. 122). NHRIs can play a key role in working with state entities to develop facilities for persons with disabilities and their representative groups to provide inputs to data collection processes (Priestley & Lawson, 2014, p. 752).

The use of indicators has taken on significant prominence in monitoring the implementation of human rights instruments. Eilionoir Flynn has highlighted that, ‘...*the CRPD implicitly requires the development of future indicators and sets the contours for measuring success in improving the lives of persons with disabilities*’ (Flynn, 2011, p. 34). Whilst the use of indicators is seen as a positive development in human rights monitoring there are certain risks (OHCHR, 2012a).

Indicators frame problems and if the process for their development is not robust and inclusive, they may be manipulated by States to present narratives of success (Davis et al., 2012, p. 71). NHRIs and OPDs must work together to ensure indicators satisfy standards of validity whilst reflecting the principles of the CRPD (OHCHR, 2012a). The OHCHR has developed a holistic set of indicators linked to the CRPD Articles, which provide a basis on which to develop indicators specific to their jurisdiction which can be integrated into domestic instruments.¹³

The development of a monitoring strategy based on indicators can often privilege those with technical expertise over those with lived experience (Brunsson & Jacobsson, 2002, p. 46). NHRIs can play a role in advising the State on the need to develop facilities to allow persons with disabilities to provide insight from their lived experience (Berghs et al., 2016, p. 35). NHRIs can also play a role in assisting OPDs to frame the evidence gathered from their lived experience to ensure it is credible and relevant to the process of applying indicators.

4.2. Monitoring CRPD recommendations

The CRPD Committee’s Guidelines on independent mechanisms emphasise a key role for an independent mechanism in monitoring the implementation of the recommendations of the

¹³ Available at: <https://www.ohchr.org/EN/Issues/Disability/Pages/sdg-crpd-resource.aspx>

CRPD Committee (CRPD Committee, 2016b, para. 21). Discussion on UN treaty reform has highlighted how NHRIs can play a key role in the “*domestication of treaty body outputs*” (Egan, 2013, p. 664). NHRIs have developed innovative tools for tracking the implementation of Treaty Body recommendations (FRA, 2020).

As the CRPD Committee recommendations are rarely put forward in an implementable form it is necessary for an NHRI to play a key role in “thickening” the standards and recommendations to ensure they have resonance in the domestic context (Sooahoo & Stolz, 2008, p. 495). Human rights commentators highlight the need for processes of vernacularisation, ‘*by which transnational human rights are adapted to local contexts*’ (Merry, 2009, p. 211). The first task of monitoring treaty body recommendations is therefore the development of a domestic plan for implementation. The participation of OPDs in the decision-making processes of such domestic plans should be ensured. The CRPD Committee encourages States to first adopt ‘*legal and regulatory frameworks and procedures to ensure the full and equal involvement*’ of OPDs (CRPD Committee, 2018d, para. 53). (CRPD Committee, 2018d, para. 53) (CRPD Committee, 2018d, para. 53) (CRPD Committee, 2018d, para. 53)

During the negotiation of the CRPD, the Australian NHRI proposed the incorporation of an obligation on Member States to develop a National Disability Action Plan or NDAP on implementation of the CRPD (Stein & Lord, 2010, pp. 702–703). Whilst this proposal was not adopted, interest in the utility of NDAPs remains (Stein & Lord, 2010, pp. 702–703). Jerome Bickenbach (2011) highlights that to be effective rights must be ‘*operationalizable*’ into policy goals, which should then be broken down into ‘*challenging yet feasible*’ targets. An NHRI which has accumulated knowledge of how Government works and political perceptiveness is uniquely placed to propose or scrutinise implementation plans which are challenging yet feasible (Mintrom, 2007, p. 146). The New Zealand NHRI has played a key role in developing New Zealand’s National Action Plan, a plan consisting of 100 actions, supported by 232 indicators to effect the implementation of recommendations from the international human rights system including the CRPD Committee.¹⁴ Thanks to the participation and collaboration of Disabled People’s Organisation Coalition in New Zealand with different actors in its designing, the newest Disability Action Plan 2019-2023 responds to current issues raised by the disability community.¹⁵

4.3. Developing new analytical approaches

Ensuring that a state’s data collection systems provide an accurate reflection of the lives of persons with disabilities is central to ensuring the effective implementation of the CRPD. Through their advisory role NHRIs can challenge Government approaches to statistical analysis to ensure they are presenting an accurate reflection of the lived experience of persons with disabilities.

In the UK austerity measures were considered to have disproportionately impacted on persons with disabilities. However due to the State’s silo approach to data collection the full impact of austerity measures on the lived experience of persons with disabilities was not being captured (Roberts et al., 2017, pp. 167–184). Noting this the UK’s Equality and Human Rights Commission developed a methodology for conducting Cumulative Impact Assessment or CIAs to assess the impact of social security and tax reforms on the household incomes of

¹⁴ See <https://npa.hrc.co.nz/overview>

¹⁵ See <https://www.odi.govt.nz/disability-action-plan-2/>

individuals.¹⁶ Such assessments would provide a more accurate record of the impact of the totality of austerity measures on the lives of persons with disabilities.

The Commission has advocated that the UK Government integrate CIAs into their own monitoring activities. On examining the UK the CRPD Committee recommended that the UK Government conduct CIAs in relation to the impact of social security reforms in the UK and integrate the methodology into policy development processes (CRPD Committee, 2017c). The adoption of this methodology would significantly strengthen the capacity of OPDs to analyse the impact of proposed policy measures.

4.4. Independent investigation

Whilst often associated with the protection remit of an NHRI, the systemic investigation of human rights issues can form part of NHRI's monitoring plans. Such investigations can be used to mitigate the failure of State monitoring activities to fully capture the lived experience of persons with disabilities. For instance, the National Human Rights Commission of Mexico conducted an investigation into the accessibility status of certain government facilities which demonstrated the failure of government monitoring activities to identify and address obstacles to accessing buildings and services.¹⁷

For those states where NHRIs are assigned the investigation role, OPDs could participate through several means, including submission of complaints, provision of support to applicants, and submitting evidence to NHRIs when conducting an investigation.

5. Conclusion

The innovation of establishing the independent monitoring framework at the domestic level is still in a process of discovery. The publication by the CRPD Committee of General Comment No. 7 has led to an increased focus on how persons with disabilities and their representative groups are being included within independent frameworks. The reluctance by State Parties to develop frameworks which include OPDs has placed the onus on NHRIs to review their internal structures. Whilst NHRIs face resourcing issues and have concerns relating to independence these are not insurmountable. The CRPD Committee have clearly demonstrated a need for independent mechanisms to develop formal procedures of engagement with persons with disabilities and OPDs. Whilst a number of NHRIs have developed advisory committees these have tended to include persons with disabilities as individuals rather than as representatives of organisations of persons with disabilities. The CRPD Committee clearly see the value of OPDs participating in the activities of the monitoring framework (CRPD Committee, 2018d). There is clearly a need for NHRIs designated as an independent mechanism to establish formal procedures of engagement with OPDs. Through such procedures NHRIs can share their expertise and insights with OPDs and strengthen the development of domestic disability movements.

Further research is also required to identify how effective collaboration between NHRIs and OPDs can achieve advancements in the rights of persons with disabilities which would not have been achievable otherwise. We believe that experience to date has shown that the key to this lies in the triangular relationship of civil society, NHRIs and the State. NHRIs can play a key role in collaborating with OPDs in ensuring the lived experience of persons with disabilities is presented to governments in a way that is impactful. The credible evidence

¹⁶ See <https://www.equalityhumanrights.com/en/publication-download/cumulative-impact-tax-and-welfare-reforms>

¹⁷ See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=935 &Lang=en.

which it generates can facilitate the initiation of the programme of law reform to implement the CRPD. Delivering this reform requires collaboration, long term commitment and patience from all actors.

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