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Chapter 6

The United Kingdom

Asymmetrical Challenges to Implementing the CRPD

1. INTRODUCTION

Equality law in the UK is the dominant prism through which disability is addressed. Countless examples across the UK demonstrate how disabled people's rights cannot be fully realized unless equality law is delivered in conjunction with the human rights-based approach outlined in the UN Convention on the Rights of Persons with Disabilities (CRPD).¹ Since the UK ratified the CRPD in 2009, efforts to maximize the transformative potential of the CRPD have been driven from the bottom-up through careful advocacy and political campaigns focused on securing rights for disabled people through the devolved governments in light of the central government's general apathy for human rights. Sectoral laws and policies have ensured and promoted some specific rights in different areas of disability but these are generated predominantly by the subnational governments. The focus of this contribution is the extent to which the UK's constitutional framework has shaped implementation of the CRPD.

For clarity of terminology used in this chapter, when referring to the subnational governments within the UK, the specific government, such as the Welsh Government or Northern Ireland Executive (NI Executive), or the term 'subnational administration' or 'devolved nation' will be utilized in line with the UK approach to referring to the four separate entities as 'nations'. Furthermore, reflecting the social model of disability, the term 'disabled people' is used to acknowledge that 'people with an impairment are disabled by barriers in the environment and society'.² This choice takes into account the terminology preferred by various advocacy organizations focused on disability rights and law as well as UK law and policy.³

¹ This chapter was developed from a 2020 briefing paper by the author, see K. McCall-Smith, 'Incorporating the United Nations Convention on the Rights of Disabled People into Scots Law' (*Inclusion Scotland and The Health and Social Care Alliance Scotland*, 2020) <<https://www.alliance-scotland.org.uk/blog/resources/incorporating-the-united-nations-convention-on-the-rights-of-disabled-people-into-scots-law/>>.

² UK Independent Mechanism (UKIM), 'Disability Rights in the UK. Updated submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK's implementation of the UN CRPD' (2017), 3 <<https://www.equalityhumanrights.com/sites/default/files/crpd-shadow-report-august-2017.pdf>>.

³ E.g., Disability Discrimination Act 1995, s1; Equality Act 2006, s8(4).

This chapter explores how ratification of the CRPD drives the asymmetric governance arrangements and developments of disabled people’s rights in the UK. Section 2 will outline how the unique governance arrangements of each of the UK’s devolved nations enable Wales, Scotland and Northern Ireland to give effect to disabled people’s rights using distinct policies and programmes developed under the umbrella of equalities law and general human rights law. Section 3 will dive deeper into subnational law and policy to demonstrate how the three subnational governments aim to entrench the transformative vision of the CRPD into the devolved legal systems. This localized approach should ensure that the rights of disabled people are brought to life in those areas that matter most, particularly in the promotion of the social model of disability. However, in focusing on four areas underpinning implementation – the concept of disability, non-discrimination and equality, accessibility and participation – it becomes clear that the potential for disabled people in the UK to exercise, enjoy and claim the rights set out in the CRPD is often dependent on the constitutional capacity of the devolved government. The chapter then considers how the UK implements Article 33 CRPD and whether greater coordination could make the focal point and independent mechanism more effective tools in the UK. The final section offers thoughts on how the varying devolution settlements in Britain create both opportunities and barriers to implementing the CRPD.

2. DISABILITY RIGHTS GOVERNANCE IN THE UK AND ITS DEVOLVED NATIONS

While the UK is ‘decidedly not a federal State’, it follows a ‘method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent’.⁴ However, unlike most federal states, the UK has no unified, written constitution and each of the devolved UK nations has a unique legal settlement with the national government that defines which areas of governance sit at the central or devolved levels. In other words, the limits on subnational entities are not identical across the same level of subnational government, though through subsequent amendments the differences are increasingly disappearing.⁵ The Supreme Court is the highest court in the UK and is the final court of appeal for all civil suits. It may also

⁴ R. Schütze, ‘British “Federalism”?: From England to United Kingdom: Internal Structures’ in R. Schütze and S. Tierney (eds.), *The United Kingdom and the Federal Idea* (Hart 2018), 11.

⁵ *ibid*, 8.

decide devolution issues when there is a question about whether one of the devolved nations has infringed on reserved powers – a point that can create tension when the subnational entities legislate to give greater force to human rights. In the context of human rights policy development there are identifiable grey areas where the competence to govern is mixed or unclear between the UK and devolved administrations. For this reason, three of the four distinct jurisdictions are presented independently, including Wales, Scotland and Northern Ireland. England is not treated separately, as general UK law is applicable as the *lex loci* and it does not have a second, concurrently governing subnational administration.

In Wales and Scotland, all matters not expressly reserved to the UK fall under the competence of the devolved administrations. As the devolution settlements detail, however, the catalogue of matters falling in either sphere of governance are not identical between the Welsh and Scottish governments.⁶ This legal reality can make cross sub-national comparisons difficult to develop. As Tierney notes, the adaptation to the devolved settlements of the UK ‘has occurred without any sense of coherent planning’.⁷ To add to the complexity in comparative analysis across devolved competencies, in Northern Ireland the devolution settlement is more nuanced with distinctions being made between excepted, transferred and reserved areas of competence. Here, the ‘excepted’ matters align with many of the policy areas reserved to the UK Government through the Scotland Acts and Government of Wales Acts. ‘Transferred’ matters under the Northern Ireland Act (NI Act) are those areas expressly designated as matters of competences of the NI Executive. ‘Reserved’ matters in Northern Ireland are those that are currently governed by the UK Government but could be transferred in the future. The identification of potentially transferable areas of competence is not part of the existing settlements with Wales or Scotland and recent history demonstrates that transfers of new areas of competence are relatively *ad hoc* responses to political pressure.⁸

The UK requires incorporation of international law before it becomes binding on state actors at any level. For this reason, the Human Rights Act 1998 (HRA 1998)

⁶ Compare New Schedule 7A to the Government of Wales Act 2006, amended by Government of Wales Act 2017, sch 1, with Scotland Act 1998, sch 5, amended by Scotland Act 2016 .

⁷ S. Tierney, ‘Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017’ in Schütze and Tierney, *The United Kingdom and the Federal Idea*, 102.

⁸ See Scotland Act 2012 and 2016 and Government of Wales Act 2017, and discussion in Tierney, *ibid*, 104 *et seq.*

is arguably the cornerstone of human rights protections for the British population as it directly incorporates the European Convention on Human Rights (ECHR) into UK law.⁹ Common law and other legislation supplements human rights protections. However, the HRA 1998 does not specifically address the rights of the disabled community and ongoing attempts to weaken the Act threaten to minimize its value in protecting the most marginalized members of British society.¹⁰ As a result, disabled people in the UK still face barriers to exercising their civil and political rights and are under-represented in public office.¹¹

The CRPD's breadth of coverage across civil, political, economic, social and cultural rights opens up a range of opportunities to respond to challenges faced by the disabled community using the devolved competences of the subnational governments. The UK Government is reticent to strengthen economic, social and cultural rights in law despite these rights playing a crucial role in developing the full range of human rights for every person. The barriers preventing disabled people from accessing their rights in the UK reinforce the interrelated and indivisible nature of all human rights in that failure to secure economic, social and cultural rights directly impedes disabled peoples' abilities to exercise their civil and political rights.¹² The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has called upon the UK to bring its law and policy into conformity with the Convention. Specifically, the Committee has 'observe[d] with concern: ... The insufficient incorporation and uneven implementation of the Convention across all policy areas and levels within all regions, devolved governments and territories under its jurisdiction.'¹³

The key legislation protecting disabled people in the UK is the Equality Act 2010 (EqA), though it is not applicable in Northern Ireland as will be discussed below. The EqA exists to ensure Ministers of the Crown have regard to socio-economic inequality when making decisions and to harmonize equality law in relation to nine

⁹ Human Rights Act 1998, s29(2)(d).

¹⁰ E.g., J. Swinney, 'Human Rights Act: Letter to the Rt Hon Dominic Raab MP, Lord Chancellor and Secretary of State for Justice' (Scottish Government, 21 December 2021) <<https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor/>>.

¹¹ UKIM, '2017 Updated submission', 10.

¹² E.g., R. Sandland, 'Lessons for Children's Rights from Disability rights?' in E. Brems, E. Desmet and W. Vandenhoele (eds.), *Children's Rights Law in the Global Human Rights Landscape* (Routledge 2017), 121.

¹³ E.g., UN Committee on the Rights of Persons with Disabilities (CRPD Committee), *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRPD/C/GBR/CO/1 (3 October 2017), para 6.

protected characteristics, including disability. It is common for states to rely upon non-discrimination or equality law to respect, protect and fulfil disabled people's rights, which is required by Article 5 CRPD. Discussed further in section four, to advance equality in the UK, the Equality and Human Rights Commission (EHRC) promotes and monitors the EqA across England, Wales and Scotland and also aids in coordinating CRPD implementation.¹⁴ The following offers a general outline of the devolution settlements for Wales, Scotland and Northern Ireland that are relevant to the CRPD.

Devolution through the Government of Wales Acts of 2006 and 2017 (collectively 'Wales Act') is not as extensive as the constitutional settlement between the UK and the other devolved nations. Sections 81 and 82 of the Wales Act prohibit Welsh Ministers (the Welsh *Senedd*¹⁵) from passing any subordinate legislation that is incompatible with the ECHR and prevents any actions that would be contrary to the UK's international obligations, including under the CRPD. The Wales Act also enables the *Senedd* to do anything it considers appropriate to promote economic, social and environmental well-being in Wales (section 60). The devolution settlement enables the Welsh Government and *Senedd* to develop disabilities law and policy distinct from England.

The Scotland Act 1998, and subsequent revisions in 2012 and 2016 (collectively 'Scotland Act'), enables the Scottish development of law and policy in relation to issues such as education and training, health and social services, housing, law and order, some aspects of equality, social security and taxation, among others. Even where the legal demarcation between the devolved and reserved powers is blurred, such as in the area of social security, Scotland is able to improve the rights of disabled people in distinctive ways, including directly incorporating international human rights into Scots law.¹⁶ The Scotland Act makes clear that Scottish Government is responsible for implementing international obligations in devolved areas of competence, including the CRPD.¹⁷ As with the Wales Act, the Scotland Act demands that all Acts of the Scottish Parliament comply with the ECHR.

¹⁴ In Scotland, the EHRC monitors implementation of the CRPD in the areas that are not devolved, see Equality Act 2006, ss7, 10.

¹⁵ The Welsh Parliament, see Government of Wales Act 2006, s1, amended by Senedd and Elections (Wales) Act 2020, s42(2).

¹⁶ Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework*, Cm 7577, March 2009, para 3.70.

¹⁷ Scotland Act 1998, sch 5, s7(2)(a).

The Northern Ireland Act 1998 (NI Act) imposes general human rights obligations on the NI Executive. Section 26(2) permits the Executive to implement international obligations.¹⁸ The NI Act also prohibits subordinate legislation that is incompatible with the ECHR.¹⁹ The EqA is not applicable in Northern Ireland. Alternatively, the Disability Discrimination Act 1995 (DDA) is the primary disability non-discrimination legislation. The DDA applied throughout the UK prior to the adoption of the EqA. The key distinctions will be introduced in subsequent sections.

This chapter now turns to examining the approaches to CRPD implementation exercised in the UK. In particular, section three considers the common and distinctive approaches of the UK Government in comparison to the subnational regions in four areas: the concept of disability, non-discrimination and equality, accessibility and participation.

3. IMPLEMENTING THE CRPD

As is frequently noted, implementation of international human rights law must be flexible. At the same time, embedded rights should at all times remain tethered to the international legal frameworks from which they are derived. The CRPD framework is particularly important in this regard due to the transformative potential offered through the implementation of the full suite of rights elaborated in the Convention. The differing concepts of disability employed at various levels of government appears to underpin the asymmetry in CRPD implementation across the central and subnational governments. As will be demonstrated, the employment of human rights in opposition to or in conjunction with equality law in UK has yielded different results across the devolved nations.

3.1. *The Concept of Disability*

The potential for tide change in the treatment of disabled people offered by the CRPD lies in its embrace of the social model of disability, in opposition to the medical model utilized by most states. The medical model that shaped many laws relating to disabilities during the 20th century is distinguishable as it focuses on an individual's impairment, rather than the disability, which should be understood as 'the social, material, and

¹⁸ Northern Ireland Act 1998, sch 2, s3(c).

¹⁹ s6(2)(c).

cultural barriers which exclude people with impairments from mainstream life'.²⁰ This model promotes the equal opportunity for all disabled people to engage with and activate all of their rights as part of an inclusive social and political environment that is enriched by the participation of every member of society.²¹

The EqA (section 6) defines a disabled person as an individual who has a 'physical or mental impairment' that has a 'substantial' and 'long-term' adverse effect on their ability to carry out normal daily activities.²² The DDA employs the same definition. This definition relies on the medical model of disability and the associated regulations determine which conditions are protected under the Act and provide guidance to public authorities and service providers' duties under the Act.²³ Provision of social support determined by the UK Government relies explicitly on the medicalized approach to disability. For example, the use of a 'functional impact on daily life' test in the determinations of the Personal Independence Payment (PIP).²⁴ The 2017 PIP Regulations further distinguish between the physical and mental disability, disadvantaging mentally disabled people who do not meet medically defined mobility criteria.²⁵ Other sectoral laws also reflect the medical model of disability and focus on needs-based assessments, which enhances discrimination against those disabled by society.²⁶ Recent court judgments raise concerns about the strictures employed to identify what amounts to a mental disability under section 6 of the EqA.²⁷ Overall, the

²⁰ K. Stalker, *et al*, 'A Study of Disabled Children and Child Protection in Scotland – a Hidden Group?' (2015) 56 *Children and Youth Services Review* 126, 128, relying on Union of the Physically Impaired against Segregation and the Disability Alliance discuss Principles of Disability (*Disabled People's Archive*, 22 November 1975) <<https://disabledpeoplesarchive.com/wp-content/uploads/sites/39/2021/01/001-FundamentalPrinciplesOfDisability-UPIAS-DA-22Nov1975.pdf>>.

²¹ Implementing the social model is also complex and triggers many further inquiries as to how disabled people actually benefit from it. See, S.R. Smith, 'Disability: What Rights for Disabled People in a Welfare State? Need-fulfilment versus Identity-assertion and the "Problem of Dependency"' in G. Calder, J. Gass and K. Merrill-Glover (eds.), *Changing Directions of the British Welfare State* (University of Wales Press 2012).

²² Equality Act 2010, s6.

²³ E.g., Equality Act 2010 (Disability) Regulations 2010. See S. Bunbury, 'Unconscious Bias and the Medical Model: How the Social Model May Hold the Key to Transformative Thinking about Disability Discrimination' (2019) 19:1 *International Journal of Discrimination and the Law* 26, 33-37.

²⁴ Social Security (Personal Independence Payment) Regulations 2013; Social Security (Personal Independence Payment) (Amendment) Regulations 2017.

²⁵ Equality and Human Rights Commission (EHRC), 'Social Security (Personal Independence Payment) (Amendment) Regulations 2017 - Motion Debate House of Commons: Advice for Parliamentarians' (2017) <<https://www.equalityhumanrights.com/en/social-security-personal-independence-payment-amendment-regulations-2017-house-commons>>.

²⁶ Smith, 'Disability: What Rights for Disabled People', 167; G. de Beco, 'Intersectionality and Disability in International Human Rights Law' (2020) 24:5 *The International Journal of Human Rights* 593.

²⁷ E.g., *Sullivan v Bury Street Capital Ltd* [2021] (EWCA Civ) 1694..

medical model approach to disability in UK legislation departs from the approach promoted through the CRPD and, as a result, presents multiple challenges to giving effect to the CRPD.

While existing UK law strongly favours the medical model of disability, guidance developed through the UK Government's Disability Unit advocates the social model of disability.²⁸ However, the most recent National Disability Strategy demonstrates the UK Government's lack of clarity on its approach to disability though the strategy is noted as complementing the CRPD.²⁹ The devolved governments have offered a much clearer position on their approaches to disability in terms of policy though they are bound by the EqA or DDA medicalized approaches when it comes to enforcement.

Despite the primary legislation relating to disability being the EqA, both Wales and Scotland promote the social model of disability through their primary policy instruments directed toward empowering disabled people.³⁰ As will be discussed below, these policy affirmations do not necessarily translate into a more transformational approach to ensuring the rights of disabled people. In Northern Ireland, the shared EqA/DDA definition of disability is narrowed by excluding different conditions, including certain addictions and personality disorders.³¹ The narrow interpretations of the DDA are arguably responsible for a reduction to the benefit received by disabled people in Northern Ireland.³² Interestingly, policy and strategy publications suggest the Northern Ireland approach is unsettled. The Northern Ireland

²⁸ Office for Disability Issues, 'Guidance: Portraying Disability' (2021)

<<https://www.gov.uk/Government/publications/inclusive-communication/portraying-disability>> .

²⁹ eg, UK Government, *National Disability Strategy* (2021), 14, 20

<<https://www.gov.uk/Government/publications/national-disability-strategy>> .

³⁰ Welsh Government, *Action on Disability: The Right to Independent Living - Framework and Action Plan* (2019), 7 <<https://gov.wales/sites/default/files/publications/2019-09/action-on-disability-the-right-to-independent-living-framework-and-action-plan.pdf>>; Welsh Government, *Strategic Equality Plan (2020-2024)* <<https://gov.wales/equality-plan-and-objectives-2020-2024>>; Scottish Government, *A Fairer Scotland for Disabled People: Delivery Plan* <<https://www.gov.scot/publications/fairer-scotland-disabled-people-delivery-plan-2021-united-nations-convention/pages/5/>> .

³¹ Disability Discrimination Act 1995, s49A; Disability Discrimination (Meaning of Disability) Regulations (NI) 1996, explanatory note.

³² Bunbury, 'Unconscious Bias and the Medical Model'; Equality Commission for Northern Ireland (ECNI) and Northern Ireland Human Rights Commission (NIHRC), 'Jurisdictional 'Parallel' Report on Implementation in Northern Ireland' (2017), 73

<[https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/IMNI_CRPD_ParallelJurisdictionalReport_WorkingPaper\(Aug17\).pdf](https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/IMNI_CRPD_ParallelJurisdictionalReport_WorkingPaper(Aug17).pdf)>; Personal Independence Payment Regulations (Northern Ireland) 2016, part 2; W. Rader, 'Personal Independence Payment (PIP) - An Independent Review of the Assessment Process' (2018), 37 <<https://www.communities-ni.gov.uk/publications/independent-review-pip-assessment-process-northern-ireland-report-and-response>> .

Disability Strategy 2012-2015 stated that any welfare reform should reflect the social model of disability.³³ However, the Disability Action Plan 2021-2026, which sets out the most recent NI Executive plans to fulfil its obligations under the DDA, does not refer to the social model of disability at all.³⁴ In practice, it appears that the NI Executive continues to apply the medical model of disability in the design of policies and delivery of services.

There is no harmony across the national and devolved governments of the UK in terms of their approaches to disability. While the legal definition of disability is shared through application of the EqA or DDA, policies produced in Wales and Scotland advance a social model of disability while Northern Ireland has narrowed its approach over that of even the central government. Stronger support for and use of the social model of disability by the central government would expand the potential to drive transformative change through the CRPD. As it stands, this leadership deficit restrains devolved implementation in the next three areas under discussion.

3.2 *Non-Discrimination and Equality*

Equality and non-discrimination laws have developed separately from human rights law in the UK.³⁵ This has made it difficult to navigate claims based on discrimination in many circumstances and caused particular difficulty in promoting a human rights based approach to disability rights using the social model of disability. With the departure of the UK from the EU, the EU Charter on Fundamental Rights Articles 21 (non-discrimination), 26 (integration of persons with disabilities) and 35 (preventative health care) no longer apply in the UK. Thus, the valuable prism offered through the combination of the Charter and CRPD interpretations no longer influence the UK approach to disabled people's rights.³⁶

The primary responsibility for ensuring the rights of disabled people is through the EqA Public Sector Equality Duty (PSED), which requires certain public authorities in England, Wales and Scotland to carry out their functions with due regard to

³³ NI Executive, *A Strategy to Improve the Lives of People with Disabilities 2012–2015* (2013), 18, 22 <<https://www.communities-ni.gov.uk/Articles/strategy-improve-lives-people-disabilities-2012-2015>> .

³⁴ NI Executive, *Disability Action Plan 2021-26* <<https://www.executiveoffice-ni.gov.uk/publications/disability-action-plan-2021-26>>.

³⁵ N. Crowther and L. Sayce, 'Was Ratification of the CRPD the High Watermark for United Kingdom Disability Rights? Ten Years of Monitoring Implementation of the CRPD' in E.J. Kakoullis, Kelley Johnson (eds.), *Recognising Human Rights in Different Cultural Contexts* (Palgrave Macmillan 2020), 303.

³⁶ See UKIM, 'Updated submission', 6-7.

eliminating discrimination, harassment, victimization and other prohibited conduct. The PSED further requires public authorities to advance equality of opportunity for those with a protected characteristic, including disability, and to publish information demonstrating how they comply with the PSED. While the PSED provides some protection, the due regard obligation does not offer much by way of effectiveness in securing rights for the often complicated, intersectional human rights interferences experienced by many disabled people. Nonetheless, there are variety of sectoral laws and policies focusing on disability discrimination and inequality in different areas, such as employment and education that offer additional protections.³⁷

The UK National Disability Strategy aims to increase equality of opportunity and protection from discrimination for disabled persons by increasing accessible products and services, tackling crime against disabled people and increasing social participation. This strategy voices the government’s public commitment to take action against employment discrimination and social stigma yet there is no strength behind the policy. Instead, a range of further policies that include specific attention to disabled people reinforce the Strategy, including the Hate Crime Action Plan 2016-2020.³⁸ However, two years into the Action Plan, little concrete evidence of ‘action’ is evident.³⁹ Inequalities suffered by disabled people following the policies adopted in response to the 2007 financial crisis and throughout the Coronavirus pandemic have only grown since the UK ratified the CRPD.

The EqA is enhanced in Wales through the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 which implements the Welsh PSED. This requires the Welsh Government to publish the steps it has taken to fulfil its equality objectives, publish the timeline for fulfilment and monitor the extent to which its aims have been achieved.⁴⁰ The Welsh Government considers the CRPD a reference point for the development of many of its laws and policies.⁴¹ Aside from the EqA, the most recent potentially enforceable law that could advance equality for disabled people is the Well-being of

³⁷ E.g, Public Contracts Regulations 2015, reg 20.

³⁸ UK Government, *Action Against Hate: The UK Government’s Plan for Tackling Hate Crime* (2016) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/927673/2016_Hate_Crime_Action_Plan.pdf>.

³⁹ UK Government, ‘Action Against Hate—The UK Government’s Plan for Tackling Hate Crime—“two years on”’ (October 2018), 6, 17 <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/748175/Hate_crime_refresh_2018_FINAL_WEB.PDF>.

⁴⁰ Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, ss3(2)-(3).

⁴¹ Welsh Government, *Strategic Equality Plan*, 5ff.

Future Generations (Wales) Act 2015, though it does not refer expressly to the CRPD.⁴² Statutory instruments on disabled children's education⁴³ offer potential pathways to justice for children's disability discrimination claims in educational settings and are reinforced by the Welsh Measure on children's rights, which indirectly incorporates the UN Convention on the Rights of the Child and its provisions for disabled children.⁴⁴ The instruments that do exist to drive non-discrimination and equality in Wales respond to the EqA, rather than the CRPD. Welsh policy has definitive long-term objectives to eliminate discrimination against disabled people, but without more comprehensive binding legislation, equality for disabled people in Wales will be difficult to achieve.⁴⁵

While Scotland has a range of laws, policies and national strategies specific to promoting non-discrimination and equality for disabled people,⁴⁶ implementation has failed to enable people with disabilities to exercise some of their most fundamental human rights and fully participate in their communities.⁴⁷ The Scotland Act permits Scottish Parliament to impose duties to encourage equal opportunities on cross-border public bodies operating in Scotland but the 2021 *UNCRC Reference* case complicates this possibility in the overlapping areas of competence.⁴⁸ In that case, the Supreme Court held that different aspects of the Scottish bill incorporating the UNCRC could be interpreted as modifying the UK Parliament's power to make laws for Scotland and, as such, were not permissible under the Scotland Act. The UK Government rebuffed subsequent attempts by the Scottish Government to work together to ensure that revisions to the bill would both give greatest effect to the UNCRC and comply with the devolution settlement.⁴⁹ Going forward, the judgment and lack of engagement by the

⁴² See comment in, EHRC, 'Disability Rights in Wales: Supplementary Submission to Inform the CRPD List of Issues on the UK' (2017), 9

<https://www.equalityhumanrights.com/sites/default/files/ehrc_feb_2017_disability_rights_in_wales.pdf>.

⁴³ The Right of a Child to Make a Disability Discrimination Claim (Schools) (Wales) Order 2011, see also The Special Educational Needs and Disability Act 2001(Commencement No. 2) (Wales) Order 2003.

⁴⁴ Rights of Children and Young Persons (Wales) Measure 2011.

⁴⁵ E.g., Framework for Action on Independent Living (2019); Strategic Equality Plan (2020-2024); the Diversity and Inclusion Action Plan 2017–2020.).

⁴⁶ E.g., Social Care (Self-directed Support) Act 2013 and A Fairer Scotland for Disabled People 2016-2021 Delivery Plan.

⁴⁷ Inclusion Scotland, 'Alternative Report from Civil Society' (*Inclusion*, October 2019), 4

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGS%2fGBR%2f39702&Lang=en>.

⁴⁸ Scotland Act ss53, 88; *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

⁴⁹ J. Swinney, Statement to Scottish Parliament, 24 May 2022, beginning at 14:26

<<https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13769&i=124923>>.

UK Government suggests that devolved nations will need to be extremely specific when legislating in areas of overlapping or more recently devolved areas of competence. The case demonstrates how the UK's asymmetric governance framework and reticence to legislate in favour of human rights in Westminster hinders the realization of international human rights obligation exceeding the most basic civil and political rights. Notably, the Scottish Government remains committed to incorporating the CRPD into Scots law,⁵⁰ and work on new, comprehensive human rights legislation is presently underway.⁵¹

Section 75(1)(c) of the NI Act obliges public authorities to have due regard to the need to promote equality of opportunity *inter alia*, between persons with a disability and persons without.⁵² Here, the Equality Commission for Northern Ireland (ECNI) plays an important role in ensuring equality and non-discrimination. The Commission monitors the equality schemes produced by public authorities in line with the section 75 duty. The ECNI may also receive complaints by individuals who assert that a public authority has failed to comply with an equality scheme approved by the Commission.⁵³ Complaints, however, trigger only investigations into the alleged failure with the outcome being a report to Secretary of State who may choose to give direction to the errant public authority correcting the failure. The ECNI also 'may lay' an investigation report before the NI Assembly. As the DDA is the specific disability discrimination legislation applied in Northern Ireland, the approach to disability is narrower and applies only to the provision of goods, facilities, services and premises. Section 49(a) of the Act places on specified public authorities a due regard duty to promote positive attitudes toward disabled people and encourage participation by disabled people in

⁵⁰ Scottish Government, *A Fairer, Greener Scotland: Programme for Government 2021-22* (2021), 35, 49, <<https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/>>; *Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021* (2020), 107, <<https://www.gov.scot/publications/protecting-scotland-renewing-scotland-Governments-programme-scotland-2020-2021/>>.

⁵¹ Scottish Government, Human Rights Bill Governance and Engagement Advisory Board <<https://www.gov.scot/groups/human-rights-bill-governance--engagement-advisory-board/#:~:text=Human%20Rights%20Bill%20Governance%20and%20Engagement%20Advisory%20Board,-Overview&text=The%20Advisory%20Board%20functions%20as,of%20the%20Human%20Rights%20Bill.>>.

⁵² Schedule 9 sets out the specific requirements concerning the publication of 'Equality Schemes' that show how a particular public authority proposes to fulfil its duties under Section 75, including the duty to perform impact assessments (s 4(2)(b)). See, also, Equality (Disability, etc.) (NI) Order 2000 and Disability Discrimination (NI) Order 2006.

⁵³ E.g., ECNI, 'Annual Report and Accounts 2020-2021, HC 446, 21 <<https://www.equalityni.org/ECNI/media/ECNI/Publications/Corporate/Annual%20Reports/AnnualReport2020-21.pdf>> .

public life. The DDA does not prohibit indirect discrimination. Instead, it prohibits direct discrimination and the failure to make reasonable adjustments in line with the 2008 *London Borough of Lewisham v Malcolm* case in the context of employment and higher education, though other sectoral laws further support equality for disabled people.⁵⁴ CRPD ratification has had limited effect on changes to law in Northern Ireland and there have been no proposals by the NI Executive to reform disability discrimination law or bring it level with the rest of the UK.⁵⁵ Nevertheless, the most recent Disability Action Plan identifies tackling disadvantage and promoting equality of opportunity for disabled persons as one of the NI Executive's main objectives.⁵⁶

Non-discrimination and equality in the UK are dominated by equality law and not generally linked to the CRPD. In NI, the CRPD has had less influence on non-discrimination and equality than anywhere else in the UK. Furthermore, as a result of the *Lewisham* case, the previously accepted more expansive approach to disability-related discrimination was replaced by a narrower view of what amounts to direct-discrimination. The implications of this case were obviated in the rest of the UK by the passages of the EqA and its subsequent interpretations. Difficulty in navigating the relationship between human rights and equality law in the UK is evident from the disjointed ways in which the distinct laws operate. Recent laws and policies suggest some proactive progress on the rights of disabled people in the context of non-discrimination and equality, however, Northern Ireland continues to lag behind compared to the rest of the UK due to the lack of harmonization across equality law.⁵⁷ The UK's asymmetric approach to non-discrimination and equality for disabled people undermines the principle of non-discrimination in human rights law and presents multiple challenges to disabled people attempting to engage their rights.

3.3. Accessibility

The absence of a comprehensive UK-wide accessibility plan is a key concern of the CRPD Committee.⁵⁸ The EqA includes a 'duty to make reasonable adjustments' for

⁵⁴ *London Borough of Lewisham v Malcolm* [2008] UKHL 43. See, e.g., Autism (NI) Act 2011; Special Educational Needs and Disability Act (NI) 2016.

⁵⁵ CRPD Committee, *2017 Concluding Observations*, para 17; B. Byrne, et al, 'Disability Policies and Programmes: How does Northern Ireland Measure Up? An Update for ECNI' (2014), 4-5 <https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/CRPD-Update-Summary-paper-for-Expert-Seminar_14pt_190214.pdf>.

⁵⁶ NI Executive, *Disability Action Plan*, 9, 16.

⁵⁷ UKIM, 'Updated submission', 8.

⁵⁸ CRPD Committee, *2017 Concluding Observations*, paras 24-25.

employers and service providers to remove disadvantages faced by disabled people in order to ensure that they can access jobs, education and services on an equal footing with non-disabled persons, but there are no harmonized minimum standards.⁵⁹ Sectoral laws deliver further specifications to assure accessibility but their application varies across the country. In England and Wales, for example, the Autism Act 2009 requires the development of an Autism Strategy to enhance service provisions to persons with autistic spectrum conditions. Meanwhile, the Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018 requires public sector bodies in England, Wales and Scotland to ensure their websites, documents and mobile applications are accessible to disabled people as a ‘reasonable adjustment’ pursuant to the EqA. The lack of coordination across the devolved nations means the benefits of accessibility regulation varies depending on the particular subnational system.

Accessibility to products and services is one of the UK Government’s three current priority areas of action under the National Disability Strategy. This includes action on law reform, funding allocation and service improvement for equal access to: justice, courts and legal support; housing; transport; work and employment services; schools and education; goods and services (including innovative technology); arts/culture/sports facilities; and public services. Additional soft guidance addresses autism,⁶⁰ inclusive transport,⁶¹ accessibility to information and access to public bus services⁶² and online information and services regarding government policy and programmes.⁶³ None of the most recent accessibility strategies connect the UK objectives explicitly with its obligations under the CRPD.

The Welsh Government is working to embed accessibility in line with the social model of disability and key post-2009 legislation is designed to achieve this, including: the Social Services and Well-being (Wales) Act 2014; the Well-being of Future

⁵⁹ Equality Act 2010, ss20-22, 98.

⁶⁰ UK Government, ‘National Strategy for Autistic Children, Young people and Adults: 2021 to 2026’ (2021) <<https://www.gov.uk/government/publications/national-strategy-for-autistic-children-young-people-and-adults-2021-to-2026>>.

⁶¹ UK Government, ‘Inclusive Transport Strategy: Achieving Equal Access for Disabled People’ (2020) <<https://www.gov.uk/government/publications/inclusive-transport-strategy>>.

⁶² UK Government, ‘The Bus Services Act 2017: New Powers and Opportunities’ (2017) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/918498/bus-services-act-2017-new-powers-and-opportunities.pdf>.

⁶³ UK Government, ‘Government Digital Inclusion Strategy’ (2014) <<https://www.gov.uk/government/publications/government-digital-inclusion-strategy/government-digital-inclusion-strategy>>.

Generations (Wales) Act 2015; and the Public Contracts Regulations 2015.⁶⁴ The 2014 Act, in particular, aims to increase access to services and benefits for disabled people to be able to live independently and participate equally in social life. Additional accessibility-focused legislation passed by the *Senedd* includes the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016, both of which contain provisions to improve accessible housing and service provision by housing authorities. These legislative efforts align directly with powers devolved through the Wales Act. Welsh policy expands on these laws and commits to increasing accessibility to public transport, information on tourism and public appointments, apprenticeship programmes and training, and technology.⁶⁵

Similar to Wales, above the obligation of the EqA there are a range of Scots laws that promote and ensure greater accessibility to different services and opportunities, including the Social Care (Self-directed Support) Act 2013; the Disabled Persons' Parking Badges (Scotland) Act 2014; Children and Young People (Scotland) Act 2014; among others. '[R]ooted firmly in the CRPD', the Fairer Scotland Delivery Plan seeks ensure that all places in Scotland are accessible to all people.⁶⁶ For example, the government has worked to reform the Local Housing Strategy and arrange subsidies through Affordable Housing Schemes to facilitate adjustments.

No specific accessibility legislation has been passed in Northern Ireland since the UK's ratification of the CRPD, thus accessibility requirements are outlined through the DDA and, in the context of children's education, the Special Educational Needs and Disability (NI) Order 2005. In the Disability Action Plan 2021-2026, the NI Executive commits to enhancing access to buildings, information and employment programmes. This demonstrates a positive step toward addressing older findings that people with sensory disabilities struggle to access even their GP surgeries do to the lack of reasonable adjustments.⁶⁷ Further soft instruments have focused on accessibility for

⁶⁴ Welsh Government, *Strategic Equality Plan*, 15ff.

⁶⁵ Welsh Government, *Action on Disability*, 49 *et seq*; NHS Wales, 'All Wales Standards for Accessible Communication and Information with Sensory Loss' (2013) <https://gov.wales/sites/default/files/publications/2019-04/all-wales-standards-for-accessible-communication-and-information-for-people-with-sensory-loss-large-print_0.pdf>; Welsh Government, 'Voluntary Welsh Bus Quality Standard' <<https://gov.wales/sites/default/files/publications/2018-01/voluntary-welsh-bus-quality-standard.pdf>>.

⁶⁶ Scottish Government, *Fairer Scotland Delivery Plan*, 4 and part 3.

⁶⁷ E.g., NI Health and Social Care Board, Best Practice Guide: Creating accessible primary care services for people with sensory loss', 5 <<https://hscboard.hscni.net/download/PUBLICATIONS/PHYSICAL%20AND%20SENSORY%20DIABILITY/best-practice-guidance-primarycare.pdf>>. See also, NI Department of Health, 'Physical and

individuals with learning disabilities⁶⁸ and disabled people's access to arts and culture venues across Northern Ireland.⁶⁹

Approaches to accessibility across the UK are sector-dependent and primarily hinge on the EqA or DDA. While soft instruments offer some recognition of accessibility in line with the CRPD, most of the identified aims and objectives are not enforceable. Ultimately, without a comprehensive, UK wide accessibility plan, disabled people will 'continue to face difficulties in accessing appropriate housing, the built environment, transport, information and insurance'.⁷⁰

3.4. *Participation*

A crucial component of the social model of disability is the way in which it reinforces the disability rights movement's adopted tagline – 'Nothing About Us Without Us' – by capitalizing on disabled people's views and lived experiences and actively integrating them into law, policy and action plan decision-making.⁷¹ Participation is a multifaceted concept and in a democratic society includes participation in government and community. As noted in Articles 4(3) and 33(3) CRPD, disabled people and their representative organizations should be consulted and actively involved in decision-making and monitoring processes. Presently, there are multiple barriers to disabled people's voting rights and they are under-represented in UK public and political office.⁷² The 2022 decision in *Binder v Secretary of State* demonstrates how disabled people are often under-represented or excluded from decision-making processes. This exclusion reinforces barriers to engaging disabled peoples' rights due to the limited, proactive impact of the EqA in this area. The *Binder* decision held that the PSED does not require that disabled people be consulted absent a statutory or common law obligation to the contrary and expressly noted that as an unincorporated treaty, the

Sensory Disability Strategy and Action Plan: 2012-2015' (2012) available at <<https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/disability-strategy-2012-2015.pdf>>.

⁶⁸ NI Department of Health, 'Learning Disability Service Framework' (2012) <<https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/service-framework-for-learning-disability-full-document.pdf>>.

⁶⁹ NI Department for Communities, 'DfC Access and Inclusion Programme 2021/22 - Screening' (2020) <<http://www.communities-ni.gov.uk/publications/dfc-access-and-inclusion-programme-screening>>.

⁷⁰ UKIM, 'Updated submission', 8.

⁷¹ See, e.g., Welsh Government, Report of the Disability Equality Forum Steering Group, 'Locked out: liberating disabled people's lives and rights in Wales beyond COVID-19', Methodology (2 July 2021) <<https://gov.wales/locked-out-liberating-disabled-peoples-lives-and-rights-wales-beyond-covid-19-html>>.

⁷² UKIM, 'Updated submission', 10.

CRPD obligation to consult was not binding on UK public authorities.⁷³ The case demonstrates the weak approach to participation in terms of law and policy development at the core of UK governance.

The UK National Disability Strategy's second priority action area is improving participation in public and social life. This includes action on law reform, funding allocation and service improvement for equal representation in public appointments/judicial and political leadership roles as well as participation in civic duties and privileges such as jury duty and voting.⁷⁴ Following through on these commitments, proposals in the Police, Crime, Sentencing and Courts Bill (2021), for example, provide for British Sign Language interpreters in an effort to increase the participation of deaf people on juries in response to CRPD Committee criticism.⁷⁵ Proposed section 9 of the Elections Bill (2021) addresses some of accessibility barriers for disabled people in exercising their right to vote in England, Wales and Scotland, including relaxing the information requirements for companion voters. However, without clear guidance on the interpretation of 'reasonableness' in terms of providing enabling equipment or which disabilities are covered by 'another disability', the law, if passed, is unlikely to engender change on its own.⁷⁶ Furthermore, the Ministry of Justice is investing £1 million to recruit more disabled magistrates in England and Wales and is supporting new schemes from April 2022 to support disabled people seeking to become candidates for public office.⁷⁷ While some positive movement appears on the horizon, these disjointed efforts make it difficult to secure consistent or effective participation opportunities or progress for the disabled community throughout the UK.

In the devolved nations, attention to disabled people's participation over and above the EqA is similarly sectoral and addressed primarily through policy. However, public authorities in Wales are required by law to involve disabled persons in their activities to fulfil the PSED, whereas in England there is no such obligation.⁷⁸ The

⁷³ *Binder et al v Secretary of State for Work and Pensions* [2022] EWC 105 (Admin) paras 44, 51, 52.

⁷⁴ UK Government, *National Disability Strategy*, 20, 21, 26, etc.

⁷⁵ Police, Crime, Sentencing and Courts Bill, HL Bill 95, s194 <<https://bills.parliament.uk/bills/2839/publications>>; CRPD Committee, *2017 Concluding Observations*, para 32(d).

⁷⁶ HL Bill 141 (as of 28 March 2022), s9 <<https://bills.parliament.uk/bills/3020>>.

⁷⁷ UK Government, *National Disability Strategy*, 27.

⁷⁸ Disability Rights UK and Disability Wales, 'Implementation of the United Nations Convention on the Rights of Persons with Disabilities in England and Wales: Shadow Report' (2017) 9

Welsh Government has also committed to a ‘co-production’ approach to developing policies and services in conjunction with disabled people.⁷⁹ It also is working to increase disabled people’s participation in political and public life, including representation in public office.⁸⁰ Similarly, the Access to Elected Office Fund Scotland supports disabled people running for public office in Scotland.⁸¹ Scottish legislation and policy also supports distinct aspects of participation of disabled people in public life and decision-making in relation to their lives in the areas of devolved competence. The Education (Additional Support for Learning) (Scotland) Act 2004, for example, requires that a child for whom additional support needs have been identified should be consulted if the decision-making agency deems the child to have capacity to understand the issues that feed into the decision-making process.

Northern Ireland has two strategies directed toward increasing public participation of disabled people. First, the NI Disability Action Plan (2021-2026) aims to diminish a range of barriers by: enhancing access to consultations; increasing the use of technology; and improving the accessibility of and access to information about positions and the recruitment process for public appointment. These measures are, however, very limited.⁸² The Physical and Sensory Disability Strategy was developed to promote positive attitudes towards disabled people and encourage their participation in public life in line with DDA equality duties.⁸³ However, there is little information on the Strategy or its achievements since it ended.

Altogether, it does not appear that ratification of the CRPD has had any conclusive impact on implementing disabled people’s participation rights in the UK in any broad sense. Duties arising from the EqA are limited by the interpretations of the Act in the subnational systems and the extent to which relevant policy areas are devolved. Incremental steps are being made in both law and policy but the transformative impact envisioned in the CRPD is limited in the UK.

<<https://www.disabilityrightsuk.org/sites/default/files/pdf/CRPD%20shadow%20report%20-%20England%20Wales%2026%20January%202017.pdf>>.

⁷⁹ Welsh Government, *Action on Disability*, 6, 11.

⁸⁰ Welsh Government, *Strategic Equality Plan*, 5ff; Welsh Government, ‘Diversity and Inclusion Strategy for Public Appointments in Wales (2020-2023): Reflecting Wales by Running Wales’ (2021) <https://gov.wales/sites/default/files/publications/2020-02/diversity-and-inclusion-strategy-for-public-appointments-2020-2023.pdf>.

⁸¹ The Access fund is financed by the government and administered by a local civil society organization, see Inclusion Scotland, ‘Access to Politics’ <<https://inclusionScotland.org/disabled-people-become-a-leader/civic-participation>>.

⁸² NI Executive, *Disability Action Plan*, 31, etc.

⁸³ NI Department of Health, *2012 Physical and Sensory Disability Strategy and Action Plan*.

4. IMPLEMENTING ARTICLE 33

Prior to the UK's ratification of the CRPD there was relatively little consideration of the practical implications of Article 33. This provision requires (1) the establishment of one or more Government-based focal points to coordinate implementation across different sectors and levels of Government; (2) a framework which includes an independent mechanism to promote, protect and monitor the CRPD implementation; and (3) the participation of disabled people and representative civil society organizations in monitoring processes. In their early examination of Article 33 in the UK, Murray and Johnson pointed out the difficulties raised by the distinct devolution settlements and the lack of attention to these mechanisms prior to the Convention entering into force.⁸⁴ Ten years on from their examination, this section considers whether the UK focal point and independent mechanism have evolved to deliver more streamlined monitoring of the CRPD.

4.1. *The UK Focal Point and Coordination Mechanism*

The focal point and coordination mechanism outlined in Article 33(1) CRPD is crucial to realizing the international obligations of the CRPD in a way that enriches the lived experiences of people with disabilities.⁸⁵ Following CRPD ratification, the Office for Disability Issues was designated as the combined focal point and coordinating mechanism responsible for giving effect to Article 33(1) CRPD. The Disability Unit, which replaced the Office for Disability Issues in 2019, is part of the Equalities Hub in the UK Cabinet Office and is now responsible for co-ordinating implementation of the CRPD across government, including in reserved policy areas across the UK.⁸⁶ In Scotland, the Equality and Rights unit works with the Minister for Equalities and Older People to develop the implementation plan for the CRPD in devolved areas of competence through the Fairer Scotland for Disabled People delivery plan. In Northern

⁸⁴ R. Murray and K. Johnson, 'Implementation of Article 33 CRPD in the United Kingdom: the Need to Consolidate Civil Society Engagement' in G. de Beco (ed), *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention* (Martinus Nijhoff 2013), 98.

⁸⁵ See, for example, G. de Beco and A. Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities' in de Beco, *Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 11ff.

⁸⁶ Disabilities Unit < <https://www.gov.uk/government/organisations/disability-unit#:~:text=What%20we%20do,supported%20by%201%20public%20body.>>.

Ireland, the Department for Communities acts as the devolved focal point and is responsible for disability policy.

The UK Focal Point has been criticized for its focus on developing the UK report to the CRPD rather than actually engaging in dialogue designed to better understand how to further implement the Convention.⁸⁷ There is also a lack of transparency in terms of how the Focal Point engages with the disabled community, which detours from the spirit of the Convention.⁸⁸ In highlighting the different initiatives by devolved governments, the UK Focal Point's own publications demonstrate the lack of coordinated policy across the UK.⁸⁹ However, in reviewing the National Disability Strategy, and the devolved administrations' different policies, the UK and devolved Focal Points' imprints and coordination roles are evident.⁹⁰ To deliver the vision of the CRPD greater efforts to coordinate across the central and devolved governments and entrench their policies across all areas must be made.

4.2. The UK Independent Mechanism

The UK Independent Mechanism (UKIM) established to implement Article 33(2) CRPD is comprised of the various independent statutory national equality and human rights institutions operating in the national and subnational spheres. These include the EHRC, the Scottish Human Rights Commission (SHRC), the ECNI and the Northern Ireland Human Rights Commission (NIHRC). The NI Act created the NIHRC and the ECNI and the two operate together as the Independent Mechanism for Northern Ireland (IMNI) promoting and monitoring implementation of the CRPD.⁹¹

The EHRC Wales Committee focuses on human rights, including disabled people's rights, as Wales does not have an independent human rights body.

As part of their remits, the four entities each handle complaints individually. The EHRC, for example, handles complaints in Wales and England in relation to both equality and human rights law while in Northern Ireland, the NIHRC addresses disabled people's complaints under human rights law and the ECNI addresses those raised under

⁸⁷ Murray and Johnson, 'Implementation of Article 33', 115-16.

⁸⁸ *ibid*, 116, 118.

⁸⁹ Disability Unit, 'UN Committee on the Rights of Persons with Disabilities 2016 Inquiry – UK 2021 follow-up report (14 December 2021) <<https://www.gov.uk/government/publications/disabled-peoples-rights-the-uks-2021-report-on-select-recommendations-from-the-uncrpd-periodic-review/un-committee-on-the-rights-of-persons-with-disabilities-2016-inquiry-uk-2021-follow-up-report>>.

⁹⁰ UK Government, 'National Disability Strategy', 26, 29, 34, etc.

⁹¹ Northern Ireland Act 1998, part 7.

equality legislation.⁹² The SHRC has no powers to receive complaints but may conduct inquiries into the policies and practices of different public authorities in Scotland regarding whether they are respecting the international human rights obligations of the UK, including the CRPD.⁹³ The individual mechanisms also each draft their own compliance reports to complement the reports and submissions to the CRPD Committee drafted under the framework of UKIM.

Each commission plays a significant role in driving law and policy that supports realization of the CRPD in their different areas of competence, but there are limits to what each commission can do in the context of both their mandates and their resourcing. The 2017 UKIM submission to the CRPD Committee reported dwindling funding and noted that the different commissions ‘have all had to manage significant budget reductions since being designated as the Independent Mechanism.’⁹⁴ Notably, the EHRC has had a budget reduction of over 70 per cent since 2010. Reduced funding of these human rights institutions underscores the UK Government’s apathy toward progressing human rights, including disabled people’s rights under the CRPD, and aligns with the slow uptick in comprehensive, coordinated action through general UK law and policy.

While the CRPD does not explicitly require coordination with civil society organizations or disabled people’s organisations, the reference to the Paris Principles in CRPD Article 33(2) implies such engagement.⁹⁵ The Paris Principles include developing good working relationships with civil society and in particular with organizations focused on the promotion and protection of the rights of the vulnerable groups, including disabled people.⁹⁶ The ‘A’ status of the EHRC, SHRC and NIHRC dictates that the independent mechanism, both collectively and each devolved human rights mechanism, is compliant with the Paris Principles.⁹⁷ To that end, there is a statutory requirement that at least one member of the EHRC must be or have been

⁹² Equality Commission for Northern Ireland (ECNI), ‘Promoting Equality Challenging Discrimination’ (March 2019), 3
<<https://www.equalityni.org/ECNI/media/ECNI/Publications/Individuals/Leaflet-GuideEqualityCommission.pdf>>.

⁹³ The Scottish Commission for Human Rights (Specification) Order 2008, s2.

⁹⁴ UKIM, ‘Updated submission’, 89.

⁹⁵ Murray and Johnson, ‘Implementation of Article 33’, 110.

⁹⁶ *ibid*, Methods of Operations, para (g).

⁹⁷ Global Alliance of National Human Rights Institutions, Paris Principles, UNGA Resolution 48/134, 20 December 1993.

disabled.⁹⁸ The SHRC has no such requirement.⁹⁹ Regardless of such requirements, most of the progress on UK disability rights over the past decade was driven by the UKIM and civil society rather than by government. As Murray and Johnson sagely foreshadowed, ‘without this strong steer from independent institutions, the CRPD loses the potential it so clearly has to influence government initiatives that may make a difference for disabled people’.¹⁰⁰ Despite criticism on approaches to engagement and the ongoing learning curve in terms of how to implement the CRPD effectively, the distinctive commissions have engaged their roles to promote, protect and monitor CRPD implementation to different extents and these efforts run through the efforts to implement the CRPD outlined in section 3.¹⁰¹

5. Concluding Remarks

Localized advocacy and implementation of disabled people’s rights in the devolved nations of the UK was stimulated by ratification of the CRPD. Though research and evidence based arguments promoting the social model of disability increasingly underpin the growing range of applicable policies, the law has not caught up, particularly in England and Northern Ireland. The UK Government’s failure to take a CRPD-based approach toward developing law and policy continue to inhibit implementation of disabled people’s fundamental rights. While the devolved nations have the capacity to fill some of the gaps in promoting and protecting disabled people’s lives, these efforts only reinforce the disparate support available to disabled people across the different layers of government. For example, the UK Government’s ‘Bedroom Tax’ and ‘Benefit Cap’ reforms rendered a high proportion of disabled households far worse off in England than in Scotland, where the Scottish Government channels over £100 million into mitigation programmes.¹⁰² The most recent refresh of the Welsh Programme for Government notes that there are plans to incorporate the

⁹⁸ Equality Act 2006, sch 1, s2(3)(a).

⁹⁹ Scottish Commission for Human Rights Act (2006), s2.

¹⁰⁰ Murray and Johnson, ‘Implementation of Article 33’, 106.

¹⁰¹ E.g., EHRC, Disability Advisory Committee, Final Report <<https://www.equalityhumanrights.com/en/who-we-are/our-commissioners-committees-and-governance/disability-advisory-committee>>.

¹⁰² Inclusion Scotland, ‘Alternative Report from Civil Society’ (October 2019), 13-14 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGS%2fGBR%2f39702&Lang=en>.

CRPD into Welsh law.¹⁰³ If both Scotland and Wales manage to take greater steps toward legalizing the CRPD and fulfilling disabled people's rights in law than the central government there will undoubtedly be pressure to harmonize access to the CRPD across the UK.

It is undeniable that implementing the CRPD is complicated where the devolved nations aspire to deliver stronger human rights protections than the UK Government. Recent cases demonstrate a growing antipathy for international law and its standards as a means of interpreting different rights in the UK. The *UNCRC Reference* case on Scottish legislation incorporating the UNCRC recognized the possibility of strengthening human rights in the devolved jurisdictions through incorporation of international treaties yet offered an overly narrow way forward for devolved governments in terms of navigating areas of overlapping legislative competence.¹⁰⁴ In other cases where the CRPD has been argued to be necessary to interpreting the EqA, British tribunals have refused to recognize any direct effect of the treaty in UK law where not explicitly incorporated.¹⁰⁵ The barrier to relying upon the CRPD or any other international human rights treaty without incorporation is an issue that can only be resolved through revisions or clarifications to the constitutional settlement in the UK. Until the CRPD is incorporated and ongoing uncertainties about HRA 1998 are resolved, significant gaps will remain in protections for the disabled community. As noted by the UKIM, '[c]lear action plans are needed by the UK and devolved governments to meet CRPD requirements'.¹⁰⁶ Since CRPD ratification, the UK has undoubtedly made progress in securing disabled people's rights.¹⁰⁷ However, the widespread breaches of disabled peoples' rights during the Coronavirus pandemic motivates the calls for quicker progress to deliver equality.¹⁰⁸

Ratification of the CRPD has not centralized implementation of disabled people's rights in the UK. Despite the potential to secure greater CRPD implementation

¹⁰³ Welsh Government, *Programme for Government: Update* (7 December 2021), 14 <<https://gov.wales/programme-for-Government-update>>.

¹⁰⁴ *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

¹⁰⁵ E.g., *Binder*; *Britliff v Birmingham City Council* [2019] UKEAT 0291/18; *R (Davey) v Oxfordshire County Council* [2017] EWHC 354.

¹⁰⁶ UKIM, 'Updated submission', 8, 12ff.

¹⁰⁷ E.g., UK Government, *National Disability Strategy*, 28.

¹⁰⁸ E.g., Disability Equality Forum Steering Group, 'Locked out: liberating disabled people's lives and rights in Wales beyond COVID-19' (July 2021), 33 <<https://gov.wales/locked-out-liberating-disabled-peoples-lives-and-rights-wales-beyond-covid-19-html>> .

through the current devolution arrangements, realization of disabled people’s rights will remain patchy as long as the different spheres of law and policy are left uncoordinated. While this challenge could be addressed through a written constitution, or more effective engagement by the UK Government, entrenchment of the CRPD in areas of overlapping competence remains unresolved and at the mercy of the central government’s views as to what amounts to interference in reserved areas of governance. The ongoing animosity to human rights demonstrated by successive conservative governments and continued attempts to rollback protections for the most marginalized members of British society must be monitored in order to have a chance to deliver the promise of human rights, including the transformative potential of the CRPD.¹⁰⁹

¹⁰⁹eg, J. Hutt and M. Antoniw, ‘Concerns Raised about Human Rights Act Reform’ (Press Release, *Welsh Government*, 12 January 2022) <<https://gov.wales/concerns-raised-about-human-rights-act-reform>>.