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The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the UN General Assembly on 13 December 2006 and came into force on 3 May 2008.¹ The first human rights treaty of the 21st century, the CRPD has placed the spotlight firmly upon the breadth and depth of exclusionary and oppressive practices experienced by people with disabilities and which had hitherto been rendered invisible by an ‘able-bodied’ human rights discourse. The awakening of a disability movement throughout the latter part of the twentieth century and its subsequent prominent role in shaping the CRPD during the treaty negotiation process has shaken the corporeal foundations on which society is based; that of a so-called ‘normal’ homogenous population and whose complete and functioning corporeality is the barometer against which all born into our society are measured. It is against this barometer that children with disabilities have traditionally been measured and found wanting. The development of a thematic convention is indicative of the increasing recognition accorded to the complexity of disability issues and the conclusion reached by the international community that the difference of disability is such that it has not been, and cannot be, effectively addressed by so called ‘mainstream’ human rights treaties.

The marrying of disability and human rights discourse, and the challenges these have posed to the discourses of each other, has prompted valuable scholarship on a range of issues pertaining to the CRPD.² Conspicuous by its absence in this ‘new’ scholarship is a detailed exploration of the positioning of and rights accorded to children with disabilities within the CRPD, such as been the assumed and unquestioned emphasis on the notion of a homogenous, and adult, disabled subject. Like adults with disabilities and children generally, children with disabilities have not traditionally

¹ As of 18 January 2011, 97 States have ratified the Convention and there have been 147 signatories. 60 States have ratified the Optional Protocol and there have been 90 signatories. The Convention came into force on 3 May 2008, 30 days after ratification by Ecuador, the 20th State. Both the UK and Ireland signed the Convention at the first opportunity on 30 March 2007. The UK ratified on 8 June 2009, albeit with reservations relating to employment in the armed forces (Article 27), liberty of movement (Article 19), education (Article 24) and equal recognition before the law (Article 12). Ireland has yet to ratify. The Optional Protocol also came into force on 3 May 2008 and the UK ratified the Protocol on 7 August 2009.
been viewed as ‘rights holders’. Children with disabilities can experience ‘double jeopardy’, falling short of non-disabled norms on the one hand, and adult based norms on the other. In addition, they have often been perceived as lacking the competence and capacity to be ‘reliable witnesses’ of their own lives and denied the opportunity to participate in decisions affecting them. These norms have also been a feature of international human rights law both respectively and cumulatively and children with disabilities have either not been acknowledged at all within the core treaties, or where they have been acknowledged, most notably within the Convention on the Rights of the Child, the resultant approach has been one of undue welfarism and/or medicalisation of disabled children’s lived experiences. The implications of such an approach is significant given the role of international human rights law in the production and maintenance of particular ‘truths’; in offering a “discourse of both freedom and domination”; and as a key agent of socialisation and acculturation more generally. The way in which international law conceptualises and legitimises the intersection between childhood and disability, and the disabling practices that result, has significant implications for influencing states to ‘right’ or ‘wrong’ behaviour in their treatment of children with disabilities, in determining what constitutes ‘right’ or ‘wrong’ behaviour and in legitimising the nature and content of the rights that children with disabilities can claim. The normative power of rights is thus of particular significance for a population group whose restoration to as complete a state of corporeal normality as possible has long been the primary concern for welfare professionals with little or no regard for either experiential childhood factors or the social dimensions of disability therein.

This chapter provides a critical assessment of the approach adopted by the CRPD towards children with disabilities and its implications for socialising States Parties to both ‘right’ and ‘rights’ behaviour. It discusses the ways in which ‘rights talk’ for children with disabilities, itself a relatively recent development in this context, has been predominantly needs based in its substantive content and explores whether the exacerbated disadvantage experienced by children with disabilities as a result of the particular interaction between disability and childhood is effectively addressed and given due weight by the new Convention. The CRPD’s provisions are discussed in the context of children with disabilities and their potential to provide effective redress assessed. The paper concludes with some critical reflections on the extent to which the CRPD can really be understood as minding the gap for children with disabilities. It suggests that whilst the combined mainstreaming approach adopted in the CRPD has the potential to make rights ‘real’ for children with disabilities, the double jeopardy hitherto experienced by this population group will continue unabated unless children with disabilities are accorded explicit attention throughout the full range of implementation and monitoring procedures mandated by the Convention. It is also crucial that

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future ‘rights talk’ with respect to children with disabilities does not again become undermined by welfarist discourse. The CRPD provides a key opportunity to revisit the medically oriented and individualised ‘rights’ base to which children with disabilities have been subject. For the purpose of this article, ‘disability’ is understood as a socially constructed concept; specifically as resulting from the complex interaction between: impairment; the imposition of restrictions and barriers by cultures, structures and institutions; and the legitimation of ablist ways of ‘being’ and ‘doing’ as exerted by educational, medical and social discourses.

From Welfare Talk to (Empty) Rights Talk?

The ways in which respective debates on understandings of disability and of childhood have persisted in compartmentalising ‘children’ and ‘disabled people’ has not been helpful in highlighting the complexity of the lived experiences of children with disabilities. The categorical nature of identity ascription that assumes a single, fixed identity has prioritised either the corporeal ‘normality’ of childhood or the adult experience of disability. There are a number of common themes to be found across the fields of childhood and disability. Traditional developmental understandings have conceptualised childhood as ‘natural, passive, incompetent’\(^5\) and as ‘lacking the capacities, skills and powers of adulthood’\(^6\), while traditional medicalised understandings of disability have reduced disabled people to positions of powerlessness, unable to fully participate unless they can be restored to some form of specified ‘normality’. Disability and childhood have been commonly presented in their respective spheres as dependent and incomplete states, constitutive of diminished capability and seemingly bereft of any meaningful capacity and agency until they are either ‘cured’ or ‘grow up’. Children with disabilities have found it difficult to escape these traditional conceptualisations since:

> “Judged against...normative yardsticks, the imperfectable bodies... of disabled children were inevitably constructed as inferior - as ‘backward’ or ‘developmentally delayed’. Moreover, as children were exposed to ever more scrutiny, so children with impairments became disproportionately subject to new forms of surveillance, discipline and control (through institutional ‘care’, ‘special’ schooling, medical treatment, ‘corrective’ surgery, ‘remedial therapy’, eugenic abortions and genetic ‘screening’).”\(^7\)

Social policy relating to both childhood and disability has been underpinned by an ethic of care and dependency. The terms ‘disability’ and ‘childhood’ are commonly used in their respective fields as

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administrative and distributive constructs; a means of legitimating access and entitlement to resources, services and opportunities through, for example, diagnosis and labelling, and acceptance or rejection of expressed need against set criteria. Mayall’s observation that “whole armies of health and social workers work to modify childhood” is amplified in the context of children with disabilities.\(^8\) In this way, social policy has facilitated the policing of children with disabilities through its establishment of “boundaries of normalcy in an idealised version of the normal life course.”\(^9\)

As such, children with disabilities are particularly vulnerable to forms of additive discrimination; that is, discrimination on the grounds of age like other children, because they too are children; and discrimination on the grounds of disability like other people with disabilities, and which increases the “quantitative nature of the experience of discrimination”.\(^10\) Significantly, children with disabilities can also experience intersectional discrimination since they may experience discrimination in a way that is distinct both from other children and from other people with disabilities. As Crenshaw illustrates with reference to black women; “often they experience double discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes they experience discrimination as Black women – not the sum of race and sex, but as Black women.”\(^11\) Similarly, children with disabilities can experience discrimination not simply as the sum of childhood and disability, but distinctively as children with disabilities. For example, children with disabilities: are more likely than children without disabilities to live away from home for substantial periods of time;\(^12\) are more likely to experience neglect, and emotional, physical and sexual abuse than children without disabilities;\(^13\) and are far less likely to be involved in decision making processes\(^14\) with a tendency for their interests to be inextricably linked with that of the family.

International human rights law has mirrored these categorical and welfarist understandings of both disability and childhood, with a social model of disability particularly slow to penetrate the human rights arena. ‘Rights talk’ has been regarded as irrelevant and inappropriate for a group of children


whose restoration to as close a state of 'normality' as possible remains the immediate concern – and priority - for professionals and families. Engagement with particular aspects of these discourses by the international human rights framework is crucial; not only in socialising States to 'right' behaviour, but in determining what constitutes ‘right’ behaviour, and the implications of such norm setting for the rights children with disabilities can claim. The international human rights framework has, however, perpetuated and legitimated a form of rights behaviour that has been fundamentally disabling of children with disabilities.

With limited exceptions, the core UN human rights treaties have not expressly addressed the human rights of children with disabilities. Indeed, the international human rights domain has itself been guilty of perpetuating negative and disempowering views of disability. Understandings of disability as constitutive of individual deficit and relative 'inability' have manifested itself in the ablist norms which underpin rights discourse and to which children with disabilities have been subject. Prior to the adoption of the CRPD, the Convention on the Rights of the Child was the only core human rights treaty to make explicit reference to disability. Other human rights treaties have subsumed disability under ‘…other status’, as demonstrated in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) (1966) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966). In 1994, the Committee on Economic, Social and Cultural Rights developed a General Comment on disability, recognising that children with disabilities were especially vulnerable to exploitation, abuse and neglect and thus entitled to special protection. However, ICESCR, like ICCPR, was clearly not designed with children or people with disabilities in mind and subsequently have had little impact in addressing issues particular to either children or people with disabilities, lest children with disabilities specifically. The textual absence of children with disabilities in the core treaties prior to the CRC has served only to embed the invisibility of this particular group within the mainstream human rights paradigm; itself based on ‘able-bodied’, adult norms. One could argue that the UN human rights machinery has itself been as disabling and discriminatory as the practices it has sought to challenge by seemingly situating children with disabilities outside of human rights norms. While the universality of human rights is oft proclaimed with vigour, such universality has been ill-applied to children with disabilities in practice.

The United Nations Convention on the Rights of the Child (CRC) is the most comprehensive human rights instrument dedicated solely to the promotion and protection of children’s rights. As the ‘touchstone’ for children’s rights across the world, the Convention contains extensive standards covering almost all areas of children’s lives, including, inter alia, health, education, play, and standard of living. It also contains provisions specific to particular groups of children such as

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refugee children; children with disabilities; children in conflict with the law; and children who have been subject to abuse and exploitation. As such, it is a key source of rights for children with disabilities. Article 2 of the CRC, for the first time in binding international law, prohibits discrimination in the enjoyment of the Convention rights on the grounds of disability. In its General Comment on disability, the Committee on the Rights of the Child expressly stated that children with disabilities should enjoy all the Convention rights without discrimination of any kind. Recognition of the need for substantive equality measures and of the multiple forms of discrimination experienced by children with disabilities is also evident:

'[The] explicit mention of disability as a prohibited ground for discrimination in article 2 is unique and can be explained by the fact that children with disabilities belong to one of the most vulnerable groups of children. In many cases forms of multiple discrimination - based on a combination of factors... increase the vulnerability of certain groups. ...Discrimination takes place – often de facto – in various aspects of the life and development of children with disabilities.'

Article 23 of the CRC specifically addresses the rights of children with disabilities to, *inter alia*, enjoy a ‘full and decent life’ and to ‘special care’ and ‘assistance.’ The Committee has made clear that the applicability of the CRC to children with disabilities is not limited to this right. In its General Comment on children with disabilities, the Committee has stated that the underlying principle of this provision is that children with disabilities should be included in society. The effectiveness of Article 23 in addressing the rights of children with disabilities has been called into question. Kilkelly for example has observed that, in contrast to other provisions such as Article 22 on refugee children which requires States Parties to take ‘all appropriate measures’ to ensure they receive the care and protection they need, Article 23 (2) stops short of specifying how the right of children with disabilities to ‘special care’ is to be achieved. While Article 23(1) recognises that children with disabilities ‘should’ enjoy a full and decent life, it does not place any obligation on States Parties to take measures to this end. Similarly, Article 23(3), whilst requiring the provision of assistance, makes this subject to available resources, ‘wherever possible’, and ‘taking into account the financial resources of parents or others caring for the child.’ The language of the disability specific provision in the CRC and of the general comment on disability is heavily grounded in a welfarist and medicalised approach to disability with emphasis on ‘special care’, ‘treatment’ and ‘rehabilitation’, suggesting that there remains a tendency to regard all children with

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18 N. 17, above, 11.
19 Article 23(1) CRC.
20 Article 23(2) CRC.
21 N. 17, above, 5.
23 N. 22, above.
disabilities as necessitating predominantly protective measures rather than as active holders of rights more generally. The emphasis has thus been one of ‘normalisation’, that is, upon the ‘therapeutic’ process of bringing an individual as closely as possible towards the ‘normal’. Thus the purpose of rights talk and action for children with disabilities in the context of the CRC has been to focus on ways of overcoming the gap between the ‘impaired being’ and a ‘normal becoming’. Children with disabilities are accepted not for who they are, but for what they fail to be and what they might become. The perceived work and input needed on the part of States Parties for children with disabilities to achieve the normal status that is held in such high esteem, not only devalues disabled children for who they are but fails to recognise the role of States Parties in the disabiling process. Significantly, the overall goal that children with disabilities should be included in society, and the measures to be taken to this end, fails to problematise the ablist and adult based foundations on which society is based, preferring instead to place responsibility for change and adaptation upon a seemingly delinquent subject. Conceptualising children with disabilities in this way exemplifies the crucial role of the international human rights community in socialising States Parties to particular behaviours and actions, not least in inducing States Parties to medically oriented and deficit based ‘rights’ behaviour and legitimising particular understandings of children with disabilities in the process. Ultimately, the CRC has sought only to positively address one aspect of disabled children’s lives; that of their inherent ‘childhood’, with the experience of ‘disability’ remaining ‘locked’ into an individual, medical approach.

It is acknowledged that the Committee on the Rights of the Child has begun to offer a more positive appraisal of disabled children’s lives in their General Comments, and which have been bolstered by the drafting of the CRPD at that time. Yet the General Comment on children with disabilities, whilst purporting to draw upon the social model based definition of disability set out in the CRPD, continues to confuse disability with impairment and emphasises the need for measures which will “enable [children] to adjust and live better with their disabilities” and “psychological support that is sensitive to the stress and difficulties imposed on families of children with disabilities”; the stress and difficulties imposed perceived as an inevitable and inherent result of caring for a disabled child. There remains a danger that the experiences of children with disabilities is construed as a ‘burden’ upon their adult caretakers and “subsumed into the collective notion of the disabled family.” By placing undue attention on the functional limitations of impairment, the CRC has contributed to the socially constructed and negative existential status of disability. In so doing, the child with the impairment is subsequently positioned as the key barrier to their own rights discourse.

24 N. 17, above, 7.
25 N. 17, above, 27, emphasis added.
26 N. 17, above, 41.
Another major shortcoming of the CRC lies in the ‘inevitable arbitrariness’ with which disability issues are considered by the Committee on the Rights of the Child.\(^{28}\) An analysis of the Committee’s 2002 Concluding Observations to the UK’s second periodic report uncovers only passing reference to children with disabilities\(^{29}\) with the Committee’s most recent 2008 report on the UK’s combined third and fourth periodic reports (post adoption of the CRPD and following adoption of the General Comment on the rights of children with disabilities) paying increased attention to this group of children.\(^{30}\) It will be interesting to observe: whether the Committee on the Rights of the Child accords increased attention to children with disabilities in the long term given the co-existence of the CRPD; whether the CRPD will be perceived by the latter Committee as the natural home for detailed commentary on children with disabilities; or indeed whether arbitrariness will endure. Finally, the lack of an individual complaints mechanism under the CRC, combined with the under-resourcing and heavy workload of the Committee on the Rights of the Child has further limited the CRC’s potential to provide effective redress to children with disabilities.\(^{31}\) Nevertheless, the positioning of children with disabilities as rights holders within the CRC is a major achievement, in particular given that adults with disabilities remained implicitly protected in the other core human rights treaties and not expressly so. As shall be seen, given the relatively adult-centric manner in which the CRPD was drafted, it is highly unlikely that the CRPD provisions which are directly applicable to children with disabilities would have been so extensive had the CRC not already been in place.

**Unpacking the CRPD**

The CRPD is structured in a typical fashion. It comprises 50 articles and its Optional Protocol comprises 18 articles. The treaty begins with a series of introductory (Preamble) and interpretive articles (Articles 1 and 2); continues with general obligations (Articles 3 to 9) and substantive rights (Articles 10 to 30), and establishes implementation and monitoring processes (Articles 31 to 40). It also sets out the rules which govern the operation of the Convention such as how States become party and when it will come into force (Articles 41 to 50). Through the Optional Protocol, an individual complaints procedure is established, allowing individuals and groups of individuals to raise complaints with the treaty body where they have exhausted domestic and regional remedies. It also establishes an inquiry procedure in relation to gross or systematic violations of the rights contained in the Convention. The Convention adopts a holistic approach and contains a

\(^{28}\) N. 22, above, 194.
\(^{29}\) Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, (2002), Thirty-first session. CRC/C/15/Add.188 at paras 15, 22 and 47.
\(^{31}\) Work is ongoing to develop a draft Optional Protocol to the CRC which would allow for an individual complaints mechanism.
full range of civil, political, economic, social and cultural rights. While many of the rights specified in the CRPD are also specified in other human rights instruments, the Convention focuses on the actions that States Parties must take to ensure that people with disabilities enjoy these rights on an equal basis with others.

Somewhat significantly, the CRPD departs from the definition of disability adopted by previous treaty monitoring bodies. Its preamble recognises that disability is an ‘evolving concept’ which results from ‘the interaction between persons with impairments and attitudinal and environmental barriers’, while Article 1 of the CRPD makes clear that:

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

Whilst proponents of a social model of disability in its purest form would no doubt critique the seemingly overlapping boundaries between impairment and disability in this statement, it is nonetheless the first expression of a social constructionist view of disability in a human rights treaty, and for this reason should be built upon rather than undermined. In the context of education for example, the focus should be on those socially constructed educational barriers, which, in interaction with, impairment hinders the full and effective participation of children with disabilities on an equal basis with their peers. Whilst undoubtedly imperfect, it does represent progress in international law since prior to the adoption of the CRPD, approaches to disability were characterised wholly by their medicalisation. It is also testament to the difficulties inherent in the process of treaty negotiation and wherein attempts to reach consensus on a definition of disability was the subject of much debate between proponents of individual and social models of disability. In the CRPD, and in contrast to Article 23 of the CRC, no reference is made to ‘special needs’ or ‘care’. This is interesting in itself and is indicative of a more positive approach to, and nuanced understanding of, the lived experiences of both children and adults with disabilities. It is also perhaps reflective of the extent of participation by people with disabilities themselves in the negotiation process. However, the failure to explicitly distinguish between and separate ‘disability’ and ‘impairment’ from the outset, and the subsequent vaguity that is implied, may fail to adequately challenge the entrenchment of disablist norms within States Parties by providing something of a legitimate escape route to ‘safer’ individualised climes. It remains to be seen if, and how, the Committee on the Rights of Persons with Disabilities approaches disability as a concept in its Concluding Observations and whether it will issue a General Comment on the issue. Intuition suggests that given the potential controversy this may elicit, it may be some time before the Committee is ready to take this step.

32 Emphasis added.
The CRPD adopts a combined mainstreaming approach to the rights of children with disabilities per se with numerous references to the specificity of children’s lives throughout and obligating States Parties to provide age appropriate assistance alongside a specific article addressing issues specific to children with disabilities not addressed elsewhere. The key overarching provisions relating to children with disabilities are contained within Article 3 (General Principles) and Article 7 (Children with disabilities). In contrast to the underlying principles of the CRC which were identified later by its Committee, the CRPD itself explicitly sets out eight ‘general principles’. All provisions of the Convention must therefore be read in light of these principles. Significantly, in addition to principles relating to, inter alia, full participation, equality, accessibility and non-discrimination, Article 3(h) establishes as a general principle:

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 7 (Children with Disabilities) reads:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

These provisions clearly draw upon rights contained in the CRC with Article 3(h) CRPD drawing upon Article 5 CRC, and Article 7 CRPD drawing upon two of the cross-cutting principles contained in the CRC; that of best interests (Article 3 CRC) and of the right to be heard (Article 12 CRC). It is important to note in the context of the CRPD that the principle of respect for evolving capacities is not restricted to the confines of parental autonomy but must guide the interpretation of all CRPD rights. The explicit inclusion of this concept and its prime location therein, is of great significance for a group of children who have often been perceived as incapable of demonstrating any meaningful capacity or competence. There is a presumption that, not only do children with disabilities have capacity, but that, like children more generally, their capacity for autonomous decision making will develop over time. The Committee on the Rights of the Child has referred to evolving capacities as constitutive of a ‘positive enabling process’ and encompassing ‘processes

33 The concept of evolving capacities is stated in Article 5 CRC with respect to parental direction and guidance in the exercise by the child of the Convention rights. It is repeated in Article 14 CRC with respect to parental direction and guidance on the child’s right to freedom of thought, conscience and religion. ‘Evolving capacities’ is linked to the requirement of Article 12 CRC that the views of children should be given due weight in accordance with the age and maturity of the child.
of maturation and learning whereby children progressively acquire knowledge, competencies and understanding.\(^{34}\) In their periodic reports to the Committee on the Rights of Persons with Disabilities, States Parties are required to report on the manner in which the general principles have been implemented, and to provide examples.\(^{35}\) There remains, however, as Lansdown asserts more generally in the context of the CRC, a potential for conflict when children’s assessment of their capacities do not concur with those of parents, educationalists and health professionals among others.\(^{36}\) This concept may therefore be perceived as particularly challenging in the context of children with disabilities given the lower baseline capacity they may be viewed as possessing and the extrinsic barriers to the meaningful exercise of capacity that children with disabilities may experience in contrast to children without disabilities, such as higher levels of overprotection and low expectations; a legacy of the intersection between disability and childhood. While children’s capacities evolve to differing degrees and at different rates, the extent to which the capacities of children with disabilities are de facto enabled may diverge from that which is possible, becoming contingent upon adult views and understandings of what is considered acceptable and ‘safe’ for a disabled child to achieve, and/or the type of support that may either be available or perceived as appropriate in particular instances. It is imperative that if the principle of evolving capacities is to effectively inform the realisation of all other CRPD rights, that the extrinsic barriers to processes of maturation and learning experienced by children with disabilities are recognised and challenged by the Committee on the Rights of Persons with Disabilities in their commentary to States Parties.

The language of Article 7 CRPD is in stark contrast with the medicalised discourse evidenced in Article 23 CRC. It is also in opposition to the first draft of the child specific article proposed during the CRPD negotiations which took the latter as its starting point, and which made reference to the need for children with disabilities and their adult caretakers to be provided with ‘counselling’ and for the provision of ‘assistance’ and ‘care’ appropriate to the ‘child’s condition and the circumstances of their parents’\(^{37}\) This marrying of the needs of children with that of their parents was removed in the final provision. The final article is much more positive in language. Article 7(1) obligates States Parties to take all necessary measures to ‘ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children’. Nonetheless, what is considered ‘necessary’ will vary between States Parties.

Article 7(2) clearly sets out the best interests principle. The best interests of the child are to be a primary consideration in all actions concerning children with disabilities. The wording of this

\(^{34}\) Committee on the Rights of the Child, General Comment No.7 ‘Implementing child rights in early childhood’ (CRC/C/GC/7Rev.1, 2005) 17.


principle indicates that its scope is very wide, potentially extending to public and private bodies and to private family settings. It remains to be seen just how extensively the Committee will interpret this provision. As in the CRC, the best interests principle is not determinative but is only one primary consideration. This raises the question of which other values should prevail or outweigh the best interests consideration. The reduction of best interests to ‘a primary’ consideration is a considerable weakening of the original draft proposal that best interests should in fact be the *paramount* consideration in all actions concerning children with disabilities.38 The inclusion of Article 7(2) is problematic and theoretically deficient. There was no attempt by the Ad Hoc Committee or Working Group to define the concept of best interests; a fundamental flaw in ensuring its effective applicability since “for some best interests can be reduced to a satisfaction of material needs... Others will emphasize emotional security, psychological well-being, attention to developmental interest. Some... will stress moral and religious welfare.”39 The welfarist discourse with which the concept is associated with respect to children with disabilities in particular, risks reaffirming and entrenching rather than challenging the paternalist practices to which children with disabilities continue to be subject. Moreover, as Archard and Skivenes have observed in the context of children generally; “By whom and according to what procedures are judgements of best interests made? Clinicians...may be accomplished diagnosticians, but they need not be the best placed to judge whether or not a life is worth living”40 Similarly, what happens when the interests of parents, professionals and children collide? How should best interests be measured? Is it in the ‘best interests’ of a child with a disability to be brought as closely as possible to the culturally, socially and biologically ‘normal’? What is the relationship between the general principle of ‘respect for difference and acceptance of persons with disabilities as part of human diversity and humanity’ as established in Article 3 of the CRPD and the best interests principle here? Take, for example, a deaf child in whose medical interests it has been established would be to receive a cochlear implant, but which would potentially lead to the exclusion of that child from the signing Deaf Community of which the child is part, and thus may not be in that child’s cultural interests? Which set of interests or considerations should prevail? Consideration of the child’s best interests is vital, however it is the unproblematised vaguity of the concept within the CRPD combined with the deeply entrenched welfarist underpinnings of ‘best interests’ as used in the context of both disability and childhood which could prove to be the undoing of the glossy allusions presented in Article 7. As it currently stands, continuation of such usage with respect to children with disabilities would be quite legitimate.

38 Paramountcy of the child’s best interests is established in Article 23(2) of the CRPD; Respect for home and family in relation to the guardianship, wardship, trusteeship or adoption of children, reflecting a similar provision in Article 21 CRC.
Some reassurance may be found in Article 7(3); the right of children with disabilities to express their views freely on all matters affecting them and for their views to be given due weight in accordance with their age and maturity. The explication of disability and age appropriate assistance in realising this right is cognisance of the realities of multiple discrimination experienced by children with disabilities on the grounds of both childhood and disability. In its recent response to the UK’s third and fourth periodic reports, the Committee on the Rights of the Child expressed concern that ‘insufficient action has been taken to ensure that the rights enshrined in article 12 are applied to children with disabilities.’ Children with disabilities are often perceived as a justifiable exception to participative processes for three reasons: a belief that they have no views to express; an assumption that the interests and lived experiences of children with disabilities will always be best articulated by adult caretakers; and concern that any attempts to facilitate children’s views will be too expensive or too difficult. It is hoped that the further elaboration of this right in the CRPD will encourage States Parties to take their obligations more seriously in this respect. Lundy (2007) writing on Article 12 CRC, has identified four key factors underpinning successful implementation of this right: first, ‘space’- children must be given the opportunity to express a view in a space that is safe and inclusive. For children with disabilities such spaces must also be physically accessible. Second; ‘voice’ – children must be facilitated to express their views. The proliferation of ‘voice’ for children with disabilities will necessitate particular forms of support or adjustment where appropriate, alongside recognition of the range of verbal and non-verbal ways in which views can be expressed. Third, ‘audience’ – the view must be listened to; and finally, ‘influence’ – the view must be acted upon as appropriate.

It is interesting to note that whilst Article 12 CRC is assured only ‘to the child who is capable of forming his or her own views’, no such restriction is placed upon its CRPD equivalent. The inclusion of ‘evolving capacities’ as a key principle strengthens the potential of Article 7 in bringing the voices of children with disabilities to the fore. However, as Lundy rightly observes in the context of the CRC, “At some point, attention needs to focus on the extent of influence; what constitutes the ‘due’ in the ‘due weight” as well as the danger that “the adults who act as gatekeepers to Article 12 rights may decide that children are not sufficiently mature to express a view” The latter concern is exacerbated when the intersection between disability and childhood is brought to the fore. Attention needs to be paid to which children with disabilities are approached to participate in decision-making processes. There remains a danger that only older children who have impairments which are perceived to be relatively inexpensive to accommodate or who require only minimal or readily available forms of support are given the opportunity to express

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41 Thus drawing upon Article 12 CRC.
44 Article 12(1) CRC.
45 N. 43, above, 937.
their views, or that some forms of verbal or written means of expression are prioritised at the expense of other specialised or less well known modes and which may thus be deemed as secondary in importance for this purpose.

Article 4(3) (General Obligations) stipulates that:

‘In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.’

Article 4(3) is reflective of the unprecedented level of engagement by civil society in the negotiation process. Civil society in this context largely encompassed organisations OF people with disabilities as opposed to organisations FOR people with disabilities. At first glance Article 4(3) appears to be a fairly strong obligation advocating direct engagement. During the negotiation process, it was proposed that the latter part of this provision should read ‘...involve persons with disabilities, including children with disabilities, and their representative organizations’. The replacement of the word ‘and’ with ‘through’ weakens this obligation. Nonetheless, Article 4(3) requires States Parties to actively involve children with disabilities through organisations that are representative, recognising that children, and not just adults, have an important role to play. It requires such involvement both in processes relating to the implementation of the Convention and in other decision making processes concerning issues relating to people with disabilities. Article 4(3) is clearly complemented by Article 7(3) of the CRPD with respect to children.

The Convention rights apply equally to all people with disabilities, including children. The Ad Hoc Committee responsible for drafting the Convention text recognised however, the need to articulate rights in ways that would effectively address the combined effects of practices on the basis of disability and other grounds such as gender and age. The CRPD in its mainstreaming approach makes explicit references to children and/or age in articles outside of those already discussed. In Article 8(1)(b), States Parties are required to ‘undertake to adopt immediate, effective and appropriate measures’ to combat stereotypes, prejudices and harmful practices relating to people with disabilities, including on the basis of sex and age, in all areas of life.46 Interestingly, the CRPD also requires States Parties to take measures to foster ‘an attitude of respect’ for the rights of disabled people at all levels of the education system, ‘including in all children from an early age’.47 Reference to ‘age-appropriate accommodations’ is made in the context of ensuring

46 Article 8 CRPD, Awareness-raising.
47 Article 8(2)(b) CRPD.
effective access to justice for people with disabilities,\(^48\) while the right of children with disabilities to registration of birth, to a name, to acquire a nationality, and, as far as possible, to know and be cared for by their parents is set out in Article 18(2).\(^49\)

The right to be free from all forms of exploitation, violence and abuse is established in Article 16. This right is crucial in recognising the greater likelihood of people of disabilities to experiences of abuse and exploitation, both inside and outside the home through placement in care and educational, social or medical institutions. The Committee on the Rights of Persons with Disabilities has, in its reporting guidelines, stipulated that States Parties should pay particular attention to women and children with disabilities in this context.\(^50\) States Parties are obliged to take protective and preventive measures, including ensuring that protection services and support are ‘age, gender and disability sensitive’.\(^51\) States Parties are also required to take account of ‘age specific needs’ in supporting the recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse.\(^52\)

Paragraph 5 of Article 16 requires States Parties to implement legislation and policies, including child-focused legislation and policies to ensure that instances of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted. The pattern of, and for many children with disabilities, negative consequences of long term institutionalisation, is illuminated in Article 23 - respect for home and family. This article presents a detailed set of provisions for children with disabilities. It should be recalled at this point that in implementing Article 23, as with all other rights, States Parties are required to take account of the CRPD’s general principles and to ensure that the views of children with disabilities are given due weight in accordance with their age and maturity, adding additional weight to its provisions. Under Article 23(3), States Parties are to ensure that children with disabilities have equal rights with respect to family life. In addition;

3. [...] With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine..., that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents.

5. States parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

\(^48\) Article 13(1) CRPD, Access to justice.
\(^49\) Article 18 CRPD, Liberty of movement and nationality.
\(^51\) Article 16(2) Freedom from exploitation, violence and abuse.
\(^52\) Article 16(4).
Article 23(4) reflects the potential conflict that could arise between a child’s views and that which is perceived by the relevant authorities as being in their best interests while Article 23(5) clearly challenges States Parties to avoid institutionalization of children with disabilities as far as possible. In addition, Article 23(1)(c) obliges States Parties to ensure that people with disabilities, including children, retain their fertility on an equal basis with others.

The right to an effective education is crucial for children with disabilities. For the parents of children with disabilities, the key debate centres on whether they should access mainstream educational provision or be educated within a segregated, ‘special’ school environment. Whilst educational achievement and progression is clearly important for all, educational provision for children with disabilities has been negatively skewed towards the lower end of the non-academic spectrum in a way that has been pejorative to the moral worth and social inclusion of people with disabilities more generally. Article 24 CRPD accords the right of people with disabilities to education without discrimination and on the basis of equal opportunity. It requires States Parties to ensure an inclusive education system at all levels, and draws on Article 29 CRC in establishing the aims to which such a system should be directed.\(^{53}\) However no attempt is made to explicitly define what is meant by ‘inclusion’ other than to state that children with disabilities should not be excluded from the general education system on the basis of disability,\(^ {54}\) and that they should receive the support required within the general education system, to facilitate their effective education.\(^ {55}\) This would appear to signify a positive approach to inclusion; one wherein the presumption is in favour of education in mainstream settings, with the provision of support to ensure that education really is inclusive and not reduced to mere integration. No attempt was made during the negotiation process to define ‘inclusion’ or to include any such definition in Article 2 of the CRPD which defines the terms ‘communication’, ‘language’, ‘discrimination on the basis of disability’, ‘reasonable accommodation’ and ‘universal design’ for the purposes of the Convention. The remainder of Article 24 does elaborate further on what would appear to be the prerequisites for an inclusive education system. In addition to measures to ‘enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education’,\(^ {56}\) States Parties are required to provide reasonable accommodation and individualized support measures in ‘environments that maximise academic and social development’ and which are ‘consistent with the goal of full inclusion’.\(^ {57}\) The concept of ‘reasonable accommodation’ permeates the Convention.

\(^{53}\) Set out in Article 24(1), that is, to ‘the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity’, and ‘the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential’.

\(^{54}\) Article 24(2)(a).

\(^{55}\) Article 24(2)(d).

\(^{56}\) Article 24(3). These measures include, inter alia, facilitating learning of Braille, sign language and alternative means of communication and mobility skills.

\(^{57}\) Article 24(2).
This is the first time reasonable accommodation has been both included and defined in a core human rights treaty. Article 2 defines reasonable accommodation as:

‘Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’

The explicit inclusion and definition of the concept is, on the one hand, a crucial component of the CRPD, recognising the ways in which people with disabilities, including children, have been disadvantaged by the immanent rules of a ‘game’ designed by and for a non-disabled and adult majority which has already begun, not least in education and social settings, and of the remedies needed to ensure a more level ‘playing field’. However, the concept of reasonable accommodation contained in the CRPD, remains inherently problematic, and fails to depart significantly from welfarist assertions of assistance contained in other human rights treaties. Whilst the grounding of the CRPD in a social model of disability is to be clearly welcomed, the CRPD fails to recognise the way in which ‘reasonable accommodation’ can itself become a barrier which may ‘hinder full and equal participation’ of children with disabilities ‘in society on an equal basis with others’. It does not challenge the legitimacy of prevailing ways of being and doing, focusing only on the need to instigate change where absolutely necessary. The complexity of reasonable accommodation and the justifiable discrimination it implies has been highlighted by Riddell et al, in the context of national disability discrimination legislation, rightly arguing that “[t]he notion of ‘reasonableness’ is evidently a somewhat slippery concept which may be interpreted differently in a variety of contexts.” What is understood as ‘reasonable’ by one State Party may be wholly different from another. Consideration also needs to be paid to what constitutes an ‘undue burden’. Implicit within understandings of justifiable discrimination and reasonable adjustment is the idea that children with disabilities and their needs are both burdensome and expensive and wherein the notion of reasonableness and its subjective parameters risks becoming something of a safety net and/or an institutional conservation strategy against structural change. That children, and adults, with disabilities can still be subject to justifiable discrimination is something that would be deemed intolerable and inappropriate for those whose differences are grounded in gender, ethnicity, religion or class. In this regard reasonable accommodation becomes something of a double-edged sword: a precursor to a form of conditional rather than absolute inclusion, and ultimately to a conditional rights discourse. Such conditionality emanates from the implicit designation of some children with disabilities and those children with more complex needs in particular, as having needs that are ‘unreasonable’, ‘too costly’ and ‘burdensome’. Whilst viewed as a key avenue through which disabling barriers can be eradicated and of achieving substantive equality, the continuing

59 Shelia, Riddell, Teresa Tinklin and Alastair Wilson, Disabled Students in Higher Education: Perspectives on widening access and changing policy (Routledge, London, 2005) 79.
justification for practices that are clearly discriminatory, but ‘unreasonable’ to remove, locates the ‘problem’ of disability with the disabled child who, but for their costly requirements perceived as resulting from individual need, would be ‘able’ to fully participate and/or avail of a particular right. This subtle practice of blame transfer is clearly reminiscent of processes of ‘othering’, not least because “The Different Ones are seen as less competent, less skilled, less knowing…”

Finally, Article 25(b) accords children with disabilities the right to health services needed specifically because of disability, including early identification, intervention and prevention, while Article 30(3)(d) requires States Parties to ensure that children with disabilities have equal access to participation in play, recreation and leisure and sporting activities, including those activities in the school system.

**Monitoring the CRPD’s Monitoring Provisions**

As with all human rights treaties, the Convention contains a number of monitoring provisions. Particular aspects of these provisions are innovative, largely unprecedented in other human rights treaties. The overarching objective of monitoring is to ensure effective implementation of the provisions of a treaty, and that those intended to benefit from these provisions are able to do so. Monitoring processes are of critical importance to ensuring the rights of children with disabilities. Aside from reporting procedures which are common to all treaties, the relative diversity of monitoring provisions across the core UN treaties with respect to individual complaints mechanisms highlights the lack of consensus about how implementation can be best achieved. There is however, general consensus that the work of treaty bodies should be heavily weighted towards encouraging and facilitating the development of national systems and processes which support and defend the articulated rights. The inclusion in the CRPD of Article 33 on national implementation and monitoring is recognition of the need for strong systems of monitoring so as to ensure the transmission of and engagement with the Convention’s standards at national level. Such processes are crucial in socialising States Parties to ‘right’ and ‘rights’ behaviour. Effective implementation of the CRPD is ultimately premised on establishing a ‘domestic architecture for change’ as envisaged by Article 33 of the CRPD. This requires States Parties to designate one or more focal points within government for matters relating to the Convention; maintain, strengthen,

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61 Article 25 CRPD, Health.
62 Article 30 CRPD, Participation in cultural life, recreation, leisure and sport.
65 Article 33(1) CRPD.
designate or establish a framework to promote, protect and monitor implementation\textsuperscript{66}, and ensure that civil society, in particular, people with disabilities and their representative organisations are involved and participate fully in the monitoring process\textsuperscript{67}. It is not yet clear how well this will work in practice and with no comparator in the human rights treaty system, it is likely to be some time before effective national level systems of monitoring are developed. There has already been debate among and within States Parties that the ‘framework’ referred to in Article 33(2) necessitates only the designation of a national human rights institution as opposed to the collaborative effort and partnership of a number of bodies, including civil society, that close reading of the article would suggest. Nonetheless, the deliberate inclusion of these provisions is something of a natural progression given the wider debate on enhancing the effectiveness of treaty monitoring by the international community. As such the CRPD is illustrative of a shift towards more participative forms of monitoring in which people with disabilities play a central role. In taking a more considered approach to processes of implementation and monitoring, Article 33 has the potential to promote greater and more meaningful compliance with human rights norms at domestic level and to act as a powerful disincentive to violating behaviour. The role of Article 33 in enhancing the domestic internalisation of norms is, on one level, exciting and to be highly welcomed. Ironically, however, it also has the potential to become a double edged sword where the norms it seeks to inculcate are grounded in conceptions of individual deficit, and wherein added legitimacy is granted to concepts such as reasonable accommodation in its present form.

The role of children with disabilities within the monitoring process remains under question given that they are not explicitly mentioned anywhere in Article 33. It would be somewhat misleading to assume that the phrase ‘persons with disabilities’ is here all encompassing in the eyes of States Parties. Whilst theoretically so, the default use of ‘persons’ in international law to date has, in practice, been exclusive of people with disabilities and children generally unless otherwise stipulated, much lest children with disabilities. The lack of reference to children here is particularly disappointing given the numerous references to children throughout the CRPD’s substantive provisions as well as the requirement for children with disabilities to be involved in the development of legislation and policies relating to the implementation of the Convention under Article 4(3). In contrast to Article 4(3) however, Article 33(3) requires people with disabilities to be involved in the monitoring process \textit{alongside}, that is, in addition to, their representative organisations rather than merely \textit{through} these organisations. There is a risk that the potential of the CRPD with respect to ensuring the rights of children with disabilities and in developing truly participative forms of monitoring will be undermined by the absence of express reference to children in relation to national monitoring specifically as experience in relation to international human rights law more generally demonstrates.

\textsuperscript{66} Article 33(2) CRPD.
\textsuperscript{67} Article 33(3) CRPD.
In contrast to the current status of the CRC, the Optional Protocol of the CRPD establishes an individual complaints procedure, allowing individuals and groups of individuals to raise complaints with the treaty body where they have exhausted domestic and regional remedies. This would appear to offer much hope in enabling children with disabilities to bring forth individual complaints. As Freeman has observed; “[T]he sight of children hauling their own state before an international court would be particularly gratifying.” Examination of the CRPD’s Optional Protocol suggests that this has not been designed with children in mind and it remains to be seen how effective this will be in practice for children with disabilities, or indeed people with disabilities more generally. Unlike the text of the CRPD itself, the Optional Protocol is disappointingly standard. There is no reference to disability or age specific assistance or support in the complaints process. There is no reference to submission of complaints or exchange of information in alternative formats or cognisance of any barriers within the complaints process that may arise. Whilst the individual complaints procedure would appear to be ill-conceived for adults with disabilities, the intersection between disability and age and failure to take this into account would appear to exclude children with disabilities even further from effective redress of rights violations.

**Conclusion**

The United Nations Convention on the Rights of Persons with Disabilities has generated expectations of urgent redress for the long overdue advancement of human rights for people with disabilities throughout the world. In determining what constitutes ‘right’ or ‘wrong’ behaviour, international human rights law undoubtedly plays a key role in the enunciation and development of norms at both international and national levels. It would be misleading however, to assume that such explication will inevitably be positive. In determining the content and nature of the rights that designated rights-holders can claim and the parameters of the duties to be exercised on the part of States Parties, the legitimating role of international human rights law can cause the human rights framework itself to become a part of the disabling processes it purports to challenge. This has been particularly evident in the case of children with disabilities wherein the human rights system prior to the CRPD has itself been guilty of perpetuating the ‘otherness’ of children with disabilities by placing undue attention on overcoming the functional limitations of impairment through highly individualised and welfarist based solutions rather than on eradicating the disabling effects of society. Nor has the human rights system addressed the intersectionality of disability and childhood with any great success.

The development of a thematic convention in the form of the CRPD is therefore crucial; not only in challenging persistent human rights violations on the ground, but in providing the human rights

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system with a much needed opportunity to revisit and reassess the less than satisfactory nature of the rights discourse to which both adults and children with disabilities have been subject. As such the CRPD’s success is highly anticipated and its coming into force heralded as a major achievement in itself. While not altogether unwarranted, such celebration must be kept in perspective and close attention paid to the implications of that which is presented in the CRPD lest children with disabilities become subject to little more than an illusionary vessel. The CRPD clearly enhances the textual visibility of children with disabilities within international human rights law. Such textual visibility is a legacy of the mainstreaming approach that was adopted by the treaty’s drafters towards children with disabilities and of the high involvement of civil society in that process. Of especial importance is the explicit applicability of the CRPD rights across disabled children’s lives and cognisance not just of the intersection between disability and childhood per se but of the intersection between childhood, impairment and the imposition of restrictions and barriers by structures and institutions. The success of such an approach remains untold however and it is vital that these intersections are given not only textual voice, but are given practical voice in the ever developing processes of implementation and monitoring that seek to give effect to these rights. Children with disabilities must be accorded equal status to adults with disabilities both by the Committee on the Rights of Persons with Disabilities and by States Parties and not positioned as a mere addendum or afterthought. Indeed, while it is much too early to assess the CRPD’s progress to date, one wonders whether the CRPD’s long term success in effectively minding the gap for children with disabilities might have been enhanced by naming the treaty the ‘Convention on the Rights of Children and Adults with Disabilities’ given the extent to which disability has been perceived as located outside of human rights norms by virtue of its textual absence in human rights discourse and the extent to which childhood has fallen victim to a homogenous and inevitably adult-based disability discourse. Indeed, human rights discourse has too often concealed positions of power under the guise of universality. The traditional use of ‘persons’ as an all encompassing term has served only to conform to, and reaffirm, an ablist and adult oriented status quo by rendering silent that which is taken for granted. In this way a thematic convention and the textual visibility of children with disabilities therein must be understood as positive. What is not yet certain is how well this will be translated into practice.

Some aspects of the CRPD are of concern and, to some extent, continue to locate children with disabilities within a welfarist discourse albeit in reconstituted forms. This is most evident through attempts by the international community to address issues relating to ‘reasonable accommodation’. Undoubtedly a complex and challenging issue for the Committee, not least in obtaining consensus among States Parties, the way in with which this has been conceptualised has created space for the legitimation of exclusionary practices within State Parties. Whilst the reality of resources will always be an issue, of particular concern here is the way in which the problem of resources
becomes understood as the problem of ‘disability’ in its medicalised form, and wherein the child with the impairment subsequently becomes the key barrier to their own rights discourse.

In conclusion, the combined mainstreaming approach to childhood adopted by the Ad Hoc Committee in developing the Convention alongside elaboration of key CRC rights in the context of disability denotes a substantial window of opportunity in providing effective redress to the human rights violations experienced by children with disabilities across the world. The coming into force of the Convention and its ratification by States Parties across the developing and developed world is but one step in realising the rights therein for children. Whilst States Parties’ obligations in promoting, protecting and respecting the fundamental rights and freedoms of children with disabilities have been made substantively clearer than has hitherto been the case, the realisation of these obligations will remain elusive on the ground unless effective implementation and monitoring systems are in place. It will be up to the Committee on the Rights of Persons with Disabilities to set the standard by elaborating upon the nature and content of these rights, and in so doing inducing States to ‘rights’ and ‘right’ behaviour in a positive and meaningful manner. One hopes that this is a challenge that the Committee will take on with vigour and understanding so that the CRPD really does mind the gap in realising the rights of children with disabilities.