



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION

Annual Conference

Disability Issues Paper

APF 12

The 12th Annual Meeting of the Asia Pacific
Forum of National Human Rights Institutions

Sydney, Australia, 24-27 September 2007

Contents

1	Introduction	3
2	A first in human rights instruments	3
3	Importance of consulting disability organisations	4
4	Importance of NHRIs sharing experience	5
4.1	Roles in relation to national focal point or points and co-ordination mechanism within government.....	5
4.2	Framework and mechanisms.....	7
5	Promotion, protection and monitoring	8
5.1	Promotion	9
5.2	Monitoring.....	9
5.3	Protection.....	11
6	Recommendations	12

ISSUES PAPER

NHRIs and National Implementation & Monitoring of the Convention on the Rights of Persons with Disabilities

1 Introduction

The Convention on the Rights of Persons with Disabilities (“CRPD”) was opened for signature on 30 March 2007 and has already been signed by over 100 States.

Consideration in detail of issues of monitoring and implementation is thus likely to be already occurring in many States. This paper is intended to contribute to the exchange of ideas among NHRIs on the roles they might undertake, or have assigned to them, regarding monitoring and implementation of the CRPD, and on issues which may require further discussion with governments regarding other elements of national frameworks for implementation.

2 A first in human rights instruments

Largely as a result of the contributions of NHRIs, together with representatives of people with disability, the following provision was included in the drafting of the CRPD. It is a “first” in human rights instruments, a specific article on national implementation and monitoring:

Article 33 - National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the

principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

This is much more specific than the general obligations clauses contained in previous human rights instruments, which require States to use “all appropriate means, including particularly the adoption of legislative measures” (ICESCR) or to “to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” (ICCPR). Of course, the CRPD also contains a general obligations clause, which is itself more developed in some respects than those in earlier instruments, and the implications of which should also be given attention by NHRIs with a view both to promoting appropriate responses in their States and to considering their own roles.

The existence of NHRIs indicates an acceptance, in those States where NHRIs exist, of the importance of national monitoring mechanisms as a part of the implementation of human rights obligations entered into by those States, rather than the combination of domestic legislative measures and international monitoring being regarded as sufficient.

The express incorporation of this insight into a major human rights instrument is both a necessary response to the specific issues raised by disability, and a welcome precedent for the development and implementation of human rights law more generally. The CRPD goes further than previous human rights instruments in reflecting the truth of the important observation made (by Rene Cassin) during the drafting of the Covenants, that

“it would be deceiving the peoples of the world to let them think that a legal provision was all that was required ... when in fact an entire social structure had to be transformed”.

3 Importance of consulting disability organisations

In view of their contribution to the development of the CRPD and of article 33 in particular, NHRIs are well positioned to contribute to the development in their States of measures to implement article 33.

In making such contributions, it is important that NHRIs ensure that they take into account, and seek that their States take into account, article 4.3 of the CRPD:

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.

In addition to the fact that the CRPD itself requires consultation with and involvement of representative organisations of people with disability, there are particular reasons for NHRIs to draw on the expertise and experience of this area of civil society in considering their own roles, and in advising their States, regarding monitoring and implementation of the CRPD:

- The fact that until now the major international human rights instruments have not referred to disability in any detail (or in most cases at all) may mean that NHRIs whose jurisdiction has been defined by reference to those instruments have less experience of disability issues than they do in relation to issues and areas of life which have been more specifically recognised hitherto.
- NHRIs which have had specific jurisdiction in relation to disability under national laws against disability discrimination may nonetheless find (as discussed later in this paper) in many cases that the range of issues which the CRPD covers is broader than has been covered by discrimination laws, and that approaches used to date in promoting, monitoring or implementing discrimination laws may be incomplete or inapplicable in addressing some of the human rights issues comprised within the Convention.

4 Importance of NHRIs sharing experience

Clearly it will also be useful for NHRIs to share their experience in promoting the human rights of people with disability, and relevant experience derived from other areas of human rights - both to date and as experience develops in relation to the CRPD. To do so would be in keeping with Article 32 of the CRPD which recognises the importance of international co-operation and calls for States to undertake appropriate measures

Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices

A number of issues for discussion among NHRIs regarding implementation and monitoring of the CRPD are listed below:

4.1 Roles in relation to national focal point or points and co-ordination mechanism within government

It is important to note that article 33 has two sets of requirements for monitoring and implementation.

Clause 2 deals with frameworks and mechanisms for protection and for monitoring and promotion of implementation and will be discussed further below. Clause 1 however also requires attention by NHRIs.

This clause requires States to establish a focal point, or points, within government and to consider establishing a co-ordination mechanism. Even a brief survey of the CRPD indicates the wide range of areas of government which would need to be involved in effective implementation. Clearly, designating one or more specified agencies within government to have leading responsibilities in relation to the CRDP has a number of advantages:

- for the achievement of the purposes of the CRDP, in providing advocacy within government for implementation
- for governments, in developing sources of expertise and information to make their implementation efforts more efficient and effective and avoid duplication of effort
- for civil society including disability representative organisations in providing a clearer channel or channels of communication than would be involved in needing to pursue consultation with each and every agency of government.

Similarly the range of areas of government whose responsibilities will be involved in implementation of the CRDP indicates the advisability of establishing a co-ordination mechanism, as is suggested although not required.

It is not expected that NHRIs or most governments would see it as appropriate for an independent NHRI to perform the role of single focal point within government or for an NHRI alone to be allocated the role of the mechanism co-ordinating the large scale resource allocation, policy and regulatory and legislative activity which may be involved in implementing the CRDP.

NHRIs may wish however to give attention to this clause in several respects:

- An initial role - either in processes leading towards ratification or soon thereafter according to what is appropriate in their own circumstances - may be to promote to governments the need for designation of a focal point or points and the desirability of a co-ordination mechanism, and in each case the need for consultation with disability representative organisations on the roles involved.
- It is possible that governments and some sections of civil society might assume that a NHRI is in fact the appropriate focal point and/or co-ordination mechanism, on the basis that human rights conventions are solely or primarily the responsibility of human rights agencies – rather than of the whole of government and society having this responsibility and without a NHRI being allocated the authority and resources to perform these roles. NHRIs accordingly may need to be prepared to discuss with governments and with civil society organisations the reasons why simply adding the CRDP to

the jurisdiction of existing NHRIs is likely to be an inadequate response to the requirements of Article 33.

- NHRIs may wish to be involved in discussions with governments on what the appropriate designation and roles of a focal point or points and a co-ordination mechanism should be. For example NHRIs might be involved in seeking to ensure that, while implementation efforts within government involve sufficient disability expertise (which in many cases might at present be expected to reside within specialist areas of government dealing with specific disability service issues), high level and cross government involvement is secured such that disability does not continue to be conceived of as only being the responsibility of these specialist areas.
- NHRIs may have important perspectives on whether a single focal point or more than one would be more effective and appropriate in their own national circumstances. As well as the particular issues for federal states (where at a minimum designation of a focal point within each constituent unit of the federation would appear desirable) issues here might include whether a single agency has, or can achieve, the necessary combination of authority and expertise across the areas covered by the convention to drive implementation efforts most effectively.
- Some NHRIs, subject to considerations of independence and relations with government in each case, might wish to discuss with government prospects for their providing a focal point of disability and human rights expertise, and / or being involved jointly with other key agencies in a co-ordination mechanism, while not assuming sole responsibility for these roles.

4.2 Framework and mechanisms

In recognition of the breadth of issues to be addressed in implementing the Convention and the need for wide-ranging actions by government and other agencies in society, clause 2 of Article 33 does not simply contemplate designation of a single mechanism (such as a NHRI) for monitoring, protection and promotion of implementation. Although establishment or designation of a mechanism or mechanisms is called for, this is set within a broader requirement to establish a framework for promotion, protection and monitoring.

NHRIs can be expected to have critical roles:

- As one of the independent mechanisms included in the framework
- In promoting to governments the need to establish a framework
- In participating in consideration by governments of the nature of the framework to be adopted (including promoting to governments the need to involve disability representative organisations).

Article 33 states in relation to monitoring mechanisms:

When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

This does not mean however that the only mechanisms which should be included in a framework are NHRIs complying with the “Paris Principles”. While States agree to take these Principles into account in establishing or designating a mechanism for the purposes of Article 33, they will have clearly done so if such an NHRI is included as one of the mechanisms within the framework while retaining its independence.

Elements of an appropriate framework are likely to vary substantially according to national conditions and legal and administrative structures. Initial elements could however include:

- Identification of lead agencies within government for implementation of responsibilities against each obligation in the CRPD,
- Identification of any areas where mechanisms necessary for protection, promotion or monitoring are lacking or inadequate
- Adoption of requirements (whether legislative or national policy based) for public authorities to identify and report against relevant obligations and measures for their implementation including, in turn, measures for promoting implementation by private sector and civil society organisations
- Consideration of the relationship between the monitoring framework and arrangements for data collection (article 31) and reporting obligations (article 35). It is suggested that NHRIs should emphasise to governments that article 31 is not solely concerned with the collection of demographic statistics on prevalence and types of disability or impairment, but also with data on the extent of compliance or otherwise with the requirements of the Convention; and that States’ initial reports should contain benchmarking data on initial levels of compliance wherever possible, and in any event strategies for measuring compliance in future.

5 Promotion, protection and monitoring

Although this paper (following the heading of Article 33 itself) has used the term “implementation and monitoring” it is important to note that clause 2 actually refers to States establishing a framework, and a mechanism or mechanisms, to “promote, protect and monitor” implementation. A brief discussion here of each of these elements may assist further discussion by NHRIs.

5.1 Promotion

Promotion of implementation is not identical with promotion of public awareness and acceptance of rights of people with disability, obligations on which are set out in Article 8 and regarding which NHRIs will also clearly have a role (although as with other aspects of the Convention it is recommended that this role not be seen as one solely for an NHRI).

Promotion of implementation involves a strategic rather than a purely informational role - although clearly necessary strategies would include identification of, and achieving measures to address, information needs in achieving implementation (for example, information needs for employers or education providers in making reasonable adjustments, or information needs for consumers with disability in seeking to purchase accessible products).

Determining approaches to promotion of implementation appears to require:

- Detailed analysis of each of the obligations set out in the Convention by reference to each of the rights recognised
- Consideration in national circumstances of implementation methods and tools available to government and other agencies with potential roles in implementation
- Determination of strategies for promoting action by these agencies.

In some contexts promotion of implementation could involve:

- Governments requiring regulatory agencies responsible for particular areas to incorporate measures into their regulatory regimes (or improve existing measures within those regimes) to achieve or move towards compliance with the CPRD (for example, inclusion of disability access requirements in regulatory regimes for buildings, transport, information and communications technology, consumer electronics, etc.); or
- NHRIs persuading relevant regulators to take such measures; and
- NHRIs negotiating agreed strategies for action by other agencies or organisations over a period of time – including through NHRIs using, and/or agreeing not to use, enforcement powers where available to them.

5.2 Monitoring

Clearly, there are strong connections between promotion of implementation and issues of monitoring, reporting and data collection – it is not possible to know whether we are succeeding in promotion of implementation unless we know where we are starting from and where we have got to.

NHRIs acting alone are likely to lack the resources and capacity to undertake comprehensive monitoring of current and future levels of compliance with the CPRD. While monitoring by NHRIs can be expected to make an important

contribution to effective and accountable implementation it may likewise be important for NHRIs to make clear to their governments and civil society organisations that monitoring by NHRIs (in particular, within their existing resources and capacities) should not be seen as sufficient fulfilment of the requirements of article 33, but rather as indicated by article 33 should be approached as part of a broader framework.

It may again be useful to emphasise that monitoring in the context of the CRPD does not involve only monitoring of (hopefully rare) incidents of breaches which can be approached as exceptional cases. While, clearly, national circumstances vary widely on some issues covered by the CRPD it should be equally clear – including from the input of disability representatives worldwide during the drafting process – that in all States the starting position is that major social structures really do have to be transformed – physical and communications environments, education and employment, housing and accommodation and so on – and that monitoring these processes will also involve major tasks.

NHRIs currently will have different areas and levels of capacity and experience in monitoring relevant to various areas covered by the CRPD.

Some for example may have more experience in monitoring human rights in institutional settings such as prisons which may be transferable to monitoring human rights in relation to institutional settings relevant to the CRPD, as well as being applicable to monitoring human rights of people with disability themselves in the criminal justice system. Other NHRIs whose jurisdiction and experience has been based on narrower models of anti discrimination law may have less experience and capability in this respect.

Similarly, some may have had more detailed involvement in issues of physical or communications access to date than others and so on.

Some NHRIs may have experience with development and application of human rights indicators and of the conduct of human rights audits which could be usefully applied to monitoring of implementation of the CRPD, and shared with other NHRIs whose experience is more concentrated in investigation and resolution of individual complaints and/or litigation based enforcement.

However broad the range of experience and capability of NHRIs may be, taking into account the range of issues covered by the Convention it appears likely to be most effective to approach monitoring, as Article 33 does, as being performed through a framework which includes NHRIs as well as other relevant agencies and mechanisms, rather than through a NHRI being seen as solely responsible.

Participation in, or initiation of, discussions with governments, with agencies with relevant responsibilities, and with disability representative organisations on the most effective roles for different organisations within a framework appears to be an early task for NHRIs to undertake.

5.3 Protection

The same point made above in relation to promotion and monitoring – that NHRIs have important roles as part of a framework for implementation of the CRPD rather than being appropriately assigned sole responsibility – applies even more obviously regarding measures for protection of rights.

Many of the civil and political rights restated or expanded upon in the CRPD will in all States be covered by legislation which is primarily the responsibility of mechanisms beyond NHRIs – in areas such as criminal law, guardianship, family law etc. NHRIs may however have an important role as part of a national framework (or, to the extent possible within their existing resources and jurisdiction, on their own initiative) in examining needs and possibilities for any additional measures in these areas – such as the development of guidelines and strategies (whether by NHRIs or by the agencies responsible, or both) regarding disability issues in law enforcement and the administration of justice.

Regarding economic social and cultural rights, the CRPD acknowledges (Article 4.2) that this class of rights may be subject to progressive implementation, rather than being required to be immediately realised in full. This has led to perceptions that economic social and cultural rights are not classed as real rights and in particular are not capable of being justiciable.

Although many NHRIs may not currently have direct or comprehensive jurisdiction in relation to the Covenant on Economic Social and Cultural Rights they may nonetheless have important contributions to make to realisation of these rights, and to consideration by governments of measures for protection of these rights.

In particular, many NHRIs do already exercise jurisdiction in relation to economic social and cultural rights through administering anti-discrimination laws applying to these rights and thus are familiar with issues of rights which are justiciable and yet are subject to progressive implementation (for example the requirements for accessibility of public transport which exist in several States and which include timelines for compliance).

Discrimination laws in some States draw a distinction between a right to have non-discriminatory access to those services and facilities which exist (recognised in law), and a right of access to needed services and facilities (not recognised). In other States however legislation appears to go further towards recognising rights to needed services, supports and adjustments more directly. Exchange of experience between NHRIs in this area would appear particularly valuable.

6 Recommendations

Forum Councillors have already agreed to recommend ratification of CRPD to their States.

Forum Councillors may also wish to consider:

1. appointing a senior policy officer within their institutions as an APF focal point on disability;
2. The APF would be willing to establish a 'virtual' communication system via a secure component of the APF website to enable the focal points to exchange information with regard to the role of NHRIs and the CRPD;
3. In addition to the APF and ICC endorsed 'disability database' proposal, the APF focal points may also propose additional projects for Forum Council consideration and endorsement.