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National Implementation and Monitoring: Engaging Civil Society

Rosemary Kayess

President: Disability Studies and Research Institute

Central to calls for a thematic convention was the failure of the existing framework of non-binding instruments to have a significant impact on the situation of many of the world's people with disability. The strength in having a convention was seen in the binding nature of the obligations on States and the legal rights it accords people with disabilities. It is this relationship between States and their citizens that means compliance through domestic implementation is an essential feature.

The various developments in soft law had provided a significant framework of principles but had not necessarily delivered reform and social change. The normative nature of such an instrument means compliance is fundamental and that domestic application and implementation are essential goals. The binding nature gives credibility to the intentions of States and clearly establishes a role for international and national governance.

What tend to be sought are treaties with 'teeth', that is, they have some enforcement measures.

It has been suggested that the emphasis should not be about the enforcement of obligations but the management of compliance¹. Commentators contend that the principal source of noncompliance is not willful disobedience but the lack of capacity, clarity or priority, hence the idea of enforcement is misguided as a means for achieving compliance². What is needed is a more

¹ Chayes, Abram and Chayes, Antonia. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge. Page 21

² Ibid page 22

sophisticated strategy that directly addresses these deficiencies to deal with compliance problems. Strategies that include elements such as transparency and capacity building are more effective in generating compliance. That greater emphasis should be placed on implementation strategies, transparency and capacity building. Transparency – the generation and dissemination of information about the requirements of the treaty regime and the parties' performance under it – is an almost universal element of management strategy. Transparency influences strategic interaction among key stakeholders in the direction of compliance. Capacity building is aimed at addressing deficits of technical and bureaucratic capability and policy resources.

The very nature of disability and the inherent systemic discrimination and social exclusion that is an element of it means that many governments have very limited expertise in disability. Historically, people with disabilities have been excluded from key social institutions which has isolated them and the issues that disability raises from mainstream public policy. This has been repeatedly demonstrated through the failure of successive treaties to recognise disability as an area of concern. The active participation of people with disability and their representative organizations in the public policy process is central to building capacity.

This convention heralds a new formal role for civil society. Civil society engagement, up until now, has been through treaty body practice rather than formal provisions within a treaty³. CRPD is the first convention to so thoroughly engage civil society in the negotiations and to include substantive

³ It is important to note that working relationships between NGOs and most of the Treaty Monitoring Bodies have evolved on an informal basis. None of the core Human Rights Treaties establishing the different Committees expressly mention NGO contribution to the work of the Treaty Bodies. The Convention on the Rights of the Child does provide scope for NGO participation within Article 45:

In order to foster the effective implementation of the Convention and to encourage international operation in the field covered by the Convention: (a) ... The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.

Although there is no express reference to NGOs in this article, it appears clearly from the travaux préparatoires that the expression "other competent bodies" was meant to allow cooperation with and participation of NGOs in the work of the Committee.

provisions outlining on-going engagement with implementation and monitoring. These provisions are embedded in Article 4 General Obligations, and more importantly for our focus here today Article 33 National Implementation & Monitoring.

Central to the provisions of Article 33 is a framework to promote, protect and monitor implementation of the Convention, including the maintenance of a NHRI based on the *Paris Principles*. NHRIs are well situated to undertake this role. It is an independent mechanism that provides a central human rights focus. A second aspect of Article 33 is the engagement of civil society, in particular that persons with disabilities, be 'involved and participate fully in the monitoring process'. For NHRIs this process should be seen as twofold. The *Paris Principles* set out the principles relating to the "**composition and guarantees of independence and pluralism**". This recognises the need for Institutions to be representative of the plurality and diversity of society. People with disability need to be actively involved with the work of the institutions. Institutions should promote the employment of people with disability into key positions. The skills and expertise of people with disability needs to be acknowledged and harnessed within the work of the institutions. People with disability need to be active members but also active partners. Civil society, in particular people with disability, have the lived experience of disability they understand the social environmental context which underpins disability discrimination and disadvantage.

Disability based discrimination is much more structurally based than individual acts of prejudice and as such is not truly remedied through the traditional mechanisms of litigation and compensation⁴. If social structures that create barriers to participation are considered discriminatory then remedial anti-discrimination laws and policy reform need to have

⁴ Fredman, S. (2004) Providing Equality: Substantive Equality and the Positive Duty to Provide. *South African Journal of Human Rights*.

mechanisms to remove them and promote equality. This is the challenge. **In many ways we know and understand the principle of inclusion** but not what it looks like nor exactly how it can be achieved.

The provisions of Article 33 promote implementation through partnership. This partnership needs to be creative and transparent fostering a sense of ownership in the process of implementation and hence compliance. There is a need for there to be fora that brings together key actors to seek agreement of what needs to be and what can be achieved. It needs to draw on the expertise of key stakeholders such as civil society, in particular people with disability, to inform policy makers. It needs to be acknowledged that there will be competing interests and as such a clear recognition of roles. NRHIs are well placed to bring together, policy makers and advocates from civil society to create a framework for dialogue. This has been demonstrated with a variety of very successful national inquiries. We need to build on this to explore creative ways to promote implementation through an effective partnership with civil society.