

Asia Pacific Forum of National Human Rights Institutions

**Report of the Working Group on
legal and governance options for the
Asia Pacific Forum of National
Human Rights Institutions**

July 2000

BACKGROUND

WORKING GROUP

At the Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions held in Manila in September 1999, the Forum “discussed legal and management structures and agreed that a Working Group of the Regional Coordinator, the Office of the High Commissioner and the host institution of the Secretariat should examine and resolve these issues” (*Concluding Statement* paragraph 20). This decision was taken in the light of the growth of the Forum in both its membership and its activities.

The deliberations of the Working Group have been a forward-looking process, taking into account current needs and future growth of the organisation.

The Working Group considers that the Forum has outgrown the current management, governance and structural arrangements and that it is time for new processes to assist the Forum over the next few years. The new processes should ensure both a greater degree of formality and continued flexibility in operation and be able to accommodate developments that cannot be anticipated.

To this end the Working Group considered

- the present legal status of the Forum
- the present management and governance structure of the Forum
- principles governing a new legal, management and governance structure of the Forum.
- the current financial position and future funding needs.

The Working Group commissioned an independent expert to examine issues relating to a possible future legal framework for an independent Forum. On the basis of its own considerations and the expert report the Working Group examined a range of legal options, governance structures and financing arrangements.

The Working Group again stresses that these deliberations have been conducted with a view to the Forum’s future effectiveness and sustainability. It considers its recommendations crucial to the continuing work of the Forum.

HISTORY OF THE FORUM STRUCTURE AND RESOURCING

Since its establishment in 1996 the Forum has been legally an unincorporated association operating within the corporate umbrella of the Australian Human Rights and Equal Opportunity Commission (HREOC). HREOC has hosted the Secretariat of the Forum and Secretariat officers have been HREOC employees. Core funding for the Forum’s activities has been provided by the Australian Agency for International Development by an annual grant, initially of AUD75 000 but currently of AUD225 000. Additional project based financing has been provided by the Government of New Zealand and the Office of the High Commissioner for Human Rights.

CONTEXT OF THE WORKING GROUP'S DELIBERATIONS

In its deliberations the Working Group has been conscious of the following context:

- the rapid expansion of the activities of the Forum especially in the provision of technical assistance programs and the conduct of regional Workshops and meetings
- anticipated continued growth in membership and activities and the need to manage growth properly
- the burdens placed on the Australian Commission as host institution in terms of the costs to the Australian Commission of corporate support, staffing support and financial underpinning
- the need to expand the potential funding base of the Forum by making the Forum a more attractive option to potential funders from both the government and philanthropic sectors
- the need for a legal and governance structure that is more regionally focused and less overtly dependent on the generosity of the government and national institution of one particular country.

PRINCIPLES

The Working Group adopted the following set of principles to inform its work and as the standard by which the present and any future legal, management and governance structures should be assessed.

Legal structure

- equality of membership
- an ability to expand membership
- not for profit
- limited liability
- ability to enter into legal agreements
- ability to operate regionally
- a structure all members can legally subscribe to
- ease of relocation within the Asia/Pacific Region

Governance structure

- transparency of strategic planning and decision making
- regional participation and 'ownership'
- a constitution formally and legally acceptable to all members
- accountability of Secretariat to the APF as a whole, including an open and adequate reporting process to members on matters including programs and other activities
- financial accountability to members, including disclosure to members of financial sources and expenditure
- an appropriate financial management reporting process to donors
- future self-sustainability
- maintenance of efficiency and effectiveness
- ability to form sub-committees

OVERALL DISCUSSION AND RECOMMENDATIONS

The working party has recommended by way of a resolution at the end of this paper steps which need to be taken to achieve a viable, independent and autonomous organization.

The next section discusses these steps under the following headings:

- legal arrangements
- management and governance structures
- funding
- other

THE CURRENT LEGAL ARRANGEMENTS

The Forum has no formal separate legal status at law in Australia or probably anywhere else. HREOC hosts the Secretariat of the Forum. The Forum has to rely on its host's legal personality to form legal relationships such as contracts, funding and employment relationships. Without this the Forum would not have been able to attract and receive funds and undertake its activities.

The common practical advantages of the current arrangements are

- privacy
- informality
- flexibility
- low administrative costs for the hosted Secretariat.

The common practical disadvantages of such an arrangement are

- difficulty in attracting grants as the legal entity is an Australian statutory body
- unlimited liability of HREOC for the Secretariat of the Forum
- no legal personality making ownership of property, entering into contracts, receipt of gifts and right of appearance before the courts in its own right impossible or difficult.

The ability to attract funds has been a particular difficulty. Funders at present have to contract with and process their grants through HREOC which is an Australian body and is set up by an Act of the Australian Parliament. Funders give their priority to organisations that are located in developing countries or are regional organisations. They are reluctant to fund HREOC even though the grants sought are for Forum activities. Official development cooperation agencies, philanthropic organisations and foundations in North America and Europe have made this clear on several occasions. This has restricted the capacity of the Forum to enhance its financial viability and its effectiveness.

In any event as an organisation grows and takes on more complex transactions with external parties, it usually finds it necessary to gain its own legal personality. Legal

personality permits parties to enforce their rights in the courts, with liability being limited in most instances. The legal persona is usually liable to the extent of the property that it owns and, except for extreme cases of management neglect, the property of the members and management of the organisation will not be used to satisfy the liability.

THE RECOMMENDED LEGAL STRUCTURE

The mantle of legal personality can take a number of forms. The Working Group, advised by the expert report, considered a number of these forms. It has concluded unanimously that incorporation under Australian law as a nonprofit company limited by guarantee is the most appropriate vehicle for the acquisition of separate legal personality at this stage of the Forum's development.

A company limited by guarantee is a public nonprofit company where the members guarantee to pay a sum of money stated in the organisation's constitution if the organisation is unable to satisfy its liabilities. This sum is usually less than \$100. The ability of Forum members to be members of an Australian company will have to be ascertained by reference to laws of their jurisdiction but it is not expected to prove a difficulty. Forum members could all be members of the company with provision for new members.

The members would elect or appoint directors to manage the day to day operations of the organisation on their broad direction. Meetings can be held by telephone and other electronic means. The secretariat would be under the direction of the board of directors. All members of the company are bound to comply with a constitution agreed to by the members. In Australia, members are free to devise the provisions of their constitution within a few restrictions set out in the Corporations Law.

The company is required to have a minimum of three directors, two of whom are resident in Australia. Organisations cannot be directors. The Forum can constitute the board of directors in various ways. This could be from having each member organisation represented on the board to a small number of members all or some of whom rotate positions on a regular basis. Equality can be arranged by denying the second Australian director the right to vote, or by some similar constitutional arrangement. The second Australian director might be the chief executive officer of the organisation. (Note that this need not be an Australian citizen, just a person who resides in Australia.)

The directors of such a company may be personally liable in circumstances where they have traded recklessly when they knew or ought reasonably to have known that the company could not have paid its debts in full. Directors may also be personally liable if they breach a number of Australian laws without good excuse such as work place health and environmental regulations. Such exposure to liabilities can usually be adequately managed by the use of risk management techniques such as director's insurance.

The board is responsible and accountable to its members and donors. Australian corporate laws require such a public company to place on the public record an annual report with an independently audited financial statement to public accounting

standards. Members can enforce their statutory rights to examine the financial records of the company and demand directors be accountable for their actions. Other accountability requirements can also be placed in the constitution of the company.

THE CURRENT GOVERNANCE AND MANAGEMENT STRUCTURES

The Forum is essentially managed by HREOC through a Secretariat. There is no written agreement of any consequence between HREOC and the Forum or the Secretariat about this arrangement. Staff of the Secretariat are employed by HREOC.

The services HREOC provides to the Secretariat include general administration, accounting, payroll, overdraft facilities, human relations management, use of premises, facilities, information technologies and HREOC infrastructure generally. This is not an unusual arrangement in the circumstances.

The benefits in this type of arrangement for the Forum are:

- flexibility
- effective in establishing the administrative functions of an emerging organisation
- low costs for Forum members as many indirect costs are borne by HREOC
- employment of Secretariat staff who are employees of HREOC, permitting flexibility
- overdraft facilities of up to A\$600,000 for extended periods provided by HREOC
- infrastructure otherwise not available to the Secretariat.

The disadvantages for the Forum are:

- blurred lines of accountability to the Forum members
- blurred lines of accountability to the host body (HREOC)
- constrained to operating with HREOC regulations
- growing perceptions of the Secretariat's lack of independence from HREOC
- the Secretariat has outgrown the present informal hosting arrangement
- emerging service quality and standards disputes because of the above conditions.

HREOC is finding the present arrangements unsatisfactory in terms of blurred lines of responsibility between HREOC staff working on Forum/Secretariat activities and HREOC activities, potential legal liability and growing subsidy through indirect costs of the Secretariat.

THE RECOMMENDED MANAGEMENT AND GOVERNANCE STRUCTURES

The management and governance structures should meet the principles enunciated earlier in this paper. After considering the expert report and a number of options consistent with the requirements of incorporation under Australian law as recommended, the Working Group unanimously concluded that, as described above in accordance with the proposed legal structure, a Board of Management/Governance should be established, to which the Secretariat would be responsible. The Board should consist of one representative appointed by each Forum member. The Board might decide to establish a smaller executive committee from among its members

which would take more direct responsibility on a day to day basis for the activities of the Secretariat.

Under a normal company structure, the board is responsible for the governance of the organisation, monitoring and supervision of its employees. The Board would have one of its number as a Chair who would lead the Board and be the official spokesperson of the Forum. Board members of the Forum would contribute to the governance of the Forum through regular meetings and discussions.

FUNDING

Among the first priorities would be the preparation of a business plan and program for the Forum and the ensuring of adequate funding to implement the program. It is intended that this responsibility be delegated to the Working Group to carry out as a priority.

A number of options present themselves at this early stage concerning the financial viability of the Secretariat. It appears from the advice of HREOC and the Secretariat that the Forum should provide AUD1,000,000 in working capital. Significant one-off funds might be sourced from official development assistance programs and from philanthropic foundations for the necessary working capital of the Forum. It appears that such a proposal may interest some foundations that have an interest in the activities of the Forum.

OTHER ARRANGEMENTS

A written agreement between HREOC and the Forum should also be considered for the start of the new structure, even while other management options are considered. This process will serve to identify areas of concern by both the Secretariat and HREOC that will need to be resolved either in the short or long term.

The Forum will also have to consider the appointment of a chief executive officer/executive director/chief of staff and other staff. This will be one of the most crucial management decisions that the board will make in its initial years, as such a person will play an important part in the success of any new arrangements.

RESOLUTIONS

The Working Group recommends that the Fifth Annual Meeting of the Forum adopt the following draft resolutions to implement the recommended legal, governance and management structures.

These recommendations outline the steps the Forum now needs to take to achieve a viable, independent and autonomous organization.

The Forum resolves

1. to endorse the recommendation of the Working Group that the Forum be legally incorporated under Australian law with independent legal, governance and management structures

2. to establish an Interim Board of Management/Governance for the Forum consisting of one representative of each Forum Member to give leadership to the Forum, with the following specific responsibilities:
 - to establish an Implementation Working Group of the Board, with specific responsibilities of assisting and advising the Board of further necessary steps
 - to receive recommendations and advice from the Implementation Working Group
3. to establish the Implementation Working Group of the Board, consisting of the representatives on the Interim Board of Management/Governance from the Regional Coordinator, the host institution of the Secretariat and one other Forum member, a representative of the Office of the High Commissioner for Human Rights and the Forum Secretariat that will have the following responsibilities:
 - implement the process of incorporation and the new governance and management structures within a period of approximately six months at the end of which a report shall be made to the Interim Governing Board with a view to seeking future direction and development
 - submit to each member of the Forum the draft constitution of the proposed incorporated body for its consideration and comment and invite each member to subscribe to the final constitution as a founding member of the incorporated body
 - prepare a financial and business plan and seek funding from international donors
 - agree with HREOC any arrangements considered necessary covering the relationship of the Secretariat in the interim period until the new structure is fully established
 - advise the Interim Board of any other significant matter such as the gaining of income tax exempt status and tax deductibility status, etc
4. That an action plan be developed by the Implementation Working Group within one month to facilitate this program which includes the following tasks

Development issues

- drafting the constitution, rules of procedure and management delegations for review and confirmation by the Interim Board
- consideration of future hosting arrangements and negotiation of appropriate service contract or contracts
- staff appointments by the Board after incorporation

Financial issues

- identification and establishment of a viable financial management system
- gaining of income tax exempt status and tax deductibility status under Australian law
- the implementation of a fundraising program
- the establishment of an overdraft facility