



Commonwealth Human Rights Initiative

NGO in Special Consultative Status with the Economic & Social Council of the United Nations

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Executive Committee

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Chairperson &
Treasurer

Ms. Rosamond Bing
Director
Secretariat of the Constitutional and Electoral Commission
By email: CECDirector@gmail.com

Maja Daruwala
Director

Dear Ms Bing,

Members

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Anu Aga
K. S. Dhillon
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Poonam Muttreja
Sanjoy Hazarika
Nitin Desai
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Kamal Kumar

CHRI, an international NGO headquartered in India, has been working on issues of accountability and transparency for over a decade. CHRI takes this opportunity to provide submissions, as requested by the Constitutional and Electoral Commission (the Commission), on the issue of increasing transparency and openness in Tonga – something the Commission has touched on in its Interim Report (the Report).

CHRI here limits itself to commending to the Commission the necessity of embedding guarantees of access to information in Tonga. This will ensure people in Tonga have sufficient knowledge about governance to participate in it effectively, seek accountability and ensure probity in all areas of government functioning.

In doing so we take encouragement from the Report itself which explicitly emphasises, at paragraphs 63 and 64, the importance of transparency and the general lack of importance given to this concept by previous Tongan governments, particularly when making important policy or law changes. We support the Commission's statement that "in a democratically elected government answerable to parliament, the need for transparency is vital." However, this principle needs to be embedded as a founding principle in the highest documents of the land and guaranteed to the people of Tonga through a progressive access to information law.

We note the importance accorded to Freedom of Information legislation by the Attorney General of Tonga and his agreement to having such a law drafted at the recent "Parliament and the Media Workshop" held in October 2008 in Nuku'alofa. This included His Royal Highness Prince Tui Pelehake, Hon. Siaosi 'Aho, Acting Prime Minister, Nobles of the Realm, Cabinet Ministers, Members of Parliament, government officials, civil society and media representatives as participants and called on the Tongan Government to implement freedom of information legislation.

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Currently, there is no guarantee that people will be able to obtain any information from the government as a matter of right. The Tongan Constitution, while protecting the right to freedom of the press and freedom of speech, does not recognise the broader right to freedom of expression or the right to seek and receive information from the government.

We recommend that the ability to access information be entrenched in the Constitution itself. This will accord it the high status that such a principle merits in any democracy. Freedom of information is increasingly being included in constitutional documents. Such an inclusion would make Tonga the third Pacific Island country, after Papua New Guinea and Fiji, to enshrine these rights in a national constitution. Currently, Papua New Guinea provides the strongest constitutional protection in the Pacific to accessing information, and consideration could be given to amending Tonga's Constitution along the same lines. Article 51 of the Constitution of the Independent State of Papua New Guinea 1975 states:

“Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society...”

Providing constitutional recognition to freedom of information can ensure that people have effective remedies through the court system if public bodies are not transparent enough.

In order to ensure the people of Tonga are able to effectively exercise their right to access information, CHRI recommends the concurrent establishment of a legislative regime to outline clear and effective procedures for disseminating and requesting information. A number of principles are now internationally regarded as best practice for the most progressive and effective access law. Firstly, the preamble will make it clear that information belongs to the people and will be made available as of right. The law must provide for the maximum disclosure of information, by defining “information” in the broadest way possible and including a duty to proactively disclose information in a way which is easily and widely available. The narrow band of information which is not accessible should be tightly and narrowly defined, and based on proving that disclosure would cause serious harm and that denial is in the overall public interest. The ability to access information with ease, in an inexpensive and prompt manner, is also an essential part of a good access regime. Timelines must be provided to preclude the possibility of using delays as a means of refusing access. Effective enforcement provisions ensure the success of access legislation, by penalising officials for unreasonably withholding information. An independent mechanism for the monitoring of appeals is also necessary, and should also be tasked with spreading knowledge of the access regime.

While Tonga has not ratified most of the major international human rights instruments which recognise freedom of information as a human right, Tonga's accession to the Convention on the Rights of the Child means it is under international obligations to protect children's “right to freedom of expression... (including) freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.” Therefore, passing a comprehensive law on RTI is well within the international commitment already made by Tonga, and will ensure all people in Tonga are given the freedom to seek, receive and impart information.

In the regional context, as a member of the Pacific Islands Forum, Tonga is a signatory to the Pacific Plan for Strengthening Regional Cooperation and Integration. The Good Governance Pillar of the Plan requires signatory countries to adhere to the principles of transparency and accountability particularly in the context of sustainable development.

The Commission has suggested that possible ways to improve transparency in government might include requiring Ministers to answer all parliamentary questions within a given timeframe, and giving all parliamentary representatives the ability to introduce a private

member's bill instead of limiting this to government representatives. We support these positive suggestions but submit that in order to ensure accountability, transparency, greater participation of the Tongan people and to keep a check on corruption, the constitutional protection of freedom of information is required, together with a clear and explicit legal framework, accompanied by independent mechanisms, to monitor and spread public awareness of the law. The issues faced by the peoples' representatives in accessing government information is a concern. All representatives of the Tongan people should have equal access to information, and the people of Tonga should have the same access. The Indian RTI Act includes a useful proviso in Section 8(1) of the Indian RTI Act stating "... information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

CHRI understands that Tonga is currently focused on attaining a more representative parliament, while striving to retain the essence of Tonga's unique tradition and culture. The Commission has pointed out at paragraph 11, however, that "many ordinary Tongans have little interest in politics or the structure of government." As Tonga becomes more representative, it is necessary to garner greater interest and awareness in the Tongan people regarding what their representatives are doing in parliament. Parliament should become more transparent. Meetings of Parliament had previously been made public and broadcast on the television but CHRI understands this practice stopped last year and now a copy of the minutes of meetings must be purchased. The website of parliament is also not always functional. Records of parliamentary debates and proceedings, questions asked and answers given, and parliamentary budgets is just some of the information which should be readily accessible to the Tongan people. Experience around the world has also shown that Members of Parliament who do not face regular public scrutiny may not always adequately represent the interests of the people, as other powerful and vested interests take hold. An issue outlined in the Report at paragraph 74 is that many people, particularly those in the outer districts, complain of being "ignored by their representatives once the election is over." It is therefore crucial to raise people's awareness of what is happening in government, in order to keep track of and openly debate public affairs. One goal of the Commission, as set out at paragraph 118 of the Report, is to commence an extensive public awareness programme, "with the aim of explaining and clarifying its recommendations as widely as possible." On the topic of public awareness, we note that at paragraph 116 of the Report, the Commission acknowledges a widespread lack of knowledge about the Constitution, even while there is a prevalent belief that it is vital to the stability of the country. This is a major area of concern. In order for Tongans to learn more about the Constitution and other laws affecting their rights and responsibilities, the Commission might consider building on Constitutional knowledge as part of its public awareness campaign. Radio broadcasts, public libraries and educational institutions can all play a part in developing a greater awareness and interest in the workings of government. Establishing an internet law portal such as the one being developed in Tuvalu is also a good way of ensuring that people have access to relevant and up-to-date laws (see: Tuvalu Legislation On-Line: <http://tuvalu-legislation.tv/cms/>). As accessing the internet is a difficulty for some, volumes of laws must be available in public libraries, and advertisements posted, to ensure people know where to find them.

Another important way of generating interest in the workings of government is to create statutory obligations on the government to proactively disclose information to people about its work and ensure that people can access this information in a timely manner. In India, for example, Section 4 of the RTI Act requires public authorities to publish all relevant facts concerning important decisions and policies that affect the public when announcing such decisions, and likewise, before initiating any project to communicate all facts available to people likely to be affected and the public in general. If Tonga introduces proactive disclosure requirements together with a public awareness campaign, this will go a long way

towards making the Tongan people more interested and informed about the goings on of governance in Tonga.

Access to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their representatives' activities while in government. This is evident by the more than 80 countries worldwide who have chosen to enact access to information legislation. Democracy and national stability are enhanced by policies of openness which engender greater public trust in elected officials. Enhancing people's trust in their government goes some way to minimising the likelihood of conflict, such as the pro-democracy riots witnessed in Nuku'alofa in 2006. We understand there is strong support amongst Tongans for subsequent Prime Ministers to be chosen by elected members, both nobles' and people's representatives, of the Legislative Assembly from amongst their number. This will make the Prime Minister, as the Commission points out, "the elected member with the greatest overall support in the House." CHRI supports this option and wishes to underline the importance of ensuring that after the next elections, Cabinet decisions are made public. In New Zealand, for example, Cabinet material is covered by the Official Information Act and every request for it is considered on its merits. Regarding the voluntary disclosure of Cabinet material, the Cabinet Manual states that "where appropriate, papers and relevant minutes should be published together so that readers have the background to the decisions made by Cabinet." (See: New Zealand Cabinet Manual, 2008: <http://www.cabinetmanual.cabinetoffice.govt.nz/node/67#8.4>).

Openness and information-sharing also contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people, and combating perceptions of alienation. The introduction of access legislation will begin to address the widespread concern, outlined by the Commission at paragraph 11, that people living in the outer islands will remain neglected so that the next elected government, while more representative, "will simply continue to neglect their interests and devote most of its time, energy and resources to the central districts." Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' perceptions of powerlessness and redresses grievances about exclusion from opportunity or unfair advantage of one group over another.

Freedom of information will also go a long way towards guaranteeing that Tonga continues to develop and utilise its scarce resources in a sustainable and efficient manner, by ensuring the government will be held accountable for its decisions. We understand that there are currently widespread concerns relating to the administration and ownership of land in Tonga and a general "fear of the consequences of any change in the present laws relating to it, especially the likelihood of alienation." An access to information regime will help people to gain a better understanding of their rights to land, and make the government accountable for any decisions it makes relating to land. Much of the failure of development strategies throughout the world is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, including that relating to the ownership and development of land, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why development and land strategies have gone askew and press for changes to put things back on track.

In 2004, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than eight had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, only one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny. Tonga improved by 44 places in Transparency International's Corruption

Perception Index last year, with its score rising from 1.7 in 2007 to 2.4 in 2008. According to Transparency International, “(t)he introduction of an anti-corruption law and the establishment of an anticorruption commission ... helped bolster perceptions of a more systematic anticorruption approach in the country.” (Transparency International Press Release (2008): www.transparency.org/content/download/36589/575262). Fighting corruption is not the concern of the government alone. People are affected the most by corruption, and so have a stake in this battle. Opportunities need to be created for their participation, which will in turn make the job of overcoming and curbing corruption easier. That is why information access legislation will ensure that Tonga keeps its improved record.

Accessibility of information is crucial to all the issues outlined in this submission and looking at such issues is both advisable and necessary when undertaking a constitutional and governance review like the Commission is doing right now. We are very happy to assist in any way we can during this important process of change in Tonga. We urge the Commission to recommend the amendment of the Constitution to include the right to access information. This will be a very positive commitment to greater transparency and accountability in Tonga. If Tonga decides to introduce an access to information regime, it will be the second Pacific Island Nation to enact right to information legislation, after the Cook Islands Official Information Act came into force this year. This would be a valuable and long-lasting achievement in the field of human rights and good governance in the Pacific.

In case of any queries, please do not hesitate to get in touch with me at: maja.daruwala@gmail.com or my colleague Mr. Venkatesh Nayak at nayak.venkatesh@gmail.com.

Sincerely,



Maja Daruwala
Director, CHRI