

Nauru Constitutional Review CHRI Submission



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Nauru Constitutional Review

1. The Commonwealth Human Rights Initiative (CHRI) has read the Nauru Constitutional Review Background and Discussion Paper and submits the following.
2. This submission briefly comments on two specific areas within CHRI's experience, that is, the process of constitution-making and the inclusion of human rights in the Constitution. The submission comments on the current process for amending the Constitution and how that process might be improved in line with international best practice. It also comments on the inclusion of human rights in the Constitution and some considerations that could be made in that regard.

CONSTITUTION-MAKING PROCESS

3. The constitution-making process that has already been established and is currently being undertaken by the Nauruan Government and the UNDP is commendable and in line with international best practice. A nation's Constitution should be its most valued document and preparing it is a weighty undertaking that should not be addressed in isolation of the people. Nothing is more important in the political culture and history of a nation than the Constitution by which its citizens are ruled and there is a growing view that the new process-led constitutionalism is reminiscent of the anti-colonial struggle. Nauru's own history and the background to the existing Constitution as set out in the Background and Discussion Paper evidences this struggle and this Constitutional Review allows the people of Nauru to claim ownership of the document.
4. However, as the Background and Discussion Paper does not detail the minutia of the review and the constitution-making processes that are to be undertaken, a number of recommendations on the process of constitution-making are made. These issues may have already been addressed, but are detailed in this submission in case they have not.
5. In 1999, CHRI convened a working group in South Africa to develop a position paper on best practices in constitution making. This submission is based heavily on the resulting document: *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa*¹. In particular, the publication recommends that any constitution-making process undertaken should ideally observe the basic principles of legitimacy, inclusivity, empowerment of civil society, openness and transparency, accessibility and accountability. In furtherance of these principles, some more specific observations can be made:

Inclusivity:

6. The desire to arrive at a truly democratic and legitimate constitution is well-founded given the role of credible processes in creating an end product that is seen as legitimate and owned by all the Nauruan people. This feeling of ownership and legitimacy seems particularly important in Nauru given the history of the Island and the various other countries that have imposed their rule on the Nauruan people.
7. Consequently, the consultation process should be as broad and inclusive as possible and the proposed public meetings will be invaluable. Given the small population and land size of Nauru, it will be possible to include a large percentage of the population in the meetings, however it is important to ensure that the meetings are accessible and include representatives of all of Nauru's people – from each of the 14 districts, from all minorities - including Pacific Islander, Chinese and European descendents, and from other groups that can be sometimes be excluded in participatory processes such as women, younger members of society or illiterate people.
8. The method and timing of the proposed public consultation meetings need to be considered carefully to ensure representatives of all these people are heard. Considerations such as distances people may be required to travel, language, timing and methods of communication are all important.

¹ http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf

9. In addition to the public consultation meetings, other methods can be employed in order to include the greatest number of people in the constitution-making process. One way of ensuring a broad reach is through the creative use of media and the use of popular culture such as music, theatre, art, as well as other conventional methods.

Timing and continuity of process:

10. The current Nauru Constitution was drafted and adopted within a very short time frame, a result being that there does not seem to be much evidence that the Nauruan people feel ownership of the Constitution. As recognised in the Background and Discussion Paper, this review with its longer time frame should result in a greater understanding of a new Constitution which is 'truly Nauruan'. The time frame stipulated for achieving this is that the review should lead to consideration of specific amendments toward the end of 2007. However, it would be ideal if this deadline was flexible, allowing for ample time to ensure that the different options have been considered and fully understood by the public before they are put to referendum.
11. To ensure that the momentum created by this review is not broken by elections that are scheduled for 2007 (that is, that the review is not abandoned as in 2004) it would be ideal if mechanisms were implemented now to avoid this possibility. The bodies that are involved and who are integral to the review moving forward – the Constitutional Commission and the Constitutional Convention – should be established as statutory bodies with enough independence from Government that their work is not affected by a care-taker Government, a change in Government or any political instability that may occur.

Language:

12. As Nauruan people have a distinct language, all documents related to the Constitutional review – including the background paper, papers published by the Constitutional Commission, written recordings of the debates by the Constitutional Convention and particularly the final recommendations for amendment and the Constitution itself – should be available in the local language (and any other minority languages). In addition, all information should be written in plain language so that it can be easily understood.
13. The potential for language to work as a barrier to participating in the review process should also be addressed for information flows in the other direction. Submissions should be received in other languages beside English that are spoken in Nauru and these submissions should be translated into English so they can be accessed by the Constitutional Commission, the Constitutional Convention and the Nauruan Government. This was an approach taken in Uganda, where, in order to ensure that all submissions were treated equally, each submission was summarised and translated into English from local languages for the Ugandan Commissioners' use.

Constitutional Commission and Constitutional Convention:

14. Even though the Background and Discussion Paper states that the Constitutional Commission and the Constitutional Convention will be independent and representative, it does not detail how the either body will be established or who will be represented on it.
15. To ensure the Convention is respected and trusted, and therefore that their work has legitimacy in the eyes of the Nauruan people, it would be ideal if both the Commission and the Convention consisted of representatives from all 14 districts and other potentially marginalised groups listed above. This approach would be similar to Eritrea where just short of half of the membership of the Constitutional Commission were women, and all nine ethnic groups were represented. It may be preferable to ensure that none of the members of these boards are foreigners (see 'role of outsiders' below).
16. The process these bodies undertake should also be as transparent as possible, allowing for the public to monitor progress and get involved when they feel so inclined. The members and their contact details should be published, open debate of the amendments should occur and the outcomes and deliberations of both bodies should be published and disseminated broadly. It is important that the public be regularly informed at every reasonable stage about the progress of the constitution-making process. For examples, in South Africa, the Constitutional Assembly released an official newsletter, which was published fortnightly and presented updates in a detailed and

educational manner. They also had an extensive website that consisted of a database of all information, including minutes, drafts, opinions and submissions of the Constitutional Assembly.

17. Both bodies should have a mechanism to deal with deadlock situations. One way this could be dealt with is by a pre-established board made up of representatives of different sectors in Nauru who will only be referred to in deadlock. An alternative would be to designate one particular individual to decide on the recommendation, or to allow for the Commission and the Convention to put forward multiple options (although this could get confusing if these options are all presented at referendum).
18. Finally, the Government needs to ensure the Commission and the Convention have the funds, time and support to fulfill their roles effectively.

Role of outsiders:

19. The role of outsiders/foreigners in the constitution-making process can seriously undermine the legitimacy of the process and ultimately the acceptance and ownership that Nauruan people feel for any new Constitution. Yet, international experts and other outsiders to Nauru can play an important role in developing recommended constitutional amendments particularly in regard to technical matters where they can offer a wealth of international experience. The role outsiders play should therefore be considered carefully and will depend on the circumstances and prevailing attitudes in Nauru. This aspect may be a very important consideration for Nauruans given the island's colonial history and the Nauruan's long struggle for independence.
20. Consequently, it may be appropriate to limit the input that foreigners can make in the next stages of the constitution-making process to specific and defined roles. This may be difficult in the Nauruan context, where the island has a small population and the UNDP has been asked to assist in the review process. However, outside input could be limited to roles such as advising the Constitutional Commission or Constitutional Convention on technical matters, while ensuring that there are no foreign members on these bodies, and that foreigners are precluded from the final debates on amendments.

Constitutional entrenchment of future review processes:

21. In some of the recent constitutions developed in Africa, an article has been included evidencing the legitimacy of the processes undertaken in developing the Constitution. They stipulate that the citizens and/or armed forces of each country are required to defend the constitution, calling upon them to be accountable for upholding the document they themselves contributed towards creating.² Nauruans might like to consider including such a provision.
22. Article 84 of the current Constitution could be amended to set out procedural requirements for future reviews of the Constitution. This should follow the principles stated above – that any future recommended amendments of the Constitution are the result of a process that is legitimate, inclusive, that has empowered civil society to be able to participate, is open and transparent, is accessible to all Nauruans and is organised by a constitutional committee who can be held accountable to the people.
23. The people of Nauru may want to see these principles entrenched as requirements for all activities of the legislature. For example, section 59 of the South African Constitution obliges the legislature to ensure effective public participation in ongoing legislative processes.

Once a new Constitution has been adopted:

24. The importance of the process of constitution-making does not end once recommendations for change have been brought to referendum. Although a large proportion of the Nauruan population may have been included in the developing of recommended amendments and have made an informed vote at the referendum, there will still be a need for greater understanding of the amendments and the ongoing role of the Constitution in the life of the people of Nauru.

² See the South African, Ugandan and Eritrean Constitutions.

25. In South Africa, the Constitutional Assembly endeavoured to ensure that the Constitution was accessible to all by distributing seven million copies of the Constitution (in a population of just over 40 million) in all eleven local languages. They held a “National Constitution Week” to distribute the Constitution which helped create the impetus that has ensured that all South Africans view the Constitution as the foundation of their democracy. It also had to create a sense of ownership and engender respect for the new Constitution. Distribution of the Constitution included a strategy designed to reach those that are easily excluded from government. It was distributed through existing networks - into schools, post offices, police forces, prisoners and civil society organisations all in their language preference. Each copy was distributed with an accompanying illustrated guide in the same language, which highlighted key aspects of the Constitution and made many of the legal concepts contained in the Constitution more accessible. In addition, a human rights comic was disseminated to schools and adult literacy organisations; a teacher's aid to introduce the constitution to students, tape aids and Braille was also available for the visually impaired members of the community.

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26. Taking these principles and the specific issues outlined above into account, it is recommended that the Nauruan Government ensure that:

- a. the management and administration of the process is credible and respected;
- b. the public is informed and involved at all stages of arriving at the aims and objectives of the exercise of constitution making and how these objectives are to be achieved;
- c. the process is made receptive and open to the diverse views existing in society;
- d. the process by which citizens can make contributions is made truly accessible in terms of physical proximity, languages used, plain language and within a reasonable period of time;
- e. ordinary people are empowered to make effective contributions by giving them the necessary tools to participate through ongoing public education programmes using appropriate media and other methods to reach out especially to the disadvantaged and marginalised.
- f. dissenting views are valued as enriching to policy debate and ensuring that various sectors of society are represented;
- g. conflicting aims and views are mediated in a manner that enriches policy debates and does not stall it. In this regard, adequate provision should be made for conflict resolution and consensus building;
- h. there is a continuous review and evaluation of the processes undertaken to confirm that operating principles and minimum standards are being adhered to;
- i. the process of continuing education of the public, even after the adoption of the Constitution, on its content and the values of constitutionalism continues to ensure that these are internalised by the people;
- j. the Constitution is drafted in plain and simple language and translated into all the languages used in the country; and
- k. in the interest of protecting constitutionalism, all actions violating these values are unequivocally rejected.

HUMAN RIGHTS

27. Human rights are relevant to all of humanity in every sphere of life and as a result, their protection and promotion is integral to each individual. The protection of certain human rights in the current Nauru Constitution is very positive. However, while it is necessary to ensure that the public participates in the review of the Constitution to ensure that every aspect of the adopted Constitution is appropriate for Nauru, human rights is an area where other considerations should be made - it is

an area where minorities can be protected, where derogations can have serious consequences and an area in which Nauru has already committed itself to realising certain international standards.

28. Although Nauru's existing commitments do not require Nauru to ensure constitutional protection of these rights, their inclusion in the Constitution is ideal as it legally protects these rights which are of a fundamental nature and should be given primacy over all other legislation and protected from derogation or amendment as much as possible. Other constitutions around the world that are recognised as international best practice include an extensive protection of human rights for these reasons. For example, the South African Constitution includes a Bill of Rights of over 30 Sections, protecting indivisible and interrelated rights affecting all aspects of life – from the right to life to the right to having one's environment protected.
29. South Africa's Bill of Rights is widely seen as a good model for new constitutions. However, the appropriateness of including each human right will ideally be discussed in consultation with the Nauruan people. One important issue that should be considered in such a discussion is the inclusion in the Constitution of human rights which Nauru has already committed itself to realising through various international obligations, such as:
 - a. The International Covenant on Civil and Political Rights (ICCPR);
 - b. Convention on the rights of the child (CORC);
 - c. Convention on the elimination of all forms of racial discrimination (CERD); and
 - d. Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT).

By virtue of its membership to the United Nations, various other commitments to human rights have been made through, for example, the Universal Declaration of Human Rights and the Rio Declaration on Environment and Development.

30. The human rights set out in these documents, to which Nauru is a signatory or has otherwise indicated a commitment, should ideally be legally protected by inclusion in the Constitution. On this basis, CHRI would encourage the people of Nauru to enshrine these rights in the new Constitution or bring the rights in the existing Constitution into line with the level of protection specified in these commitments. In doing so, any exemptions or possible derogations to the rights should be carefully considered, drafted narrowly and with clarity to ensure they cannot be abused.
31. Some other specific human rights related issues that should be considered include the possibility of creating a constitutionally enshrined independent institution delegated with the responsibility of promoting and protecting human rights such as a Human Rights Commission. The Constitution would ideally establish such a body and provide for its role, responsibilities and powers. Other considerations might be protection of environment rights (given the seriously depleted the natural resources) and how the protection of human rights can extend to people who are detained in centres run by foreign governments but physically located on Nauru.

CHRI – TECHNICAL ASSISTANCE

32. This submission deals broadly with the integral issues of the constitution-making process and the inclusion of human rights in the new Constitution. However, CHRI would like to offer its assistance on technical matters at any point in the constitution-making process, for instance when specific amendments are being considered by the Constitution Commission or the Constitutional Convention. In particular, CHRI has significant expertise and experience in access to information and access to justice – two human rights that would ideally be protected in any new Constitution.

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