Nauru Constitutional Review
Addendum to the
CHRI Submission

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Commonwealth Human Rights Initiative
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Nauru Constitutional Review

1. The Commonwealth Human Rights Initiative (CHRI) made a submission to the Nauru Constitutional Review on the process of constitution making and the inclusion of human rights in the Constitution. The submission referred to the expertise of CHRI in the areas of access to information and access to justice and this addendum provides further information and recommendations for Constitutional amendment in these areas.

2. The right to information and police accountability are key aspects of a community focused constitution. The amendments suggested in this addendum must be considered within a broader shift of constitution making – from one which focuses on cementing representative democracy – to one that entrenches good governance based on community participation. CHRI believes that the Constitution should recognise the small population size and limited resource base in Nauru, and ensure community focused governance and public participation in every level of government at the outset.

3. As such, we come to our suggestions in the firm belief that the Constitution must ensure arrangements whereby the population at large can be routinely involved on a day to day basis in their own governance. Processes by which decisions are arrived at should not be distant from the people. To ensure transparency, accountability, participation and the privileging of diverse views the Constitution must embed the means by which all governance is conducted in as inclusive a manner as possible, in which decisions are made only after consultation and the fullest information has been provided to the people in order to arrive at them. In addition, we urge the inclusion of mechanisms in the Constitution that permit performance review of governance beyond periodic elections, and are able to ensure the redressal of complaints on a constant basis, but without requiring a plethora of institutions and resources.

4. Therefore this addendum addresses the following topics:

    a. A community focused constitution - enshrining participation of the community
    b. Oversight mechanisms - to enable citizens to have their grievances addressed
    c. Right to information - embedding access to information in the Constitution
    d. Policing - embedding a strong police accountability in the Constitution
    e. Emergency powers and the protection of fundamental human rights
    f. The right to the environment

A COMMUNITY FOCUSED CONSTITUTION - ENSHRINING PARTICIPATION

5. CHRI's submission to the Constitution Review discussed the importance of broad and inclusive consultation in the Constitution Review process, and how creating a close connection with the Nauruan community can benefit the quality of the resulting Constitution and its implementation. The theory behind the recommendations - the role of participation and ownership by the people – is equally applicable to all aspects of governance. Modern economic and social policy thought commonly capture these ideas under the labels of participation and decentralisation theory, both of which are often applied to governance at the community level. Nauru's small geographic and population size provides a unique opportunity to apply these principles at a national level, gaining the benefits that participation can provide without the numerous challenges and confusion that citizens often face when dealing with multiple levels of government.

6. Participation and decentralisation help to bring people closer to the decision making process by establishing governance institutions that operate in close relation with and that are responsive to the community. Both of these have been applied in different circumstances around the globe and have proven to provide a range of benefits, such as improvements in health, education and employment, and increased trust in government.

7. A focus on community participation and a more direct form of democracy may help to mitigate issues that can potentially arise from not having a truly representative government or a government that gains power without a seriously contested election process (as has occurred previously in Nauru). Governance with a strong emphasis on community participation also helps to combat corruption, and minimises the negative effects of patronage and nepotism.

8. Three other main benefits of a more direct form of citizen participation in governance can be identified:

    a. Participation allows citizens (who bear the costs and reap the benefits of policy decisions) to make those decisions. This empowerment allows citizens to take control of decisions that affect their own lives and increases their commitment to and ownership of a policy.
    b. Local knowledge and priorities are voiced and can be used to develop policies so that the gap between what is provided and what is needed most is reduced.
    c. Effective participation requires that there are mechanisms through which the government can be held accountable when the people choose to exercise such a power. Strengthening accountability mechanisms while increasing participation also encourages those in positions of power not to abuse them.

9. There are various forms of citizen participation enshrined in Constitutions around the world and these take shape in different democratic models. One example is Switzerland, whose Constitution enshrines a form of direct democracy that allows citizens to take a very active role in their governance through a strong decentralisation model (to bring government closer to the community) and the popular initiative and referendum mechanisms (see below).

10. These principles can be applied to the nation as a whole, and the mechanisms for community participation can be enshrined in the Constitution by:

    a. Facilitating community participation throughout institutions the Constitution provides for.
    b. Establishing accountability and oversight mechanisms.
    c. Including an emphasis on participation in the Preamble.

<u>Facilitating community participation through constitutionally enshrined institutions</u>

11. The applicability of the principles of direct community participation should be considered in regard to all the provisions of the Constitution.

12. For example when discussing Paragraph (3) of Article 5, the Paper raises the issue of how to bring a person suspected of committing an offence before someone of judicial office within 24 hours of their arrest when such a person may not be physically available. One solution for this issue would be to return to a community focus and institute community courts that can be used in the interim until someone of judicial office is available. Initiatives such as community courts have the benefits of ensuring a person is

brought before their peers to be heard within a short period, it bridges the gap between the community and the judiciary and also allows the judicial system to be more responsive and effective in its decisions. Although schemes such as community courts are generally applied at a local government level, it may provide a solution for Nauru. However, caution should still be taken to ensure independence and impartiality by the communal court and the practical applicability to Nauru should be considered further.

13. Parliament should be easily accessed by the community. A good example to follow in this regard is the Swiss Constitution, which includes an express requirement that both chambers of Parliament shall be open to the public.[1] This could be added into the existing Article 41 of the Nauru Constitution.

14. Referendums have been used across the world as a tool for direct participation in decision making. Again, the Swiss Constitution provides an excellent model. It allows citizens to put forward their own proposals for existing or new legislation by using the mechanisms of popular initiative and referendum.[2] The government is then obliged to put the suggested popular initiative to all citizens via a referendum. This mechanism could be considered for Nauru.

Including the community focused governance in the Preamble

15. The Preamble, although not a part of the Constitution itself, is considered a guide to the intention of the people and Parliament of Nauru and therefore will be consulted if there is any ambiguity or doubt in interpreting the text of the Constitution. Consequently Preambles around the world are drafted to articulate the common values and governance principles of the country's citizens. With this in mind, the Preamble to Nauru's Constitution should reflect this proposed community-focused nature by stating that its main objective is to promote the active and direct participation of Nauru's citizens in their governance.

OVERSIGHT MECHANISMS

Civilian oversight a key aspect of participatory governance

16. A key aspect of participatory governance is the use of oversight bodies to ensure transparency, enable community participation and enhance public trust in government and government agencies.

17. Civilian oversight bodies take a number of different forms. International practice illustrates two different examples of civilian oversight that can be enshrined in a constitution - human rights commissions and Ombudsmans.

Human rights commissions

18. Human rights commissions are mandated with the protection and promotion of human rights within their jurisdiction. A human rights commission generally works by investigating complaints of human rights violations, providing recommendations to government on human rights issues, taking measures to prevent human rights abuses, assisting with the registration of criminal cases or court action or paying compensation to victims of abuse or their families. As well as dealing with general human rights complaints, commissions can also deal with complaints against specific government agencies, such as the police or information officers.

[1] Constitution of Switzerland, Article 158.
[2] Constitution of Switzerland, Articles 138-142.

19. The Fijian Constitution is an example of this approach, enshrining the requirement for a human rights commission. The relevant section is extracted below in paragraph 26 of this addendum. An alternative example can be found in the Ugandan Constitution.

Office of the Ombudsman

20. An Ombudsman is an independent person who is appointed to investigate cases of misadministration by government bodies. While the traditional concept of an Ombudsman is an appointed person, this has evolved to now include a number of appointed people forming an Ombudsmans office or commission, supported by staff. Ombudsmans are also increasingly expanding their scope to broader issues, including human rights, policing and the right to information.

21. Given Nauru's small population and resource base, CHRI recommends that Nauru consider establishing an Ombudsmans Office to ensure transparent, community-focused governance and public participation in oversight. The Ombudsman should be granted wide powers of oversight over government activity, and also mandated with dealing with subject-specific oversight, such as human rights and police complaints.

22. The Office of the Ombudsman in Vanuatu is a good example of a constitutional civilian oversight body suitably equipped to deal with cases of maladministration by government bodies, including the police. Paragraph 27 below sets out the Constitutional provisions required for the establishment of the Vanuatu Ombudsman. In terms of best practice on the ground in the Pacific, it is encouraging that the Papua New Guinea Ombudsman Commission, which is made up of three members, has a specific human rights unit that can investigate complaints of rights abuses by the police.

<u>Minimum requirements for a successful oversight body</u>

23. The minimum requirements for a successful oversight body are:
    a. Independence - the body should be independent of the executive and any agencies that it oversees and empowered to report directly to Parliament.
    b. Sufficient powers - the body should have the authority to independently investigate complaints and issue findings. This requires concomitant powers to conduct hearings, subpoena documents and compel the presence of witnesses (including members of groups such as the police). It should also be able to identify organisational problems in the agencies it overseas and suggest systemic reforms.
    c. Adequate resources - the body should have sufficient funds to investigate at least the more serious complaints referred to it. Skilled human resources to investigate and otherwise deal with complaints should also be available.
    d. Power to follow up on recommendations - the body should be empowered to report its findings and recommendations to the public, and to follow up on actions taken by government and government agencies in response to its recommendations. It should also be able to draw Parliament's attention to instances where government or government agencies take no action.

<u>Appointment to oversight bodies</u>

24. A key aspect of a successful oversight body is the process that is followed to appoint members. The appointment process must be transparent, protect diversity and prevent illegitimate political interference.
    a. Transparency - The process of appointment must be transparent to ensure public trust in the body.

b. Diversity - Any civilian oversight body must reflect the community that its members are taken from to ensure that it has the trust and support of the entire community and includes all the divergent voices in the community. This means that as far as possible it must represent the class, gender, geographic and religious diversity of the community. In order to ensure diversity, and to mandate representation of minority groups, many organisations and institutions around the world are required to satisfy minimal proportional representation of these groups. For example in many Scandinavian countries Parliaments and private companies alike have proportional minimums for women. This form of affirmative action may be necessary in Nauru if minorities could otherwise be quietened.

Alternatively, a less specific form of ensuring diversity is found in Constitutions such as section 193(2) of the South African Constitution sets out the requirements that must be considered when appointing members of state institutions that strengthen constitutional democracy. The section states "the need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed".

Under subsection 8(b) of the Fiji *Human Rights Commission Act* 1999, the Prime Minister advises the President on appointments of members to the Human Rights Commission. The Prime Minister must consider "the desirability of having as members of the Commission persons with a diversity of the personal characteristics referred to in … the Constitution." Subsection 38(2) sets out grounds for unfair discrimination, which also form the basis of the diversity that should make up the Commission. They are "actual or supposed personal characteristics of circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status,

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Other examples include:

- Section 5 of the Malaysian *Human Rights Commission Act* 1999 – "Members of the Commission shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds."
- Subsection 68(3) of the Northern Ireland *Human Rights Act* 1998 – "In making appointments under this section [to the Human Rights Commission], the Secretary of State shall as far as practicable secure

that the Commissioners, as a group, are representative of the community in Northern Ireland."

The number of members that are appointed to an agency also impacts on the breadth of diversity that can be represented. For example, in the Police Service Board that is currently included in the Constitution (as an optional body), there are three members. These members are the Chief Justice, the Chief Secretary and a member elected by police officers. This Board may not reflect the diversity of the Nauruan people. Two additional members who were taken from the community would dramatically increase the level of diversity on the Board, and the ability of the Board to accurately represent the community. The civilian members could be appointed by the Chief Justice, Chief Secretary and Police-elected member, or alternatively by Parliament, all of whom would be guided by the principles of diversity and equal representation, as enshrined in the Constitution.

It is important to note that the current *Police Force Act* 1972 sets up a Police Service Board and that this Board operates with 5 members. The Board is constituted by the Chief Justice, the Chief Secretary, a Cabinet appointee, a Chief Justice appointee and a member elected by the police service.

c. Prevention of interference - It is essential to ensure that the appointment process is free of illegitimate political interference. This is to prevent members of government stacking the oversight agency with members that will represent the interests of the government, and not of the community. A transparent process goes a long way towards preventing illegitimate political interference. Appointments should be made by as democratic and transparent process, from as wide a pool of applicants, as possible.

Appeals from oversight bodies

25. An appeals system for decisions made by civilian oversight bodies must be put in place to ensure that the bodies comply with the general laws of Nauru and are themselves accountable to some form of oversight. At least one level of appeal is required, either to the court system, or to Parliament.

Examples of oversight bodies

26. Human Rights Commission - Fiji (Section 42 Constitution of Fiji)

(1) This section establishes a Human Rights Commission.
(2) Its functions are:
(a) to educate the public about the nature and content of the Bill of Rights, including its origins in international conventions and other international instruments, and the responsibilities of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and other organs of the General Assembly of the United Nations for promoting respect for human rights;
(b) to make recommendations to the Government about matters affecting compliance with human rights, including the making of a recommendation that a particular question about the legal effect of a provision of the Bill of Rights be referred to the Supreme Court for its opinion; and
(c) to perform such other functions as are conferred on it by a law made by the Parliament.
(3) The Human Rights Commission consists of 3 members:
(a) the Ombudsman, who is to be its chairperson;

(b) a person who is qualified to be a judge; and
(c) one other member.

(4) The members of the Human Rights Commission referred to in paragraphs (3)(b) and (c) are appointed by the President on the advice of the Prime Minister, following consultation by the Prime Minister with the Leader of the Opposition and the sector standing committee of the House of Representatives responsible for matters concerning human rights.

27. Ombudsman - Constitution of the Republic of Vanuatu (Chapter 9 of Part II)

61. (1) The Ombudsman shall be appointed, for 5 years, by the President of the Republic after consultation with the Prime Minister, the Speaker of Parliament, the leaders of the political parties represented in Parliament, the chairman of the National Council of Chiefs, the chairmen of the Local Government Councils, and the chairmen of the Public Service Commission and the Judicial Service Commission.

(2) A person shall be disqualified for appointment as Ombudsman if he is a member of Parliament, the National Council of Chiefs or a Local Government Council, if he holds any other public office, or if he exercises a position of responsibility within a political party.

(3) A person shall cease to be Ombudsman if circumstances arise that, if he were not the Ombudsman, would disqualify him for appointment as such.

Enquiries by Ombudsman

62. (1) The Ombudsman may enquire into the conduct of any person or body to which this Article applies-

(a) upon receiving a complaint from a member of the public (or, if for reasons of incapacity, from his representative or a member of his family) who claims to have been the victim of an injustice as a result of particular conduct;

(b) at the request of a Minister, a member of Parliament, of the National Council of Chiefs or of a Local Government Council; or

(c) of his own initiative.

(2) This Article shall apply to all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies.

(3) The Ombudsman may request any Minister, public servant, administrator, authority concerned or any person likely to assist him, to furnish him with information and documents needed for his enquiry.

(4) The Ombudsman shall grant the person or body complained of an opportunity to reply to the complaints made against them.

(5) The enquiries of the Ombudsman shall be conducted in private.

Findings of the Ombudsman and reports

63. (1) Wherever, after due enquiry, the Ombudsman concludes that a complaint is unjustified, he shall so inform the complainant and the Prime Minister and the head of the public department or authority concerned.

(2) Wherever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that, consequently, any decision taken should be annulled or changed or that any practice followed should be revised, he shall forward his findings to the Prime Minister and to the head of the public authority or department directly concerned.

(3) The report of the Ombudsman shall be public unless he decides to keep the report, or parts of it, confidential to the Prime Minister and the person in charge of the

relevant public service, on the grounds of public security or public interest. The complainant shall in any case be told of the findings of the Ombudsman.
(4) The Prime Minister or the person in charge of the relevant public service shall decide upon the findings of the Ombudsman within a reasonable time and the decision, with reasons, shall be given to the complainant forthwith. Any period limiting the time in which legal proceedings may be commenced shall not begin to run until the complainant has received the decision.
(5) The Ombudsman shall present a general report to Parliament each year and may make such additional reports as he considers necessary concerning the discharge of his functions and action taken on his findings. He may draw the attention of Parliament to any defects which appear to him to exist in the administration.

Right of a citizen to services in own language
64. (1) A citizen of Vanuatu may obtain, in the official language that he uses, the services which he may rightfully expect from the administration of the Republic of Vanuatu.
(2) Where a citizen considers that there has been a breach of subarticle (1) he may make a complaint to the Ombudsman who shall conduct an enquiry in accordance with Articles 62 and 63.
(3) The Ombudsman shall, each year, make a special report to Parliament concerning the observance of multilingualism and the measures likely to ensure its respect.

Ombudsman not subject to direction or control
65. The Ombudsman shall not be subject to the direction or control of any other person or body in the exercise of his functions.

Recommendations

- An Ombudsmans Office should be enshrined in the Constitution to ensure public participation in oversight, transparent and effective power systems and community-focused governance.
- It should be empowered with a broad oversight role, and be mandated to accept particular types of complaints (including human rights and police complaints).
- The Ombudsmans Office should be headed by an Ombudsman/s, appointed in a transparent manner, and who reflect as far as possible the diversity of the community.

THE RIGHT TO INFORMATION

28. Information is integral to participation - citizens cannot participate in decision making or be expected to contribute effectively in governance when they are not fully informed to form their bases for those decisions. Information is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public. Officials do not create information for their benefit alone, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government's duties. Information is generated with public money by public servants paid out of public funds. It enables citizens to choose their representatives based on accurate and complete information, to participate in decision making and policy development and to hold their representatives accountable.

Right to Information as a fundamental human right

29. It is on the basis of these principles that the right to information has long been recognised as a fundamental human right that is integral to democratic governance. For

example, the United Nations General Assembly at its inception in 1946 resolved that: "*Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated*"[3]. The right to information has increasingly been accepted internationally as a right that is grounded in the principles of democracy and that, when realised, can have the benefit of strengthening good governance and promoting effective development .

30. As expressed in the UN General Assembly statement above, the right to access information underpins all other human rights. A lack of information denies people the opportunity to develop their potential to the fullest and realise the full range of their human rights. Individual personality, political and social identity and economic capability are all shaped by the information that is available to each person and to society at large. For example, the realisation of the right to the environment requires that individuals have "appropriate access to information on hazardous materials in their communities … States shall facilitate and encourage public awareness and participation by making information widely available"[4].

31. Nauru's commitment to the right to information is evidenced in many international and regional standards to which it is a party. These include Article xix of the International Covenant on Civil and Political Rights (ICCPR), to which Nauru is a signatory, which states that:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

32. The right to information has also been reflected in a number of regional human rights instruments and other declarations. Relevant to Nauru, the members of the Commonwealth have collectively recognised the fundamental importance of the right to access information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared: "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information".[5] Policy statements since then have encouraged member countries to "regard freedom of information as a legal and enforceable right."[6] The Commonwealth Secretariat has also prepared guidelines[7] and a model law[8] on the subject.

33. In addition, the Pacific Island Forum Secretariat's Pacific Plan, to which Nauru is a signatory, includes a commitment to the right to information under the Plan's good governance pillar.

<u>Right to Information as a tool for improving democratic institutions</u>

34. The benefits of entrenching the right to information are numerous:

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[3] UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

[4] United Nations (1992) *Rio Declaration on Environment and Sustainable Development*, Principle 10.

[5] Communiqué, (1980) Issued by Commonwealth Law Ministers, Barbados.

[6] Freedom of Information Act [ ], Annex to Commonwealth Secretariat Document LMM(02)6, September 2002.

[7] Communiqué, (1999) Issued by the Meeting of Commonwealth Law Ministers, Trinidad and Tobago.

[8] Communiqué, (1999) Issued by the Meeting of Commonwealth Law Ministers, Trinidad and Tobago.

It strengthens democracy: The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

It supports participatory development: Much of the failure of development policies to date 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, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why development strategies have gone askew and press for changes to put development back on track.

It is a proven anti-corruption tool: In 2006, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine 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.

It supports economic development: The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

It helps to reduce conflict: Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

<u>Current protection for the right to information in the Nauru Constitution</u>

35. The Nauru Constitution does not refer to the right to information. However, it does protect the freedom of expression in Article 12 which grants every person the right to freedom of expression to which a number of broad exemptions are stated. One of these exemptions states that the freedom of expression can be curtailed by laws that regulate the use of information obtained by public officers in the course of their employment.[9] Consequently,

[9] Clause 12(3)(d), Constitution of Nauru.

this Article does not protect the right to information, and instead appears to actually allow laws to be introduced that prevent people's access to government-held information. This contravenes many of Nauru's international obligations, denies a fundamental human right, and denies Nauruans access to a tool that can help promote participation, transparency and accountable governance.

Suggested amendments to the Nauru Constitution

36. Many Constitutions around the world include a guarantee to the right to information, either as part of the freedom of expression or freedom of speech or as a separate distinguishable right. Explicitly guaranteeing the right to information by enshrining it in the Constitution:
    - accords it sufficient importance as being inherent to democratic functioning and a pre-condition to the realisation of all other human rights;
    - satisfies Nauru's international obligations as a signatory to the ICCPR;
    - ensures that the right cannot be narrowed or ignored by any Government that may gain power; and
    - reinstates the citizen as a sovereign by giving control of information to the people of Nauru.

37. One of the Pacific Island countries that accords with international best practice and expressly guarantees the right to information is Papua New Guinea (PNG). Article 51 of the Papua New Guinea Constitution states that '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'. The PNG Constitution also details those limitations which are 'justifiable'. However, the exemptions from giving information listed are unnecessarily broad and do not follow the principles that a best practice right to information law would contemplate.

38. South Africa also has a Constitution that expressly protects the right to information. Section 32 of the South African Constitution states that:

    (1) Everyone has a right of access to –
    1. *any information held by the state; and*
    2. *any information that is held by another person and that is required for the exercise or protection of any rights.*

39. This wording captures the right to information as a fundamental human right in and of itself, without enshrining explicit exemptions in the Constitution. It also recognises the role that access to all forms of information can play in realising other rights. It is recommended that the Nauru Constitution Commission consider this phrasing as a model for the Constitution of Nauru.

40. The Constitution should also enshrine a requirement that the Government pass a law establishing the mechanisms and procedures for citizens to realise their right to information. This is in line with international best practice and many Constitutions, including those of PNG, South Africa and Fiji, which all require that the Government pass such a law providing for implementation of the right to information.[10] Fiji's Constitution differs from the PNG and South African Constitutions in that the Constitution doesn't protect the right to information itself, but protects the right to information as part of the right to freedom of expression.[11] Nonetheless, it includes another Article that requires

[10] Article 51(3) of the Constitution of Papua New Guinea.
[11] Article 30(1) of the Constitution of Fiji.

Parliament to enact a law to give members of the public a right to access official documents of the Government and its agencies.[12]

41. A requirement for domestic legislation puts an undeniable obligation on the state to ensure the right to information is fulfilled and implemented appropriately. At the same time, it gives the Government an opportunity to undertake public consultation concerning the practical requirements of implementation, such as application processes, time limits, appeals mechanisms and penalty provisions for a law that will most appropriately fit Nauru's circumstances.

42. Consequently, CHRI recommends that the Constitution Commission include a provision that compels the government to legislate for the right to information. Section 174 of the Fiji Constitution is a good example:

> *As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of the public rights of access to official documents of the Government and its agencies.*

Recommendations:

- The right to information is enshrined in the Constitution via an explicit protection in the Fundamental Rights and Freedoms section.
- The Constitution includes a requirement that the Government of Nauru enact a law to establish mechanisms for accessing information.

POLICE ACCOUNTABILITY

43. Stability in Nauru requires the police to have the confidence and backing of the people. Nauru's size makes it entirely possible to ensure that policing, as an essential public service, is done with the consent and cooperation of the public. We urge that consideration is made to including in the Constitution provisions that make it a responsibility of government to provide an accountable and responsive police service whose duty is to maintain law and order and respect the rights provided by the Constitution.

44. A community-focused constitution must ensure that the police are also held accountable to the community. It does this by setting up the police service and providing its core mandate, ensuring the apportionment of political and operational autonomy, ensuring community-focused appointments to the senior ranks of the service and involving the community through civilian oversight.

The Constitution must set up the police service and provide its core mandate

45. Where a constitution sets up a police service and provides its core mandate, the police are better protected from illegitimate political interference and the community from the kinds of police misconduct that flows from illegitimate political interference. Recent constitutional best practice enshrines the police – and its mandate – in the constitution. South Africa and Ghana's constitutions provide good examples:

    a. South Africa (Section 205 of the Constitution of South Africa):

> *(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.*

[12] Article 174 of the Constitution of Fiji.

*(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the require*ments of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

b. Ghana (Section 200 of the Constitution of Ghana)

(1) There shall be a Police Service of Ghana
(2) No person or authority shall raise any police service except by or under the authority of an Act of Parliament
(3) The Police Service shall be equipped and maintained to perform its traditional role of maintaining law and order.

<u>The Constitution must provide the police with operational autonomy</u>

46. The Constitution must also set out the basic political and operational responsibilities of the various groups or people who are involved with the police. This helps ensure transparency, reduces illegitimate political interference and allows the police to remain focused on their role protecting the community.

47. International best practice divides responsibility between a member of the government (for policy) and the head of the police (for day to day operations). This is the way that responsibility is split in South Africa and Fiji (both sections are set out below).

a. South Africa (Sections 206 and 207 of the Constitution of South Africa)

Political responsibility
206. (1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.
(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.
(3) Each province is entitled
a to monitor police conduct;
b to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
c to promote good relations between the police and the community;
d to assess the effectiveness of visible policing; and
e to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.
(4) A provincial executive is responsible for the following functions
a vested in it by this Chapter;
b assigned to it in terms of national legislation; and
c allocated to it in the national policing policy.
(5) In order to perform the functions set out in subsection (3), a province
a may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

b must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

Control of police service

207. (1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

a as prescribed by national legislation; and

b subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

b. Fiji (Section 111 of the Constitution of Fiji)

(1) This section establishes the office of Commissioner of Police.

(2) The Commissioner of Police is appointed by the Constitutional Offices Commission following consultation by it with the Minister.

(3) The Fiji Police Force is under the command of the Commissioner of Police.

(4) The Commissioner of Police is responsible for:

(a) the organisation and administration of the Fiji Police Force; and

(b) its deployment and the control of its operations; and, subject to subsection (5), is not subject to direction or control by any other person or authority in relation to those matters.

(5) The Minister may from time to time issue general policy directions with respect to the maintenance of public safety and public order and, if such a direction has been issued, the Commissioner of Police must act in accordance with it.

(6) The Parliament may make laws relating to the Fiji Police Force.

The Constitution must involve the community through civilian oversight

48. Civilian oversight is essential to ensure that the police remains community focused. Civilians need to be involved in the appointment of police officers and also in oversight of police conduct. Both these aspects of civilian oversight need to be enshrined in the Constitution:

    a. Appointment of police officers

    The Constitution currently provides for an optional Public Service Board and/or Police Service Board to oversee appointments to the public and police services. The Public Service Board takes on the power to appoint, discipline and remove officers from the public service. The Police Service Board approves decisions of the head of the police to appoint, discipline and remove police officers from the police service.

    Parliament must be required to create these bodies, rather than be given the option to put them in place. This is in line with international practice. For example, the constitutions in each of the Commonwealth Caribbean states provide for Public or Police Service Commissions to deal with personnel issues in their police organisations, including the critical accountability devices of discipline and dismissal. This is also standard practice in most of the Commonwealth Pacific. The Constitutions of Ghana, Sierra Leone, the Gambia and Nigeria go a step further, providing for Police Councils. These Councils are intended to ensure that the police have sufficient personnel, resources and equipment to undertake their operational role, leaving the head of police responsible for command and control of police operations.

    As noted above in the discussion regarding the importance of diversity within oversight bodies, consideration should be given to increasing the number of Board representatives under the Constitution to five. This would bring the Constitution into line with the existing Police Service Board constituted under legislation, and would also allow the Board to be made up of a more diverse and representative membership.

    b. Civilian oversight of conduct

    Civilian oversight of police conduct must also be enshrined in the Constitution. As discussed above, the most practical approach for Nauru would be to set up a constitutionally mandated Ombudsmans Office, made up of three Ombudsmans and a support staff, that should be given a broad mandate to look at complaints or government misadministration, and specific powers to look into police complaints.

    In terms of its policing work, the Ombudsmans Office should be empowered to investigate complaints, call for evidence, compel police cooperation, make recommendations to the police hierarchy and Parliament and follow up recommendations that have not been dealt with. Also, as discussed above, an appeal should lie from the Ombudsmans Office to either the court or Parliament.

Recommendations:

- The Constitution is amended to include the establishment of the police service and provide its core mandate.
- The Constitution ensures police operational autonomy by apportioning political and

operational responsibility.
- The Constitution mandates Parliament to set up a Police Service Board, with five members, including two members representing the community who are appointed with the diversity of the Nauruan people in mind.
- An Ombudsmans Office is enshrined in the Constitution and empowered to deal with complaints of police misconduct.

EMERGENCY POWERS AND THE FUNDAMENTAL HUMAN RIGHTS

49. Article 77 of the current Nauruan Constitution grants the President the power to declare Nauru in a state of emergency. Under Article 78, the President may make such orders as appear to him or her to be reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community. As the Background and Discussion Paper recognises, these Articles give the President sweeping powers and the ability to derogate from any of the Fundamental Rights and Freedoms in Part II. Leaving this degree of discretion in the hands of one person is ripe for abuse, is contrary to international practice and in breach of Nauru's international obligations.

50. There are two separate issues at hand:
    a. The President's ability to declare a state of emergency; and
    b. The power to derogate from human rights obligations.

Declaration of a state of emergency:

51. Article 77 of the current Constitution grants the President sole discretion to declare an emergency. CHRI recommends that this discretion be removed and safeguards put in place to prevent the potential abuse of this Article.

52. Different emergency powers are in place around the world that do not grant such wide discretion to one person but still ensure the government has adequate powers in times of an emergency. One solution would be to include a provision in Article 77 that the President be required to consult with the Cabinet before making a declaration of an emergency. A stronger approach however, would be to follow the South African Constitution that requires that a state of emergency can only be declared in an Act of Parliament (see Article 37 of the South African Constitution, in paragraph 56 below).

Derogation from human rights protection

53. Article 78 of the current Nauru Constitution allows for any enshrined human rights to be derogated from in times of emergency. This is contrary to international best practice and in breach of Nauru's international obligations.

54. The ICCPR, to which Nauru is a signatory, provides for the limited circumstances in which human rights may be derogated from, and that certain fundamental human rights shall always, regardless of emergency, be protected. Article 4 of the ICCPR requires:

> *Article 4*
> *1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

55. In summary, Articles 6, 7, 8, 11, 15, 16 and 18 provide:
    Article 6 - the right to life, abolishing the death penalty, genocide.
    Article 7 - torture, cruel, inhuman or degrading treatment or punishment.
    Article 8 - slavery and servitude
    Article 11 - imprisonment due to breach of contract
    Article 15 - ex post facto crime
    Article 16 - right to recognition as a person
    Article 18 - freedom of thought, conscience and religion.

56. International best practice provides good examples of how Nauru could enshrine this obligation. Article 37 of the South African Constitution is one such provision:

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when
a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
b. the declaration is necessary to restore peace and order.
(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only
a. prospectively; and
b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration.
The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.
(3) Any competent court may decide on the validity of
a. a declaration of a state of emergency;
b. any extension of a declaration of a state of emergency; or
c. any legislation enacted, or other action taken, in consequence of a declaration of a state
of emergency.
(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that
a. the derogation is strictly required by the emergency; and
b. the legislation is consistent with the Republic's obligations under international law applicable to states of emergency;
ii. conforms to subsection (5); and
iii. is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit o authorise
a. indemnifying the state, or any person, in respect of any unlawful act;
b. any derogation from this section; or
c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable
Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 **Section Number**	2 **Section Title**	3 **Extent to which the right is protected**
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: • subsection (1)(d) and (e); • the rights in subparagraphs (i) and (ii) of subsection (1)(g); and • subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: • subsections (1)(a), (b) and (c) and (2)(d); • the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) • subsection (4); and • subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

57. The intricate and comprehensive safeguards provided in the South African Constitution are essential for the protection of fundamental human rights and is in accordance with the above mentioned international standards to which Nauru is a party.

Recommendation:

- Amend the current Article 77 of the Constitution, to provide that a state of emergency can only be declared through an Act of Parliament.
- Replace the current Article 78 of the Constitution with one that complied with Article 4 of the ICCPR and that provides that certain rights are non-derogable.

RIGHT TO THE ENVIRONMENT

58. Currently the Nauruan Constitution does not refer to the environment in any of its clauses. However, the right to the environment is arguably especially important for Nauru considering the environmental damage the land has suffered as a result of mining, depleted phosphate sources and the economic dependence on environmentally based activities such as fishing. In addition, considering the size of Nauru, environmental disasters and damages can have an even greater impact on the people and their homes.

59. Not only is the natural environment an important social and economic consideration in Nauru specifically, but its protection is also required by Nauru's international obligations. As a member of the UN, Nauru is a party to the Rio Declaration on Environment and Sustainable Development, it is a signatory to the Convention on Biological Diversity and a party to the Pacific Plan that envisages sustainable development as one of its pillars.

60. Principle 1 in the Rio Declaration provides;

> *Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*

61. Article 1 of the Convention on Biological Diversity provides:

> *Article 1: The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding*

62. In recognition of the growing importance of the right to the environment, more modern Constitutions around the world are enshrining the right to the environment as a human right which should be protected. In addition, some Constitutions that were drafted before this right was prioritised have since been tested legally and amended to include it. The South African Constitution again provides a good example of how the right to the environment can be protected. Article 24 states:

> *24. Everyone has the right*
> *a. to an environment that is not harmful to their health or well-being; and*
> *b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that*
> *i. prevent pollution and ecological degradation;*
> *ii. promote conservation; and*
> *iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

CHRI recommends that Nauru enshrine the protection of the right to the environment in Part II of the Constitution, as another fundamental human right.

Recommendation

- Insert the right to the environment in the Constitution as a fundamental human right.

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This addendum is not comprehensive as the paucity of time does not allow us to provide detailed comments. However, CHRI would like to continue to offer our support for the future - be it for more detailed suggestions in regard to the fundamental rights for inclusion in the Constitution, for drafting a more democratic and community focused police Act or a right to information law.

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