

REPUBLIC OF FIJI

CONSTITUTION COMMISSION

**APPENDAGES TO
DRAFT FOR PROPOSED**

CONSTITUTION OF FIJI, 2013

Presented to His Excellency Ratu Epeli Nailatikau, President of Fiji, in December 2012,

in accordance with the Fiji Constitutional Process (Constitution Commission) Decree 57 of 2012

Final Essays

APPENDAGES TO THE PROPOSED DRAFT CONSTITUTION OF FIJI 2013

The Public Order Law and Access to Information Law are the Laws referred to in section 23(5) of Schedule 6 of the Draft Constitution.

Each of these Laws is an essential part of the legal framework necessary for establishing true democracy in Fiji as envisaged in the Fiji Constitutional Process (Constitution Commission) Decree 57 of 2012 and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 58 of 2012.

The Public Order Law provides for a clear framework within which the State may maintain order and protect the safety of the people of Fiji while respecting the rights of the people to engage in free discussion about democracy, politics and the future of Fiji. Like Fiji's previous public order legislation, it is based on precedent from the United Kingdom which was developed and refined in the light of considerable security threats to that country and a commitment to manage those threats without infringing human rights more than is justified by the circumstances.

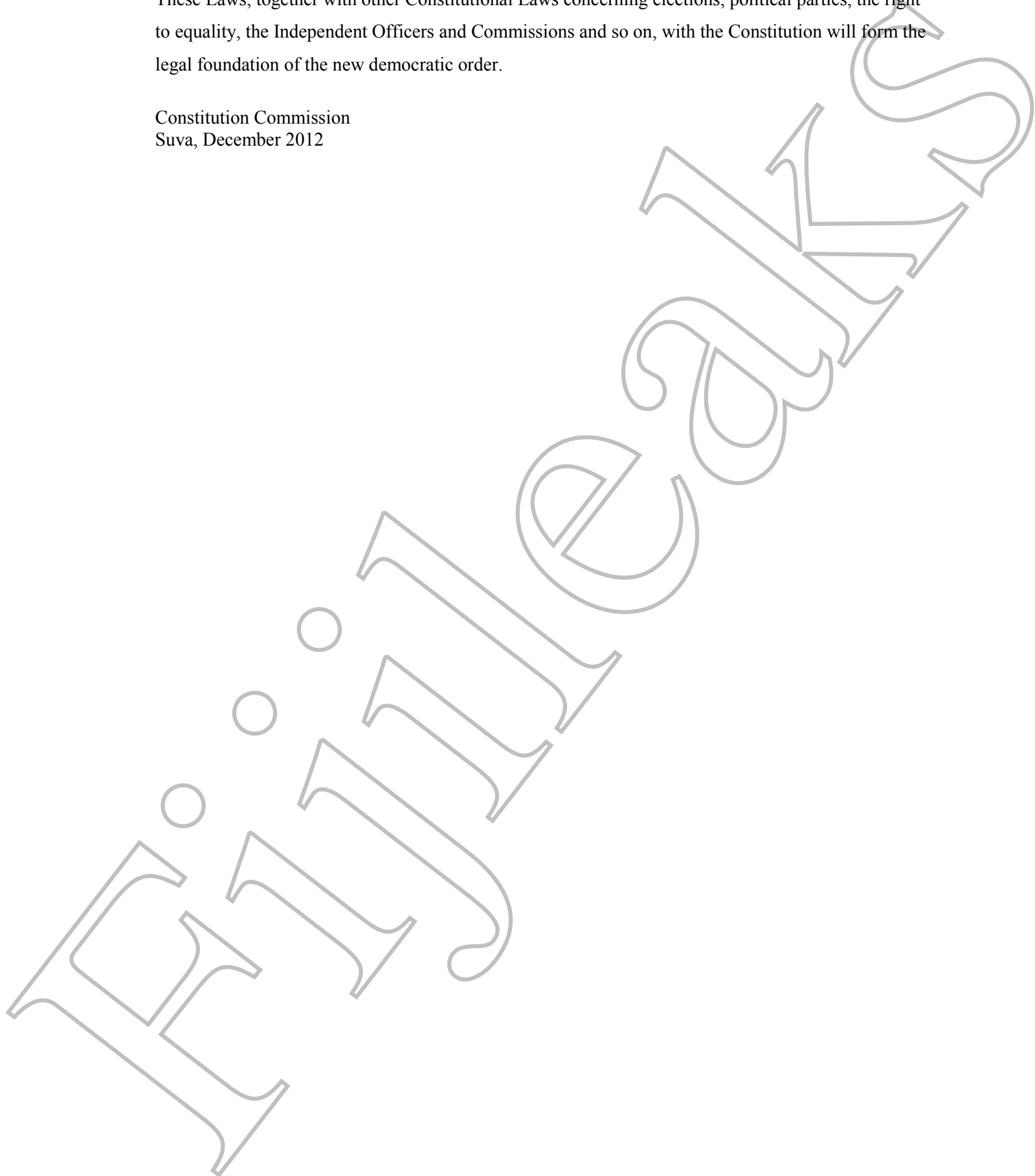
The Access to Information Law provides a framework for implementing the right to access to information held by the State in Article 32 of the Constitution. In so doing it sets out the responsibility of the State to provide access to information as unbureaucratic a manner as possible so that ordinary people can exercise the right, are informed about the actions of their government and can to participate fully and constructively in public life. At the same time it sets out the grounds on which information may be withheld so that information held by the State that should rightly remain confidential is not distributed. The Law thus both implements the right to access to information and limits in some ways the access that people may have.

Under the proposed Draft Constitution, these Laws will come into effect when the Constitution comes into effect but the Minister responsible for public administration may delay the Access to Information Law for a period to enable the State to prepare for its implementation.

Neither of the Laws may be amended before the first elections and to be amended in the future at least 36 of the 71 members of Parliament must approve the amendment.

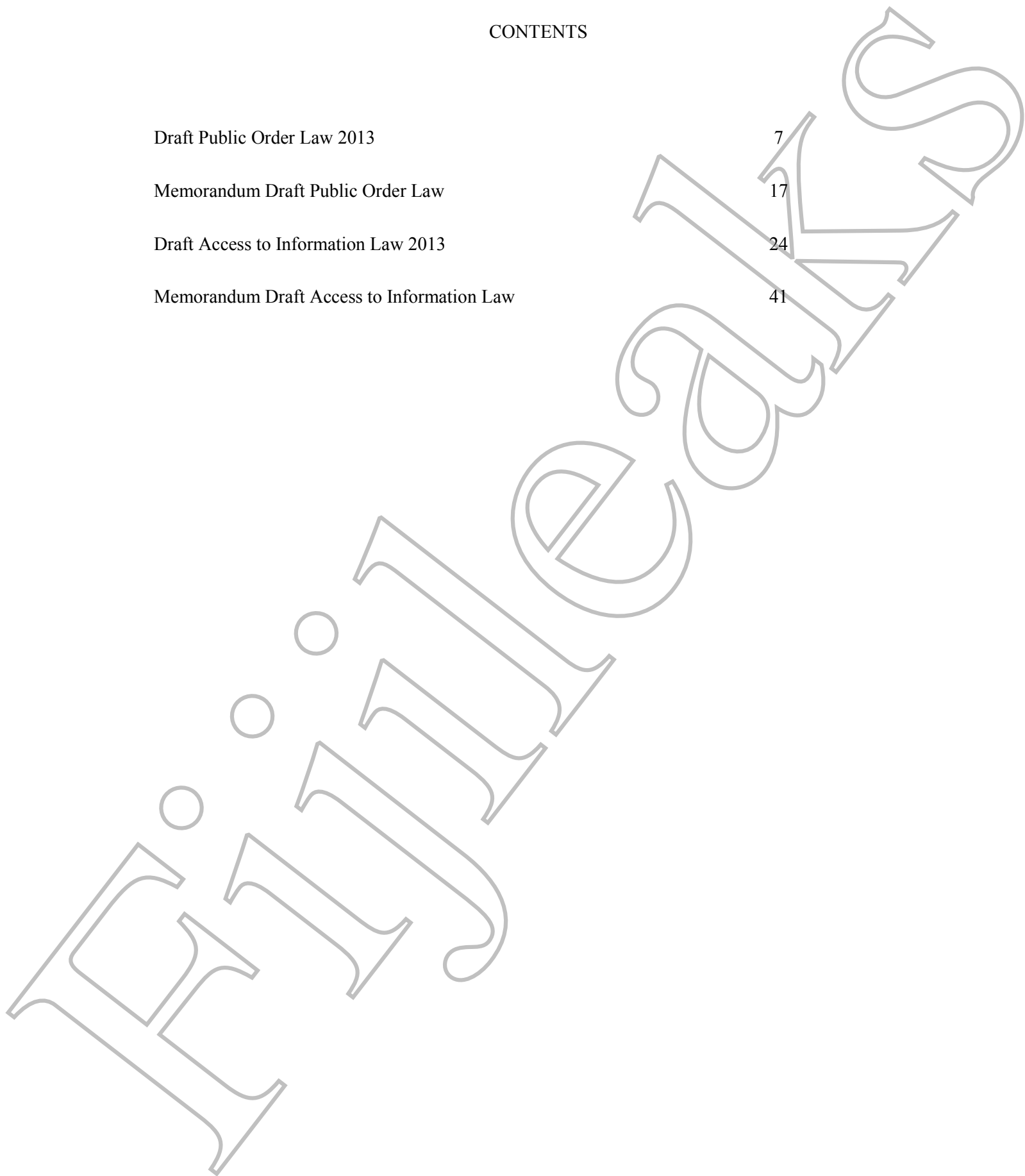
These Laws, together with other Constitutional Laws concerning elections, political parties, the right to equality, the Independent Officers and Commissions and so on, with the Constitution will form the legal foundation of the new democratic order.

Constitution Commission
Suva, December 2012



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CONSTITUTION OF THE REPUBLIC OF FIJI 2013**PUBLIC ORDER LAW 2013**

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CONSTITUTION OF THE REPUBLIC OF FIJI 2013

PUBLIC ORDER LAW 2013

Deemed to be a Law of the Republic of Fiji by virtue of section 23(5) and (6) of Schedule 6 of the Constitution of the Republic of Fiji, 2013.

Preliminary

Short title and commencement

1. This Law may be cited as the Public Order Law 2013 and comes into force on the day immediately following that on which the President assents to the Constitution of the Republic of Fiji, 2013.

Interpretation

2. In this Law, unless the context otherwise requires –

“dwelling” means any structure or part of a structure occupied as a person’s home or as other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and “structure” includes a temporary or movable structure;

“public assembly” means any gathering of 20 or more persons, held in a public place, for the purpose of the discussion of matters of public interest, or the expression of views on such matters.

"Penalty" following the specification of an offence indicates the maximum penalty which may be determined and imposed by a court in relation to the offence;

“penalty unit” means the amount of money prescribed by s. 57 of the Sentencing and Penalties Decree 2009 as amended by Regulations from time to time;

“public meeting” includes any gathering in a public place and any meeting which the public or any section of it are permitted to attend, whether on payment or otherwise;

“public place” means –

(a) any road; and

(b) any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission;

“public procession” means a procession of 5 or more people moving together along a route in an outdoor public place;

“violence” means any violent conduct, so that –

- (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons; and
- (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct.

Riot, etc.

Riot

3. (1) If 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety, each of the persons using unlawful violence for the common purpose commits the offence of riot.

Penalty: 500 penalty units or 10 years' imprisonment, or both.

- (2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.
- (3) The common purpose may be inferred from conduct.
- (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (5) Riot may be committed in private as well as in public places.

Violent disorder

4. (1) If 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety, each of the persons using or threatening unlawful violence commits the offence of violent disorder.

Penalty: 150 penalty units or 3 years' imprisonment, or both.

- (2) It is immaterial whether or not the 3 or more persons use or threaten unlawful violence simultaneously.
- (3) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (4) Violent disorder may be committed in private as well as in public places.

Affray

5. (1) A person commits the offence of affray if he or she uses or threatens unlawful violence towards another person and his or her conduct is such as would cause any person of reasonable firmness present to fear for his or her personal safety.

Penalty: 150 penalty units or 3 years' imprisonment, or both.

- (2) If 2 or more persons use or threaten the unlawful violence, it is their conduct taken together that must be considered for the purposes of subsection (1).
- (3) For the purposes of this section a threat cannot be made by the use of words alone.
- (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (5) Affray may be committed in private as well as in public places.

Fear or provocation of violence

6. (1) A person commits an offence if he or she uses towards another person threatening, abusive or insulting words or behaviour or distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting –
- (a) with intent to cause that other person to believe that immediate unlawful violence will be used against him or her or another person by any person;
 - (b) with intent to provoke the immediate use of unlawful violence by that other person or another person; or
 - (c) whereby that other person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

Penalty: 20 penalty units or 6 months' imprisonment, or both.

- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed if the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
- (3) It is a defence for the accused person to prove—
 - (a) that he or she was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling; or
 - (b) that his or her conduct was reasonable.

Riot, etc: Mental element

7. (1) A person commits riot only if he or she intends to use violence or is aware that his or her conduct may be violent.
- (2) A person commits violent disorder or affray only if he or she intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.

(3) A person commits an offence under section 6 only if he or she intends his or her words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting.

(4) For the purposes of this section a person whose awareness is impaired by intoxication is to be taken to be aware of that of which the person would be aware if not intoxicated, unless he or she shows either that the intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment.

(5) In subsection (4) “intoxication” means any intoxication, whether caused by drink, drugs or other means, or by a combination of means.

(6) Subsections (1) and (2) do not affect the determination for the purposes of riot or violent disorder of the number of persons who use or threaten violence.

Riot, etc: Procedure

8. (1) No prosecution for an offence of riot or incitement to riot may be commenced except by, or with the consent of, the Director of Public Prosecutions.

(2) For the purposes of the rules against charging more than one offence in the same count or information, each of sections 3 to 6 creates one offence.

(3) If a court finds a person charged with violent disorder or affray not guilty of the offence charged, it may convict the person of an offence under section 6.

Common law offences of riot etc. abolished

9. (1) The common law offences of riot, rout, unlawful assembly and affray are abolished.

(2) In any enactment coming into force or instrument taking effect after the coming into force of this Law, a reference to “riot”, “rout”, “unlawful assembly” or “affray”, or their cognate expressions, is to be construed as a reference to the offences created by sections 3 to 5.

(3) Subject to subsection (2), and unless a different intention appears, nothing in this Law affects the meaning of “riot” or of any cognate expression in any enactment in force, or instrument taking effect, before the coming into force of this Law.

Processions and assemblies

Public processions: Advance notice

10. (1) Unless it is not reasonably practicable, written notice must be given in accordance with this section of any proposal to hold a public procession intended –

- (a) to demonstrate support for or opposition to the views or actions of any person or body of persons;
 - (b) to publicise a cause or campaign; or
 - (c) to mark or commemorate an event.
- (2) Subsection (1) does not apply if the procession is one commonly or customarily held in Fiji or is a funeral procession organised by a funeral director acting in the normal course of business.
- (3) The notice under subsection (1) must specify the date of the procession, the time it is intended to start, its proposed route, and the name and address of the person (or of one of the persons) organising it.
- (4) Notice must be delivered to a police station in the area in which the procession will start by hand or, if the police station permits electronic notice, electronically, not less than 6 days before the date when the procession is intended to be held, or, if that is not reasonably practicable, as soon as delivery is reasonably practicable.
- (5) When a public procession is held, each of the persons organising it commits an offence if –
- (a) the requirements of this section as to notice have not been satisfied; or
 - (b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice.
- Penalty: 5 penalty units or 1 month's imprisonment, or both.
- (6) It is a defence for a defendant to prove that he or she did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements of this section or (as the case may be) the difference of date, time or route.
- (7) To the extent that an alleged offence turns on a difference of date, time or route, it is a defence for the defendant to prove that the difference arose from circumstances beyond his or her control or from something done with the agreement of a police officer or by the officer's direction.

Public processions: Conditions

11. (1) The Commissioner of Police may give directions imposing conditions on the persons organising or taking part in a public procession if, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, the Commissioner reasonably believes that –

- (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or

- (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.
- (2) Conditions imposed in directions given under subsection (1) must only be such conditions as are necessary and proportionate to prevent serious public disorder, damage, disruption or intimidation, but may include conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.
- (3) Directions given by the Commissioner of Police under subsection (1) must be given in writing no fewer than 3 days before the procession is due to be held, or as far in advance as practicable if 3 days' notice is not given.
- (4) A person who organises a public procession and knowingly fails to comply with directions given under this section commits an offence, but it is a defence for the person to prove that the failure arose from circumstances beyond his or her control.
Penalty: 10 penalty units or 3 months' imprisonment, or both.
- (5) A person who takes part in a public procession and knowingly fails to comply with directions given under this section commits an offence, but it is a defence for the person to prove that the failure arose from circumstances beyond his or her control.
Penalty: 5 penalty units.

Public processions: Prohibition

12. (1) If at any time the Commissioner of Police reasonably believes that, because of particular circumstances existing in Fiji, or any part of it, the powers under section 11 will not be sufficient to prevent public processions from resulting in serious public disorder, the Commissioner of Police may apply to the Prime Minister for an order prohibiting all public processions (or any class of public procession) in the whole of Fiji or that part of it for a period not exceeding 3 months.

- (2) On receiving an application under subsection (1), the Prime Minister may make an order either in the terms of the application or with such modifications as the Prime Minister considers necessary, but the Prime Minister may make an order only if it is reasonably necessary and proportionate to the threat of disorder.
- (3) An order made under this section may be revoked or varied by a subsequent order made in the same way.
- (4) As soon as practicable after being made, any order under this section must –
- (a) if not made in writing, be recorded in writing;
 - (b) be published in the *Gazette*; and

(c) be tabled in Parliament.

(5) A person who organises a public procession which the person knows is prohibited by an order under this section commits an offence.

Penalty: 20 penalty units or 3 months' imprisonment, or both.

(6) A person who takes part in a public procession which the person knows is prohibited by an order under this section commits an offence.

Penalty: 10 penalty units.

Public assemblies

13. (1) There is no duty on any person to inform the Commissioner of Police or any other authority of an intention to hold a public assembly or of the fact of such an assembly.

(2) The Commissioner of Police may give directions imposing conditions on the persons organising or taking part in an assembly, if on becoming aware of the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, the Commissioner reasonably believes that –

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

(3) Directions given under subsection (1) must only impose conditions that –

(a) are necessary and proportionate to prevent disorder, damage, disruption or intimidation arising from the assembly; and

(b) relate to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it.

(4) Directions given by the Commissioner of Police under subsection (2) must be given in writing and, if the Commissioner is aware of the assembly before it is held, must be given before it is held.

(5) A person who organises a public assembly and knowingly fails to comply with a direction given under this section commits an offence, but it is a defence for the person to prove that the failure arose from circumstances beyond his or her control.

Penalty: 10 penalty units or 3 months' imprisonment, or both.

(6) A person who takes part in a public assembly and knowingly fails to comply with a condition imposed under this section commits an offence, but it is a defence for the person to prove that the failure arose from circumstances beyond his or her control.

Penalty: 5 penalty units.

Miscellaneous offences

Attempts to break up public meetings

14. A person who at any public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called commits an offence

Penalty: 5 penalty units.

Riotous behaviour in places of worship

15. (1) A person commits an offence if he or she –

- (a) uses violence in any place of worship of any religious denomination, on any property attached to a place of worship or in any burial ground;
- (b) wilfully disturbs any meeting, assembly or congregation of persons assembled in any place of worship; or
- (c) molests, disturbs, vexes or troubles or by any other unlawful means disquiets or misuses any duly authorised cleric of any religion lawfully ministering or celebrating any sacrament or any divine service, rite or office in any place of worship or on any property attached to a place of worship or in any burial ground.

Penalty: 10 penalty units or 3 months' imprisonment, or both.

(2) For the purposes of the rules against charging more than one offence in the same count or information, each of paragraphs (a) to (c) in subsection (1) creates one offence.

Closing of roads, etc.

16. (1) The Commissioner of Police or the officer in charge of a Police Division may by order restrict, control, prohibit the use of or close any road, street, path, waterway or outdoor public place in the Division if such action is necessary to –

- (a) ensure public safety;
- (b) maintain public order; or
- (c) maintain supplies and services essential to the life of the community in the Division.

(2) If the situation is too urgent to communicate with an officer who has authority under subsection (1), any police officer of or above the rank of Inspector may exercise the powers conferred by that subsection.

(3) An order made pursuant to subsection (2) expires 24 hours after it was made, unless the order is confirmed by the Commissioner of Police or the officer in charge of the Police Division.

(4) An order made under subsection (1) or confirmed under subsection (3) expires after 72 hours, after which time any necessary action should be taken under other statutory powers.

(5) A person who fails to comply with an order made under this section commits an offence.

Penalty: 100 penalty units or 2 years' imprisonment, or both.

Repeal and transitional

Repeal and saving

17. (1) The Public Order Act (Cap.20) as amended by the Public Order (Amendment) Decree 2012 (Decree No.1 of 2012) is repealed except for –

(a) the definitions of “corrosive and inflammable substance”, “explosive” and “terrorism” in section 2;

(b) Part 2A (Control of Arms and Ammunition): ss 7A – 7F; and

(c) Part 3A (Terrorism Offences): ss 12A – 12F .

(2) Nothing in this Law affects the validity of any court proceedings for an offence under the Public Order Act as amended which has been commenced or conducted prior to the commencement of this Law.

(3) When imposing a sentence for an offence under the Public Order Act as amended which was committed before the commencement of this Law, the court must apply the penalties prescribed for that offence by this Law unless the offence concerned is not covered by this Law.

(4) For all purposes associated with the application of this section, the Public Order Act as amended applies to any offence committed against that Act before the commencement of this Law, and for the purposes of the proceedings relating to such offences the Public Order Act as amended is deemed to be still in force.

Transitional

18. The requirement in section 12(4) that an order must be tabled in Parliament is suspended until the first sitting of Parliament after the first elections held after the commencement of this Law.

MEMORANDUM

Draft Public Order Law 2013

1. Introduction

This draft Law has been prepared by the Constitution Commission to ensure that there are appropriate provisions in the law of Fiji for management of public order in a manner that is consistent with the chapter on Human Rights in the draft Constitution.

The draft Law is particularly urgent as certain provisions of the existing Public Order Act stand in the way of free and fair elections.

2. Replacement of Public Order Act (Cap 20) as amended

The draft Law repeals most of the Public Order Act (Cap 20) as amended by Public Order (Amendment) Decree 2012. It does not repeal provisions in the Public Order Act that relate to terrorism and arms and ammunition.

The Public Order Act was based on the United Kingdom Public Order Act of 1936. Overall, however, it is more narrowly drawn than the 1936 Act and its replacement, the UK Public Order Act of 1986. Moreover, the law relating to public order in the United Kingdom is now also subject to the UK Human Rights Act of 1998.

3. Consistency with the Constitution

The draft Constitution is consistent with international best practice in protecting the political rights of expression and assembly. The draft Constitution also acknowledges that in certain circumstances rights may be limited. It includes a provision permitting the limitation of rights if this is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (Art 48).

The current Public Order Act (as amended) is inconsistent with the Bill of Rights in a number of ways including by giving the police an unfettered discretion in prohibiting meetings and processions and to impose curfews; by adding to the provisions on hate speech in the Crimes Decree by extending the

prohibition on speech to speech alleged to “undermine or sabotage” the economy of Fiji etc; and by removing the right of courts to adjudicate disputes about whether the law is properly applied.

This draft Law permits the regulation or limitation of the rights of speech and assembly only to the extent that people purporting to exercise those rights threaten violence, endanger public safety or lead to public disorder. It requires action by the police to be reasonable and proportionate to the harm threatened. The maximum penalties that it imposes on those who commit offences under the law are commensurate with the seriousness of those offences.

4. Overview of structure of draft Law

The draft Law is divided into 5 parts.

- 1: Preliminary.
- 2: Riot etc.
- 3: Processions and assemblies.
- 4: Miscellaneous offences.
- 5: Repeals and transition.

5. Clause by clause commentary

Preliminary

Clause 1 states that the short title of the law is the Public Order Law 2013 and that it comes into effect with the Constitution.

Clause 2 sets out definitions.

Riot etc

Clause 3 establishes the offence of riot which is committed when 12 or more people gathered together use or threaten violence in a way that would cause a reasonable person to fear for his or her safety. The maximum penalty is 500 penalty units or 10 years’ imprisonment or both.

Clause 4 establishes the offence of violent disorder which is committed when 3 or more people gathered together use or threaten violence and a reasonable person present would fear for his or her safety. The maximum penalty is 50 penalty units or 3 years' imprisonment or both.

Clause 5 establishes the offence of affray which is committed when an individual uses or threatens violence and a reasonable person present would fear for his or her safety. The maximum penalty is 150 penalty units or 3 years' imprisonment or both.

Clause 6 makes it an offence to use threatening, abusive or insulting words or signs in a way that causes another person to fear violence. The crime is not committed if the person using the threatening etc. words and the person to whom they are directed are in a dwelling. The maximum penalty is 20 penalty units.

Clause 7 stipulates that a person accused of committing an offence set out in clauses 3 – 6 must have intended to use or threaten violence or, in the case of using threatening or abusive words, must have been aware that they may be perceived as threatening. The only exception to the requirement of intention is if the person accused of committing the offence is intoxicated.

Clause 8 deals with aspects of the procedure for prosecuting the offences established in clauses 3 – 6 and (i) requires the consent of the Director of Public Prosecutions for the prosecution of the offences of riot or incitement to riot; (ii) stipulates that each of the offences counts as a separate offence; and (iii) permits a court to convict a person charged with affray or violent disorder of the offence under clause 6 instead.

Clause 9 abolishes the common law crimes of riot, rout, unlawful assembly and affray and provides for certain other consequential matters. Although this repeats the repeal of all common law crimes by the Crimes Decree, it is included here for reasons of certainty.

Compliance with the Constitution:

The provisions of clauses 3 – 8 place certain limits on the rights to assembly and expression. In each case, the limits are required to protect the rights of others and, in particular, the right to security of the person. The provisions provide checks on the potential misuse of the power to control gatherings by limiting the offences to situations in which violence occurs or is threatened or threats are intended; by providing a defence to a charge if the accused did not intend violence or to threaten violence or, in the case of the clause 6 offence did not intend the impugned actions to be threatening; and by requiring

the consent of the Director of Public Prosecutions for the prosecution of the more serious offences of riot and incitement to riot.

Processions and assemblies

Clause 10 requires advance notice to the police for processions that support or oppose views, publicise a campaign or commemorate an event. However, notice is not required for processions commonly or customarily held. In addition, to provide certainty, clause 10(2) stipulates that the advance notice need not be given for funeral processions organised by a funeral director.

The clause also stipulates what the notice must say and to whom it must be delivered. Ordinarily notice must be delivered to the police at least 6 days before the procession is to take place but, if that is not reasonably practicable, notice must be delivered as soon as is reasonably practicable.

Under the clause a person who organises a procession commits an offence if he or she does not comply with the provision of the clause or if the date, time and place of the procession differ from the information provided to the police in the notice. If the date, time or place differs from that provided to the police from circumstances beyond the control of the organiser or with the agreement of the police, no offence is committed.

Clause 11 permits the Commissioner of Police to issue a direction placing *conditions on a procession*. But, conditions may be put on a procession only if the Commissioner reasonably believes that it will result in “serious disorder or serious disruption of the life of the community” or if the purpose of the procession is to intimidate others. Any conditions must be necessary and proportionate to the harm anticipated. Unless impracticable, a direction must be given at least 3 days before the procession.

It is an offence for the organiser of a procession to knowingly fail to comply with any conditions. The maximum penalty is 10 penalty units or 3 months’ imprisonment or both. It is an offence for a person who takes part in a procession to knowingly fail to comply with any conditions unless the failure was out of his or her control. The maximum penalty is 5 penalty units.

Clause 12 allows the Prime Minister in particular circumstances to *prohibit all processions* in Fiji or in part of it for up to 3 months.

An order prohibiting processions may be made only on the application of the Commissioner of Police and only if the power to place conditions on processions in clause 11 is not sufficient to prevent

serious public disorder. The order of the Prime Minister must be reasonably necessary and proportionate to the threat of disorder.

Any order made under clause 12 must be put in writing as soon as possible, published in the Gazette and tabled in Parliament.

It is an offence to organise a procession knowing that it is forbidden under this clause. The maximum penalty is 50 penalty units or 3 months' imprisonment or both. It is an offence to participate in a procession knowing that it is forbidden. The maximum penalty is 20 penalty units.

Clause 13 affirms the *right to assembly* by stipulating that there is no obligation to inform the police or any other authority of an intention to hold a public assembly. A public assembly is a meeting of 20 or more people.

The Commissioner of Police may issue a direction placing *conditions on a public assembly*. But, conditions may be put on an assembly only if the Commissioner reasonably believes that it will result in "serious public disorder, serious damage to property or serious disruption of the life of the community" or if the purpose of the assembly is to intimidate others. Any conditions must be necessary and proportionate to the harm anticipated and may relate only to the place, time and number of people participating in the assembly. Unless impracticable, a direction must be given in writing before the assembly is held.

It is an offence for the organiser of an assembly to knowingly fail to comply with any conditions. The maximum penalty is 10 penalty units or 3 months' imprisonment or both. It is an offence for a person who takes part in an assembly to knowingly fail to comply with any conditions unless the failure was out of his or her control. The maximum penalty is 5 penalty units.

Compliance with the Constitution:

The provisions of clauses 10 - 13 place limits on the rights to assembly and expression. In each case, however, the limits are carefully circumscribed by a requirement that they are necessary to prevent damage and proportionate to the damage reasonably anticipated. By requiring the conditions to be proportionate to the threat, the clauses comply with the limitation clause of the draft Constitution (Art 48) which demands that any limitation of a right be proportionate to the purpose (or need for) the limitation. Any conditions on processions and assemblies must also, as far as possible, be communicated to those organising the events in advance, providing an opportunity both for

discussion of the problems and for reorganising the event. Public processions may be prohibited only in exceptional circumstance (under clause 12).

In addition to the requirements of necessity and proportionality, a general prohibition on processions may last for a maximum of 3 months, must be Gazetted and must be tabled in Parliament. The latter requirement ensures that Parliament can exercise its oversight responsibility in such matters.

The conditions that the Commissioner of Police may place on assemblies are additionally limited to those relating to the place, duration and number of people attending the assembly.

Maximum penalties in all cases are proportionate to the offence.

Miscellaneous offences

Clause 14 protects the right to assemble by making it an offence to attempt to prevent a meeting from concluding its business. The maximum penalty is 5 penalty units.

Clause 15 protects the right to religious freedom by creating offences for the use of violence in places used for worship or burial grounds, for disturbing people assembled at a place of worship or burial ground, and for disturbing any cleric conducting a religious or burial service etc. The maximum penalty is 10 penalty units or 3 months' imprisonment, or both.

Clause 16 gives the Commissioner of Police the power to restrict the use of or close roads or other outdoor public places if it is necessary to ensure public safety, maintain public order, or maintain essential supplies. The maximum time such an order can last is 72 hours. Failure to comply with an order made under clause 16 attracts a maximum penalty of 100 penalty units or 2 years' imprisonment, or both.

Compliance with the Constitution:

The provisions of clauses 14 and 15 protect the right to meet (assemble) and the freedom of religion. Clause 16 limits freedom of movement. But the limitation is consistent with the Constitution because it may occur only in certain specified and serious conditions (16(1)), the decision to limit the right may be made by a senior police officer only; and the decision is effective for only 72 hours. These provisions ensure that the limitation of the right of freedom of movement is consistent with the provisions on human rights in the Constitution.

Repeal and transitional

Clause 17 repeals the Public Order Act (Cap 20) with the exception of sections 7A – 7F (arms and ammunition) and sections 12A – 12F (terrorism offences). It also saves any proceedings under that Act.

Clause 18 suspends the operation of that part of clause 12(4) that requires an order to be tabled in Parliament until Parliament is convened under the Constitution of 2013.

CONSTITUTION OF THE REPUBLIC OF FIJI 2013**ACCESS TO INFORMATION LAW 2013**

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CONSTITUTION OF THE REPUBLIC OF FIJI 2013**ACCESS TO INFORMATION LAW 2013**

Deemed to be a Law of the Republic of Fiji by virtue of section 23(5) and (6) of Schedule 6 of the Constitution of the Republic of Fiji, 2013.

*Preliminary***Short title and commencement**

1. (1) This Law may be cited as the Access to Information Law 2013.
- (2) Subject to subsection (3), this Law comes into force on the day immediately following that on which the President assents to the Constitution of the Republic of Fiji, 2013.
- (3) The Minister may by Order defer the coming into force of this Law or any provision of it in respect of any or all public authorities, for up to one year, in order to ensure that proper planning for the implementation of the Law is in place.

Interpretation

2. (1) In this Law, unless the context otherwise requires –

“applicant” means a person who has made a request in accordance with section 11;

“Constitution” means the Constitution of the Republic of Fiji, 2013;

“department” means a department of the government and includes a Ministry;

“government commercial company” has the same meaning as in the Public Enterprise Act 1996;

“international organisation” means an organisation of States or governments of States;

“the Minister” means the Minister responsible for the administration of this Law, or, if no such Minister has been assigned, the Minister responsible for public administration;

“official information” means any information held by a public body, other than personal information;

“personal information” means information of a personal nature held about an identifiable individual;

“prescribed” means prescribed by regulations made by the Minister under section 28;

“public body” has the meaning given that term in section 6;

“principal officer” means –

- (a) in relation to a department – the person holding, or performing the duties of, the office of secretary to the department; and
- (b) in relation to a corporate entity – the person who constitutes, or is acting as the person who constitutes, the entity or, if the entity is constituted by 2 or more persons, the person who is entitled to preside at meetings of the entity;

“record” means a document in any form, including –

- (a) a map, plan, drawing or photograph;
 - (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; or
 - (d) any article on which information has been stored or recorded either mechanically or digitally.
- (2) Information held by an officer or employee of a public body in that person’s capacity as such officer or employee is, for the purpose of this Law, deemed to be held by the public body.
- (3) Information held by an independent contractor engaged by a public body in the contractor’s capacity as such a contractor is, for the purposes of this Law, deemed to be held by the public body.
- (4) Any notice or required or permitted to be given by this Law may be given in digital format, provided the text of the notice is retrievable in hard copy and provided the requester’s consent is obtained.

Scope and status of this Law

3. (1) This Law implements the provisions of the Constitution which declare the freedom to seek, receive and impart information, knowledge and ideas and confer the right of access to information held by the State.

(2) This Law regulates the principles and procedure for the access by persons to official information held by departments of the public service and other public agencies.

(3) This Law applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.

(4) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.

(6) This Law must be construed as one with the Constitution and can be amended only in the manner prescribed for amendment of laws appended to the Constitution in section 23 of Schedule 6 of the Constitution.

Dissemination of public information

4. (1) Public bodies must adopt policies that ensure the effective dissemination of information about their policies and activities. The policies must be made publicly available and must be periodically reviewed to take advantage of technological innovations and evolving good practices.

(2) Every public body must ensure that information is broadly accessible to all citizens on a non-discriminatory basis through multiple channels, including first-person observation, print media, radio, and live and on-demand broadcasts and streaming.

(3) The Ombudsman may issue guidelines for the dissemination by public bodies of public information pursuant to this section.

Principles of access

Principles of access to information

5. (1) The principles according to which this Law must be interpreted and implemented are that –

(a) everyone has the freedom to seek, receive and impart information, knowledge and ideas;

(b) everyone has the right of access to information held by the State; and

(c) this implies a right of access to information about the operations of any public body, subject to reasonable restrictions established by law in the public interest.

(2) The question whether official information is, under this Law, to be made available must be determined in accordance with –

- (a) the purposes of this Law; and
- (b) the principle that the information should be made available unless there is good reason for withholding it.

Meaning of ‘public body’

6. (1) For the purposes of this Law, a public body means, subject to subsection (2) –
- (a) any body, whether corporate or unincorporated, established for a public purpose by, or in accordance with, a written law;
 - (b) any person holding, or performing the duties of, an office established by a written law;
 - (c) any body established by or under the Constitution;
 - (d) any body which forms part of any level or branch of Government;
 - (e) any body owned, controlled or substantially financed by funds provided by the Government or the State; or
 - (f) any body carrying out a statutory or public function;

and includes (without limiting that definition) –

- (a) Ministries and departments of government;
- (b) Parliament;
- (c) any local authority established under the Local Authority Act (Cap.125);
- (d) schools and universities that receive public funding, in respect of the activities for which they are funded;
- (e) public hospitals and clinics; and
- (f) government commercial enterprises.

(2) A public body does not include –

- (a) a court, in respect of the conduct or contents of judicial proceedings; or
- (b) a commission of inquiry established under the Commissions of Inquiry Act (Cap.47).

Reasons for withholding information

7. (1) For the purpose of section 5(2)(b), good reason for withholding official information exists, if the making available of the information would be likely to –

- (a) prejudice the security or defence of Fiji or the international relations of the government;
- (b) prejudice the entrusting of information to the Government on a basis of confidence by –
 - (i) the government of another country or a public body of such a government: or
 - (ii) an international organisation;
- (c) prejudice the maintenance of the law, including the prevention, investigation or detection of offences, and the right to a fair trial;
- (d) endanger the safety of any person;
- (e) cause serious prejudice to the effective formulation or development of government policy;
- (f) seriously frustrate the success of a policy, by premature disclosure of that policy; or
- (g) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views.

(2) For the purpose of section 5(2)(b), good reason for withholding official information also exists, if the withholding of official information is necessary to –

- (a) protect the privacy of a natural person, including that of a deceased natural person;
- (b) protect information if the making available of the information –
 - (i) would disclose a trade secret; or
 - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied the information, or who is the subject of, the information;
- (c) protect information that is subject to an obligation of confidence if the making available of the information –

- (i) would be likely to prejudice the supply of similar information, or of information from the same source, and it is in the public interest that it should continue to be supplied; or
 - (ii) would be likely otherwise to damage the public interest;
 - (d) prevent the disclosure of evaluative material the disclosure of which would breach an express or implied promise that –
 - (i) was made to the person who supplied the information; and
 - (ii) was to the effect that the information or the identity of the person who supplied it would be kept confidential;
 - (e) prevent the disclosure to a person of information relating to the physical or mental health of that person that, if disclosed, would be likely to affect seriously the physical or mental health of that person;
 - (f) avoid prejudice to measures for protecting the health and safety of members of the public;
 - (g) maintain legal professional privilege; or
 - (h) enable a public body to carry on negotiations (including commercial and industrial negotiations) without prejudice or disadvantage.
- (3) In this section, ‘evaluative material’ means evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility or qualifications of the person to whom the material relates –
- (a) for employment or for appointment to an office;
 - (b) for promotion;
 - (c) for continuation in employment or office; or
 - (d) for the awarding of a contract, award or scholarship.
- (4) Paragraphs (e), (f) and (g) of subsection (1) do not apply to facts, analyses of facts, technical data or statistical information.

Information concerning the existence of certain information

8. When a request relates to information to which section 7(1) or section 7(2)(b) applies, or would, if it existed, apply, the public body may, if satisfied that the interest protected by section 7(1) or 7(2)(b) would be likely to be prejudiced by the disclosure of the existence or

non-existence of the information, give notice in writing to the applicant that the public body neither confirms nor denies the existence or non-existence of the information.

Grounds for refusal of requests

9. (1) A request made in accordance with section 13 may only be refused on one or more of the following grounds –

- (a) that, by virtue of section 7, there is good reason for withholding the information;
- (b) that by virtue of section 8, the public body neither confirms nor denies the existence or non-existence of the information;
- (c) that making the information available would be contrary to an express direction of a court or of Parliament;
- (d) that all reasonable steps have been taken to find the record alleged to contain the information and the public body is satisfied that the record does not exist or cannot be found; or
- (e) that making the information available would substantially and unreasonably divert the resources of the public body from its other operations, and that the public body in question has certified in writing that this is the case and the reasons for so certifying.

(2) The provisions of section 7 and of subsection (1) of this section apply only in as much as the harm they envisage would, or would be likely to, occur at or after the time at which the request is considered.

Public interest over-ride

10. Notwithstanding any provision of this Act, a body may not refuse to indicate whether or not it holds a record, or refuse access to information, unless the harm to the protected interest outweighs the public interest in disclosure.

Facilitating access to information

Facilitating access to information

11. (1) Every public body to which this Law applies must to the extent reasonably practicable facilitate access to information, including (but not limited to) –

- (a) proactively disclosing as much public information as possible, by digital and other means, including the maintenance of up-to-date websites;
- (b) publicising contact details for information requests;

- (c) appointing an officer in the body responsible for responding to requests for information and for establishing, overseeing and maintaining a system for processing requests; and
 - (d) establishing and maintaining a procedure for responding to, and processing, requests for information in a timely and efficient manner.
- (2) Every public body to which this Law applies must publish, not later than the end of the year 2014, a publication that –
- (a) describes the structure, functions and responsibilities of the body;
 - (b) describes the categories of records held by it;
 - (c) describes all manuals and similar types of records that contain policies, principles, rules or guidelines in accordance with which decisions or recommendations are made by the body; and
 - (d) tells members of the public who wish to get information from the body how they should go about it and gives particulars of the officer or officers to whom requests for information should be sent.
- (3) Every public body must, at intervals of not more than 2 years, bring the material contained in the publication required by subsection (2) up to date either by publishing a new edition of the publication or by publishing a supplement.
- (4) If there is good reason under section 7 for withholding official information, nothing in this section requires the publication of that official information.
- (5) The information to be published in accordance with this section may be published by including it in the annual report of the public body.
- (6) This section applies in relation to a public body that comes into existence after the commencement of this Law as if the reference in subsection (2) to the year 2014 were a reference to the year in which the body came into existence.
- (7) The Ombudsman may issue guidelines for the facilitation of access to information by public bodies to which this Law applies.

Inspection and purchase of documents

12. (1) This section applies, in respect of a public body to which this Law applies, to any record (including any manual) used by the body or its officers containing policies, principles, rules or guidelines in accordance with which decisions or recommendations are made with respect to –

- (a) rights, privileges or benefits; or

(b) obligations, penalties or other detriments,
to which persons may be entitled or subject.

(2) The principal officer of a public body must -

- (a) cause copies of all records to which this section applies in respect of the public body that are in use from time to time to be made available for inspection and purchase by members of the public;
- (b) not later than the relevant day in relation to the public body, cause to be published and to be displayed at the main office of the body a statement (which may take the form of an index) specifying the records of which copies are, at the time of preparation of the statement, available in accordance with paragraph (a) and the place or places where copies may be inspected and bought; and
- (c) within 12 months after the publication of the last statement published under paragraph (b) or this paragraph, cause to be published and to be displayed at the main office of the body a statement bringing up to date the information contained in the last preceding statement.

(3) For the purpose of subsection (2), the relevant day in relation to a public body is -

- (a) in the case of a public body that was in existence before the commencement of this Law - the day that occurs 12 months after the commencement of this Law;
- (b) in the case of a public body that comes into existence on or after the commencement of this Law - the day that occurs 12 months after the public body came into existence.

(4) The principal officer is not required to comply fully with subsection (2)(a) before the expiration of 12 months after the commencement of this Law, but must before that time comply with that subsection so far as is practicable.

(5) If, by virtue of section 7, there is good reason for withholding some of the information contained in a record to which this section applies, the principal officer must, unless it is not practicable to do so -

- (a) make a copy of the record available with any deletions or alterations that are necessary; or
- (b) cause to be prepared a corresponding record, altered only to the

extent necessary to exclude the information, and cause the record so prepared to be dealt with in accordance with subsection (2).

(6) Subsection (4) applies in relation to a public body that comes into existence after the commencement of this Law as if the reference in that subsection to the commencement of this Law were a reference to the day on which the public body comes into existence.

Requests for access to official information

Requests for access

13. (1) A person who wishes to obtain official information from a public body may request the body to make the information available.

(2) The request must be made in writing in a form the public body accepts or, if there is disagreement about the form, in a manner approved by the Ombudsman.

(3) The request must be accompanied by any fee that is prescribed in respect of that category of request.

(4) The request for official information should be sufficiently specific to enable the public body to comply with the request.

Assistance and transfers

14. (1) It is the duty of a public body to give reasonable assistance to a person who –

(a) wishes to make a request in accordance with section 13; but

(b) in making a request –

(i) has not made it in accordance with section 13;

(ii) has not made it sufficiently specifically; or

(ii) has not made it to the appropriate public body.

(2) A public body to which a request in accordance with section 13 is made may transfer the request to the other public body if the information to which the request relates –

(a) is not held by that public body but is, to the knowledge of that public body, held by another public body; or

(b) is believed by the person dealing with the request to be more closely connected with the functions of another public body,

(3) If a public body transfers a request as permitted by subsection (2), it must inform the applicant accordingly.

Decisions on requests

15. Subject to this Law, the principal office of a public body to which a request is made in accordance with section 13 or is transferred in accordance with section 14(2) must, as soon as reasonably practicable and in any case not later than 30 days after the day on which the request is received by the public body –

- (a) decide whether the request is to be granted, and if so, in what way and for what charge (if any); and
- (b) give or post to the applicant notice of the decision on request.

Extension of time limits

16. (1) When a request in accordance with section 13 is made to a public body or transferred to a public body in accordance with section 14, the principal officer of the public body may decide to extend the time limit set out in section 15 in respect of the request if –

- (a) the request is for a large quantity of information, or necessitates search through a large quantity of information, and meeting the time limit would unreasonably interfere with the operations of the public body; or
- (b) consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the time limit.

(2) Any extension under subsection (1) must be reasonable having regard to the circumstances.

(3) Notice of the extension must –

- (a) be given or posted to the applicant within 30 days after the receipt of the request;
- (b) specify the period of the extension, which must not be longer than 30 additional days, unless the request is of exceptional complexity or volume in which case a further 60 additional days extension may be permitted;
- (c) give the reasons for the extension; and
- (d) state that the applicant has the right, under section 20, to complain to the Ombudsman about the extension.

Forms of access

17. (1) A record comprising official information may be made available to an applicant in one or more of the following ways –

- (a) by giving a reasonable opportunity to inspect the record;
 - (b) by giving the applicant a copy of the record;
 - (c) in case of a record that is an article or thing from which sounds or visual images are capable of being reproduced – by making arrangements for the applicant to hear or view those sounds or visual images; or
 - (d) in the case of a record in which words are recorded so as to be capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form – by providing the applicant with a written transcript of the words recorded or contained in the record.
- (2) The public body must make the information available in the way preferred by the applicant unless to do so would –
- (a) unreasonably impair efficient administration; or
 - (b) involve an infringement of copyright (other than copyright owned by the State or a public body) subsisting in matter contained in the record.
- (3) If information is not made available in the way preferred by the applicant, the public body must give the applicant reasons for not making the information available in that way.

Severability

18. If there is good reason for withholding from the applicant some of the information contained in a record pursuant to section 7 or section 9, the other information in the record may be made available by making a copy of the record available with any deletions that are necessary.

Reasons to be given

19. If a request made in accordance with section 13 is refused on any of the grounds set out in section 7 or section 9, or information is deleted from a record under section 18, the public body must give to the applicant –

- (a) a written statement –
 - (i) setting out the findings on material questions of fact; and
 - (ii) giving the reasons for the refusal of the request or the deletion of the information; and
- (b) information concerning the applicant’s rights by way of complaint under section 20 to the Ombudsman, to seek a review of the decision.

Complaints to the Ombudsman

20. (1) A person may complain to the Ombudsman in writing, concerning a decision by a public body made in response to a request under section 13.

(2) A failure to make a decision on a request within the time limit specified in section 13 (or any extension under section 16) is to be taken, for the purpose of subsection (1), as a refusal to make the information available.

Powers of the Ombudsman

21. (1) Upon receiving a complaint that a request for information has either been denied or not responded to within the time limits provided for in this Law, the Ombudsman must review the matter and either –

- (a) order release of the record or records requested;
- (b) affirm the grounds for denying access to the information requested and dismiss the complaint; or
- (c) remit the matter to the public body with appropriate guidance, or with a request for further information about the matter and the grounds for denying access.

(2) The Ombudsman is entitled to review the record in question, if it is necessary and appropriate to do so for the purposes of the adjudication.

(3) In the case of a general complaint about access to public information, the Ombudsman must –

- (a) review the matter and issue a decision regarding the complaint; and
- (b) if appropriate, offer advice and guidance to the public body or bodies concerned in order to enhance compliance with this Law.

(4) Advice and guidance given under subsection (4)(b) must be made public unless the complainant requests otherwise in order to maintain confidentiality of the identity of the complainant.

(5) The Ombudsman may summarily reject a complaint which appears to be frivolous, vexatious or clearly unwarranted.

Additional powers and duties of the Ombudsman

22. (1) The provisions of the Constitution and of the Ombudsman Act 1998 conferring powers on the Ombudsman apply to the extent necessary when the Ombudsman is responding to a complaint under this Law.

(2) In addition to any other powers and duties provided for in this Law, the Constitution or the Ombudsman Act 1998, the Ombudsman may –

- (a) monitor and report on the compliance by public bodies with their obligations under this Law;
- (b) make recommendations for reform both of a general nature and directed at specified public bodies;
- (c) provide, or assist in the provision of, training activities for public officials on the right to information and the effective implementation of this Law;
- (d) refer to the appropriate authorities cases which reasonably disclose evidence of criminal offences under any written law; and
- (e) publicise the requirements of this Law and the rights of individuals under it.

Multi-stakeholder forum

23. As soon as reasonably practicable after the commencement of this Law, the Ombudsman must convene a multi-stakeholder forum comprising representatives of government, civil society, communities and the private sector to consider the implementation of this Law and to agree common standards giving full effect to the purpose of this Law.

Code of Practice on records management

24. The Ombudsman must, after appropriate consultation with interested parties, including the multi-stakeholder forum established under section 23, issue and from time to time update a Code of Practice relating to the making, keeping, management and disposal of records, as well as the transfer of records to the relevant archiving body, such as the Public Archives.

Information about individuals

Application for correction of personal information

25. (1) If –

- (a) whether under this Law or otherwise, personal information about an individual has been made available to the person by a public body; and

- (b) the person claims that the information is incomplete, incorrect, out of date or misleading,

the person may, by letter addressed to the public body –

- (i) request the public body to correct the record of the information; or
 (ii) require that an annotation be made to the record of the information.

(2) When a public body receives a request under subsection (1), the public body must notify the person of the action taken as a result of the request.

(3) Section 20 (Complaints to Ombudsman) applies in relation to a decision made under this section to refuse to amend or annotate a record as if that decision were a decision refusing a request for information under section 13.

(4) Nothing in this section prevents a public body from adding the public body's comments to an annotation of a record made under this section.

Decisions affecting individuals

26. (1) If, on or after the commencement of this Law, a public body makes a decision or recommendation affecting an individual personally, the person is entitled, on request made within a reasonable time of making the decision or recommendation, to be given written a statement –

- (a) setting out the findings on the material questions of fact;
 (b) subject to subsection (2), referring to the evidence of other material on which the findings were based; and
 (c) giving reasons for the decision or recommendation.

(2) Nothing in this section limits the operation of section 7 (Reasons for withholding information).

(3) Sections 13 to 19 apply, with necessary modifications, to a request made under subsection (1) above, except that no fee or charge is payable for providing to an applicant a written statement in accordance with a request made under subsection (1).

(4) Nothing in this section entitles a person to obtain a written statement of advice given to the President.

Miscellaneous provisions

Regulations and fees

27. (1) The Minister may make regulations prescribing any matters which are required or permitted by this Law to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Law, including prescribing reasonable fees or scales of fees for the purposes of this Law.

(2) Any fee prescribed under subsection (1) –

(a) must be reasonable; and

(b) must not exceed the likely cost of making the information available.

(3) No fee is payable for making available to an applicant personal information about the applicant or for a request that is made in the public interest.

(4) Regulations under subsection (1) are subject to the requirements for making of regulations set out in the Constitution.

MEMORANDUM

Draft Access to Information Law 2013

1. Introduction

This draft Law has been prepared by the Constitution Commission to ensure that there are appropriate provisions in the law of Fiji to give effect to the public's right of access to information, and in a manner consistent with the chapter on Human Rights in the draft Constitution.

The draft Law is urgent since governmental transparency is essential for free and fair elections, public accountability, and for the immediate and long-term legitimacy and resilience of Fiji's constitutional democracy.

2. Consistency with the Constitution

The draft Constitution conforms to international best practice in protecting the civil and political right of freedom of expression. International legal protection of the right to freedom of expression encompasses the right of access to information. Furthermore, Article 32 of the draft constitution specifically enshrines the right of access to public information, and a right of access to privately-held information where access is required for the exercise or protection of any legal right.

While the right of access to information establishes a presumption in favour of openness over secrecy in service of the public interest, on occasion the public interest will tilt in favour of withholding public information from disclosure.

The draft Constitution also acknowledges that in certain circumstances rights may be limited. It includes a provision permitting the limitation of rights if this is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (Art 48).

In the draft Law, certain exemptions set out the lawful basis for withholding information. For a public record to be exempt it must clearly relate to one or more specific public interest grounds that would be served by non-disclosure, all of which are narrowly defined and set out in the Law.

Moreover, all of the exemptions are subject to a public interest over-ride, which means that, where the public interest in disclosure is greater than the public interest in withholding the information, the information should be disclosed upon request.

Accordingly, the exemptions contained within the draft Law are consistent with the limitations clause (Art 48), in that they are “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

3. Overview of structure of draft Law

The draft Law contains seven parts:

- Preliminary
- Principles of access
- Facilitation of access to information
- Requests for access to official information
- Role of the Ombudsman
- Information about individuals
- Miscellaneous provisions

4. Clause by clause commentary

Preliminary

Clause 1 states that this Law may be cited as the Access to Information Act 2013 and will come into force on the day after the President assents to the Constitution of the Republic of Fiji, 2013, but that the coming into force may be deferred in the case of any or all public authorities by order of the Minister, to allow for proper planning for the implementation of the Law.

Clause 2 sets out all necessary definitions.

Clause 3 describes the scope and status of the Law, including the constitutional derivation of the Law, in that it gives effect to the right of access to information enshrined in Article 32 of the Constitution, and declares that the Law will be the primary law in relation to public access to official information and that it can be amended only in the manner prescribed by section 23 of Schedule 6 of the Constitution.

Clause 4 establishes the principle of proactive disclosure by requiring all public bodies to maximise the amount of official information that is automatically disseminated, making full use of all available technologies, and with the guidance of the Ombudsman.

Principles of access

Clause 5 affirms the principles on which this Law must be interpreted.

Clause 6 defines the meaning of ‘public body’.

Clause 7 spells out the 14 public interest grounds on which official information may be withheld: prejudice to the security or defence of Fiji; prejudice the entrusting the information of another country, another country's public body or an international organisation to the Government of Fiji; prejudice the maintenance of the law; endanger the safety of a person; cause serious prejudice to the effective formulation or development of government policy; seriously frustrate the success of a policy, by premature disclosure of that policy; significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; protect the privacy of a person; if disclosure would disclose a trade secret or be likely to unreasonably prejudice the commercial position of the person who supplied the information; protect information provided in confidence; prevent the disclosure of evaluative material (as defined); where disclosure is of information relating to the physical or mental health of a person; legal professional privilege; enable a public body to carry on negotiations without prejudice or disadvantage. Official secrets are not mentioned in this list because such information is captured by a number of the 14 listed grounds eg prejudice to security or defence; prejudice maintenance of law and order; cause serious prejudice to the development of policy. Government may continue to classify information as secret but would have to justify its non-disclosure on the basis of one of the grounds. (Clause 8 increases the protection given to such material.)

Clause 8 permits a public body to neither confirm nor deny the existence of the information requested where to do so would cause a public interest enunciated in *Clause 7* to likely to be prejudiced by the disclosure of the existence or non-existence of the information.

Clause 9 elaborates the circumstances under which a public body may refuse to grant access to information. These are that (i) one of the fourteen grounds for withholding information set out in clause 7 exists; (ii) it is refused pursuant to clause 8; (iii) making the information available would be contrary to an express direction of a court or of Parliament; (iv) despite all reasonable steps having been taken to find the record, it cannot be found or the public body is satisfied that it does not exist; or (v) making the information available would substantially and unreasonably divert the resources of the public body from its other operations.

Clause 10 states that access to a record must not be refused unless the harm to the protected interest outweighs the public interest in disclosure.

Compliance with the Constitution:

Clauses 7-9 limit the right of access to information enshrined in Article 32 of the Constitution. However, the clauses do so taking account of the competing public interests, recognizing that even in an open and democratic society there will be occasions when the public interest in withholding information is greater than the public interest in disclosure. Furthermore, the justification for non-disclosure is carefully defined in relation to a set of narrowly drawn grounds for withholding (clause 7). A record cannot be withheld unless one or other of the fourteen grounds set out in Clause 7 is applicable. Moreover, the public interest is further protected by the public interest over-ride (Clause 10), which states that even where there is a public interest in withholding information, it must outweigh the public interest in disclosure for a refusal to grant access to be permissible and lawful.

This complies with the requirement in the limitation clause in the proposed Constitution (Art 48) that rights may be limited only to an extent that is proportionate to the reason for their limitation.

Facilitation of access to information

Clause 11 requires public bodies to proactively disclose information; publish contact details for potential requesters; appoint an officer to be responsible for responding to requests; and establish and maintain a procedure for responding to and processing requests in a timely and efficient manner. Public bodies must also publish a 'guide' to the structure and functions of the public body, as well as the categories of information held by it. The Ombudsman may issue guidelines for the facilitation of access to information.

Clause 12 sets out the duties of the principal officer of a public body in respect of publishing the availability of records by his or her public body.

Requests for access to official information

Clause 13 provides for the making of a request to obtain access to an official request. It permits a fee to be set. (See clause 27 on fees.)

Clause 14 imposes a duty on the public body to give reasonable assistance to a requester where the original request is insufficiently specific, has been made to the wrong public body or has not made it in accordance with Clause 13. Furthermore, it requires the public body to transfer the request to the correct public body where it has been mistakenly requested, provided that the requester is informed in writing of the transfer.

Clause 15 requires the public body to notify the requester of its decision as to whether to grant access or not within 30 days of the request.

Clause 16 permits the public body to extend the time limit within which it must provide access in certain, limited circumstances to a maximum of 60 additional days. The body must provide the requester with reasons for the extension.

Clause 17 provides for different forms of permissible access to records.

Clause 18 permits a public body to provide access to parts of a record while withholding access to other parts. If parts of a record as exempt from disclosure under clauses 7-9 the body may delete them from the record made available to the requester.

Clause 19 requires the public body to set out in writing the grounds for refusing access to a record to the requester.

Compliance with the Constitution:

Clauses 13, 15, 16 and 19 all provide for some modest limitation of the right of access to information enshrined in Article 32 of the Constitution. However, the limitations are of an administrative or procedural nature, and seek to balance the rights of the requester with the reasonable bureaucratic and related needs of the public body, by enabling the public body to receive the request in a comprehensible form and giving it reasonable time to process and determine the request. Accordingly, they would, therefore, be justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom as required for the limitation of constitutional rights under Article 48 of the draft Constitution. Clause 18 permits a public body to delete exempt information from a record that is to be disclosed, but constitutional rights would be protected by virtue of the fact that only information that is exempt pursuant to the provisions of the Law may be redacted.

Role of the Ombudsman

Clause 20 provides a requester who has been denied access to an official record with a right to complain to the Ombudsman.

Clause 21 sets out the powers of the Ombudsman when responding to a complaint, and empowers him or her to order release of the record or records requested, affirm the grounds for denying access, or to remit the matter back to the public body with appropriate guidance.

Clause 22 sets out additional powers and duties of the Ombudsman, to monitor compliance with the Law, make recommendations, provide training, and publicise the rights and duties established by the Law.

Clause 23 requires the Ombudsman to establish a multi-stakeholder forum as soon as practicable after the commencement of the Act to support the implementation of the Law. This forum of representatives of government, civil society and the private sector will contribute to effective implementation of the Law and ensure that the interests of all parties are properly considered in designing mechanisms to implement it.

Clause 24 requires the Ombudsman to issue a Code of Practice on records' management, and to update it from time to time.

Information about individuals

Clause 25 provides individuals with a right to apply to a public body where they believe that personal information about themselves is incomplete, incorrect, out of date or misleading, and imposes a duty on the public body concerned to respond to the applicant informing them of the action taken as a result of the request for the personal information to be corrected.

Clause 26 requires a public body that has made a decision or a recommendation affecting an individual person to provide that person with a written statement setting out the findings on material

questions of fact and referring to the evidence of other material on which the findings were based, and giving reasons for the decision or recommendation.

Miscellaneous provisions

Clause 27 empowers the Minister to make regulations prescribing any matters needed for the implementation of this Law, including prescribing fees for accessing information.

Compliance with the Constitution:

Requiring a requester to pay a fee may serve to limit the right of access to information enshrined in Article 32 of the Constitution, by deterring or preventing potential requesters from making a request. This may especially be so in the case of an indigent requester. Clause 27 requires, however, that fees must be reasonable and must not exceed the likely cost of making the information available. Moreover, no fee is payable where the requester is requesting personal information about him or herself, or where the request is made in the public interest.