



## **Access Now Submission to the United Nations Human Rights Council on the Universal Periodic Review 37th Session Third Cycle for Nauru**

9 July 2020

### **About Access Now**

Access Now is an international organisation that works to defend and extend the digital rights of users at risk around the world. Through representation around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the continued openness of the internet and the protection of fundamental rights. By combining direct technical support, comprehensive policy engagement, global advocacy, grassroots grantmaking, legal interventions and convenings such as RightsCon, we fight for human rights in the digital age. As an ECOSOC accredited organisation, Access Now routinely engages with the United Nations in support of our mission to extend and defend human rights in the digital age.<sup>1</sup>

### **Introduction**

1. This is the third review for Nauru, last reviewed in November 2015.<sup>2</sup> At the time, the government of Nauru received 108 recommendations during the UPR in Geneva, of which 80 were supported and 28 were noted.<sup>3</sup> Nauru was first reviewed in January 2011.
2. The Universal Periodic Review (UPR) is an important UN mechanism aimed at addressing human rights issues across the globe. Access Now welcomes the opportunity to contribute to Nauru's third review cycle. This submission examines (1) freedom of expression and access to information and (2) the right to privacy in Nauru. Specifically, this submission raises concerns regarding internet shutdowns, protection of journalists and whistleblowers, freedom of peaceful assembly and association and data protection. The rights to freedom of expression, access to information and privacy remain priority issues for Nauru.

### **International and domestic human rights obligations**

3. Nauru has signed onto and ratified international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR). Nauru has not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup>

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<sup>1</sup> Access Now, [Access Now About Us](#).

<sup>2</sup> UN Human Rights Council, [Universal Periodic Review - Nauru](#).

<sup>3</sup> UPR-Info, [2RP: Responses to Recommendations and Voluntary Pledges: Nauru](#).

<sup>4</sup> [Status of Ratification Interactive Dashboard Nauru](#), OHCHR.

4. Part II of the Constitution of Nauru provides for judicially enforceable fundamental rights. Among other fundamental rights, Part II establishes the rights to life in Article 4, freedom of conscience in Article 11, freedom of expression in Article 12 and peaceful assembly and association in Article 13.<sup>5</sup>
5. Section 3 of Article 12 poses certain restrictions on the right to freedom of expression. For instance, pursuant to this section, laws that prevent the disclosure of information received in confidence are not inconsistent with the right to freedom of expression. Neither are laws "that are reasonably required for the purpose of regulating the (...) technical operation of telephony, telegraphy, posts, wireless broadcasting or television or restricting the establishment or use of telephonic, telegraphic, wireless broadcasting or television equipment or of postal services."<sup>6</sup>

### **Freedom of expression and access to information**

6. Although freedom of expression is constitutionally protected in Nauru, it is not always respected or fostered by the government of Nauru.
7. In 2016, the government of Nauru updated its criminal law by replacing the Criminal Code from 1899 by the Crimes Act 2016. The new law was welcomed by civil society organizations for its improvement on human rights.<sup>7</sup> Yet, it still poses certain concerns regarding the enjoyment of the right to freedom of expression. Division 13.2 of the Crimes Act provides for the crime of defamation. Pursuant to section 250, one commits this offense if "(a) the person publishes defamatory matter of another living person (the 'victim'); and (b) the person: (i) knows the matter is false; or (ii) does not have regard to whether the matter is true or false; and (c) the person publishes the matter being reckless as to whether serious harm is caused to the victim or another person."<sup>8</sup> The punishment for criminal defamation is three years' imprisonment.
8. Criminal law is not an appropriate response to speech acts and it creates a dangerous space for human rights abuse in the form of state-sponsored intimidation and unjustified prosecution of critical voices. It also leads to grave risks of chilling effect on speech as people may self-censor because of the fear of reprisals and criminal prosecution coming from the State.
9. Despite previous recommendations from civil society organizations in previous UPR reviews,<sup>9</sup> Nauru still lacks legislation on access to information. Furthermore, the media is owned and operated by the government, which gives authorities greater control over published and disseminated content.<sup>10</sup>

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<sup>5</sup> [Constitution of Nauru](#), 1968.

<sup>6</sup> *Id.*

<sup>7</sup> Amnesty International, [Nauru: New criminal law is welcome improvement on human rights](#) (15 June 2016)

<sup>8</sup> Republic of Nauru, [Crimes Act 2016](#), Act n. 18 of 2016.

<sup>9</sup> Nauru Island Association of Non-Governmental Organisation - NIANGO, [Joint Submission 3 for Nauru's second UPR review](#) (March 2015)

<sup>10</sup> See Nauru Island Association of Non-Governmental Organisation - NIANGO, [Joint Submission 3 for Nauru's second UPR review](#) (March 2015)

10. The government has repeatedly prevented people, including journalists and independent observers, from accessing the island, especially since asylum seekers started arriving in Nauru<sup>11</sup> In March 2016, for instance, the government changed the country's immigration rules to require that Australians and New Zealanders wanting to visit Nauru will need a sponsorship letter from a Nauruan citizen. Non-compliance with this rule may trigger a fine of up to AUD\$5,000 and up to one year imprisonment.<sup>12</sup> The government also imposed a fee on the media visa application in the amount of AUD\$8,000, which is non-refundable, even if the application turns out to be unsuccessful.<sup>13</sup>
11. In 2018, the government banned journalists from the Australian Broadcasting Corporation (ABC) from attending the annual meeting of the Pacific Islands Forum, which was hosted by Nauru. The government justified the restriction under the allegation that ABC was interfering in Nauru's domestic affairs prior to the 2016 election.<sup>14</sup>
12. Access to the internet, particularly to an open and high-quality internet, also helps ensure citizens' access to information, as well as to relevant services and economic mobility. By expanding and enhancing connectivity, the government enables the enjoyment of various human rights, especially by vulnerable communities, who are mostly affected by the lack of connectivity.
13. It is imperative that everyone, especially those in at-risk or under-served communities, such as low-income people, have access to a high-quality internet connection. In light of the COVID-19 pandemic, the internet is an essential tool for employment, education, health, communication, political engagement, and accessing other important resources. Moreover, those without a connection are cut off from exercising a broad range of human rights, including the right to access information.<sup>15</sup>
14. Studies conducted by the International Telecommunication Union (ITU) demonstrate that, in 2017, 57% of the Nauruan population had access to the internet.<sup>16</sup> In 2011, 54% of the population was online, while in 2001 only 2,99% of the Nauruans had access to the internet.<sup>17</sup>
15. In May 2018, the government of Nauru signed an agreement with the Asian Development Bank (ADB) concerning the funding of the delivery of high-speed internet to Nauruans.<sup>18</sup>
16. As connectivity is expanded and enhanced, more people go online and thereby benefit from the educational, professional and personal benefits provided by the internet. They

<sup>11</sup> Amnesty International, [Island of Despair: Australia's "processing" of refugees on Nauru](#) (2016), at p. 52-53; See also Amnesty International, ['It's better to die from one bullet than being slowly killed every day' – refugees forsaken on Nauru](#) (4 August 2016).

<sup>12</sup> ABC News, [Nauru visa changes slammed as 'crazy, embarrassing' by former president](#) (7 March 2016)

<sup>13</sup> The Government of the Republic of Nauru, [Visa Requirements](#)

<sup>14</sup> Michael Koziol, [Nauru bans the ABC from covering Pacific Islands Forum over 'blatant interference'](#), The Sydney Morning Herald (2 July 2018)

<sup>15</sup> Access Now, [Access Now releases "Expanding connectivity to fight COVID-19: recommendations for governments and telcos"](#) 30 April 2020.

<sup>16</sup> ITU, [Country Profile: Nauru](#) (2017)

<sup>17</sup> ITU, [Statistics - Nauru](#).

<sup>18</sup> ADB, [ADB Signs Agreement to Help Kiribati, Nauru Access High-Speed Internet](#) (2 May 2018)

are also able to learn how to securely and effectively exercise their human rights. The government, on its end, must ensure that human rights are protected online and implement an open, transparent and accountable internet governance framework.

## Internet shutdowns

17. In 2015, the government of Nauru imposed an internet shutdown in the island, blocking people from accessing certain websites, including Facebook.<sup>19</sup> At the time, the government argued that the measure aimed to protect citizens from abusive content on the internet, such as online pornography,<sup>20</sup> and claimed that the internet restrictions would remain in place until protective mechanisms were adopted to "ensure that Nauruans are not left exposed and vulnerable to the actions of criminals, sexual perverts and cyber bullies."<sup>21</sup>
18. The internet shutdown and the disruption of access to the affected websites set an alert to civil society organizations, human rights defenders and journalists. Many people saw these measures as a means to cover up the human rights violations that had been happening in the immigration detention center for people seeking asylum in Australia, and contain the spread of information relating thereto.<sup>22</sup>
19. Access Now commends the government of Nauru for lifting the ban in January 2018.<sup>23</sup> Yet, we take the opportunity to highlight that internet shutdowns are absolutely impermissible under international human rights law, as it has been declared by UN and international experts.<sup>24</sup>
20. In the current context of the COVID-19 pandemic, access to the internet becomes even more important as the internet became a fundamental tool for the dissemination of public health information, such as preventive measures, and governmental responses and guidelines to contain the spread of the virus.<sup>25</sup>

## Protection and safety of journalists, whistleblowers

21. The situation of the immigration detention center in Nauru and the related human rights abuses have been covered up by extremely dangerous efforts deployed by both the Australian and the Nauruan governments.<sup>26</sup> Aside from restrictions on access to the island and disruptions to the internet, these efforts include reprisals to journalists and

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<sup>19</sup> Access Now, [Why is a tiny nation facing an internet shutdown?](#) (14 May 2015)

<sup>20</sup> Access Now, [Why what happens on the little island of Nauru should matter to the whole world](#) (21 May 2015)

<sup>21</sup> President Baron Waqa *in supra* note 8.

<sup>22</sup> Access Now, [Why what happens on the little island of Nauru should matter to the whole world](#) (21 May 2015); *See also* OHCHR, [UN Rights Expert Urges Nauru to Withdraw Norms Threatening Freedom of Expression](#) (22 May 2015)

<sup>23</sup> Freedom House, [Freedom in the world 2019 - Nauru](#) (2019)

<sup>24</sup> Access Now, [Internet kill switches are a violation of human rights law, declare major UN and rights experts](#) (4 May 2020)

<sup>25</sup> Access Now, [#KeptOn: Internet shutdowns during COVID-19 will help spread the virus!](#) (17 March 2020)

<sup>26</sup> Amnesty International, [‘It’s better to die from one bullet than being slowly killed every day’ – refugees forsaken on Nauru](#) (4 August 2016); Amnesty International, [Island of Despair: Australia’s “processing” of refugees on Nauru](#) (2016), at p. 52-53.

whistleblowers, who fear prosecutions and other measures if they speak up about what has been happening in Nauru.

22. In 2018, Barbara Dreaver, a journalist for New Zealand's TVNZ was detained by Nauruan police for attempting to interview refugees, while covering the Pacific Islands Forum in the island. After being held by the police for four hours, Dreaver had her forum accreditation revoked, which prevented her from attending the forum media center and press conferences, although she could still cover forum-related stories. The government then claimed that journalists should resort to "proper channels" if they wanted to conduct interviews with refugees.<sup>27</sup>
23. In response to this episode and the media's attempt to cover the refugees' stories, president Baron Waqa gave a hostile statement addressed to the media, mainly foreign news outlets. He accused the media of profiting from disseminating misinformation about the refugees, and used this as a justification for the media visa application fee.<sup>28</sup>
24. Researchers from Amnesty International and Human Rights Watch went to Nauru to assess the situation of refugees and asylum seekers in the island. During their research, they interviewed several services providers related to the immigration detention center, who agreed to share information but expressed their fear of being subject to criminal prosecution or other penalties for providing information.<sup>29</sup> It should be noted that these potential reprisals come from both the government of Australia and Nauru, which have been acting together to surround the events in the island by a "wall of secrecy."<sup>30</sup>
25. By actively posing threats to journalists and whistleblowers in Nauru, the government of Nauru hinders people's right to freedom of expression and access information on the situation in the island, thus failing to comply with international human rights law standards.

### **Freedom of peaceful assembly and association**

26. The constitution of Nauru guarantees the freedom of peaceful assembly and association. Yet, in some occasions, the government has attempted to restrict the exercise of this human right.
27. For instance, demonstrations concerning the treatment of asylum seekers at the Australian immigration detention center in Nauru are often subject to governmental reprisal.<sup>31</sup>
28. In 2015, 19 people, including several former parliamentarians and a former Nauruan president were charged and prosecuted for "rioting", disturbing the legislature" and

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<sup>27</sup> Helen Davidson, [New Zealand reporter detained by police on Nauru after refugee interviews](#) (4 September 2018)

<sup>28</sup> RNZ, [Nauru president attacks journalists for covering refugee stories during Forum](#) (6 September 2018)

<sup>29</sup> Amnesty International, [Australia: Appalling abuse, neglect of refugees on Nauru](#) (2 August 2016)

<sup>30</sup> *Id.*

<sup>31</sup> *Supra* note 21 - FH.

"entering a restricted area", after they organized a protest outside parliament. Together with other people, these individuals were "protesting against the suspension of three parliamentarians for granting interviews, critical of the government, to foreign media".<sup>32</sup> In 2019, the Nauru 19 group was found guilty of "rioting".<sup>33</sup>

29. Restrictions on individuals' freedom of peaceful assembly and association have serious impacts on their right to freedom of expression. Reprisals against peaceful protests and demonstrations that criticize governmental conduct not only amount to censorship of content by the authorities, but also trigger self-censorship by individuals themselves, who refrain from manifesting their views due to the fear of facing criminal and civil punishments.

### **The right to privacy and data protection**

30. During both the first and second review cycles, Nauru received no recommendations regarding the right to privacy or data protection.<sup>34</sup> Nonetheless, these are two latent concerns in the country.
31. Nauru has no privacy laws or any draft laws addressing privacy rights. The country also lacks legislation on data protection, consumer protection and cybercrimes laws.<sup>35</sup>
32. In recent years, Nauru has been the stage of serious human rights abuses, especially with regard to the immigration detention center open in the country upon an agreement signed with Australia.<sup>36</sup> In this context, violations of the rights to privacy of refugees and asylum seekers have also been carried out.
33. In 2015, for instance, the government of Nauru publicized the name of a Somali refugee who filed a complaint of sexual assault. The police report was published together with graphic details of the alleged attack.<sup>37</sup>

### **Recommendations**

34. We urge that freedom of expression, access to information and the right to privacy are prominent issues in the upcoming UPR review cycle. We therefore recommend that the government of Nauru:
35. Sign and ratify the International Covenant on Economic, Social and Cultural Rights.
36. Repeal or amend the provisions of the Crimes Act 2016 on criminal defamation in order to bring Nauru's legal framework in line with international human rights law obligations.
37. Repeal or amend national immigration rules to allow wide access to the island, including by foreign journalists, human rights defenders and NGOs, in accordance with

<sup>32</sup> CIVICUS, [Judicial Harassment of Nauru 19 Protesters Continue](#) (18 March 2019)

<sup>33</sup> Helen Davidson, [Nauru 19 found guilty of rioting and other charges in controversial retrial](#), The Guardian (11 December 2019)

<sup>34</sup> UPR Info [Database of Recommendations](#).

<sup>35</sup> UNCTAD, [Cyberlaw Tracker: The case of Nauru](#)

<sup>36</sup> Julia Hollingsworth, Angus Watson, [Taking Australia's asylum seekers was a 'deal with the devil': former Nauru leader](#) (18 April 2019)

<sup>37</sup> Amnesty International, [Island of Despair: Australia's "processing" of refugees on Nauru](#) (2016), at p. 39.

international standards.

38. Make a state pledge to refrain from imposing any restrictions on internet access and telecommunication in the future, and amend Article 12 of the Constitution to explicitly prevent the blocking or throttling of information and communications technologies, networks, applications, or services.
39. Ensure that national legislation and policies fully guarantee the safety of journalists, whistleblowers and human rights defenders, so that these important actors can pursue their activities freely without undue interference, attacks or intimidation.
40. Refrain from restricting individuals' right to freedom of peaceful assembly and association, pursuant to the ICCPR, and subjecting them to criminal prosecution or civil liability.
41. Enact a comprehensive data protection law to protect the right to privacy, and adequately fund and support its implementation.
42. Enact a law affirming the public's access to information, and ensure its proper functioning with appropriate administrative resources, support, and accessibility.
43. Ensure that all governmental activity, including law enforcement, is consistent with international human rights obligations, including the protection of the right to privacy, and is conducted on the basis of a legal framework which is publicly accessible, clear, precise, comprehensive and non-discriminatory.

## **Conclusion**

44. The UPR is an important UN process aimed at addressing human rights issues worldwide. It is a rare mechanism through which citizens around the world get to work with the government to improve human rights and hold them accountable to international law. Access Now is grateful to make this submission.

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