



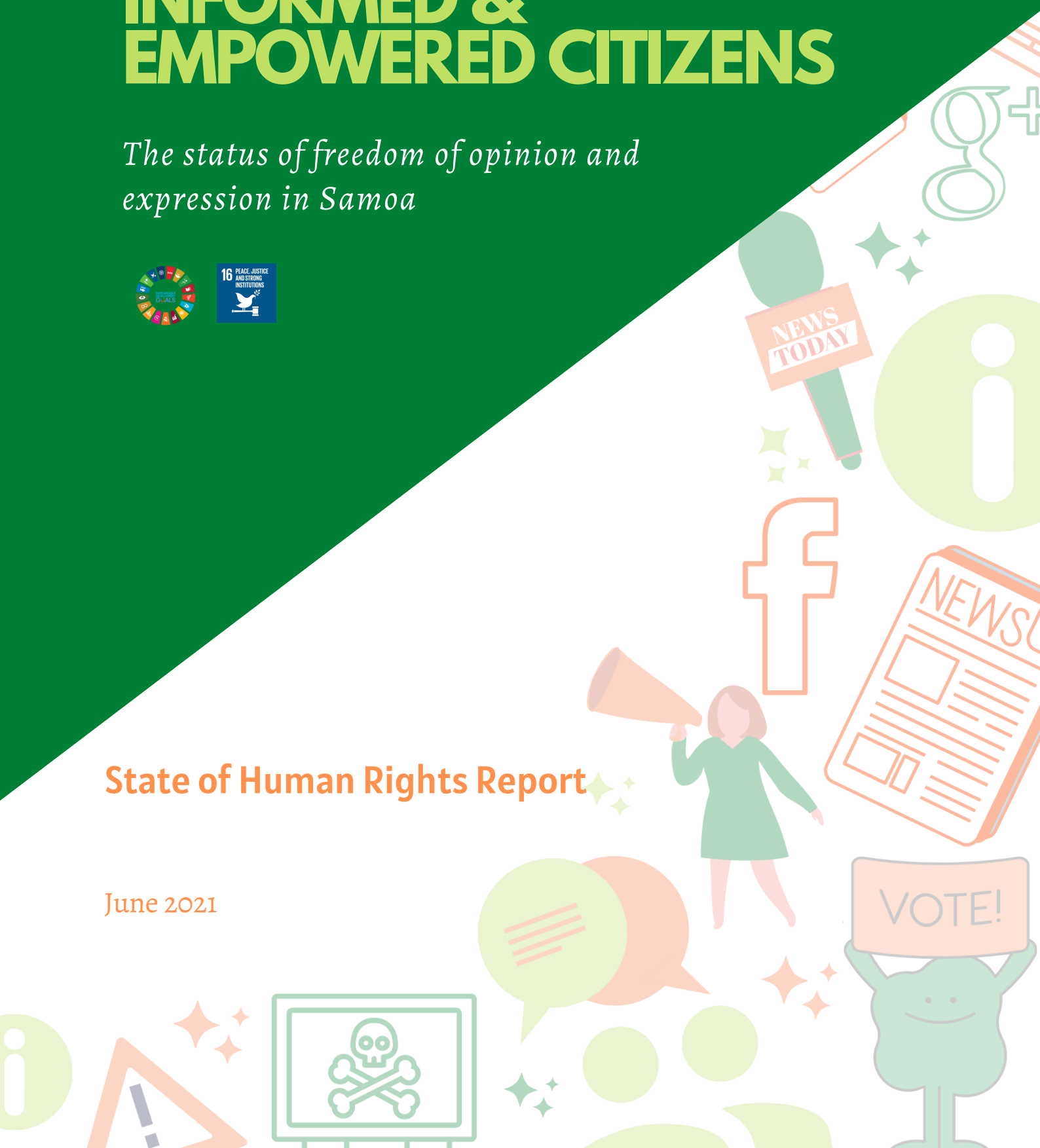
# INFORMED & EMPOWERED CITIZENS

*The status of freedom of opinion and expression in Samoa*



State of Human Rights Report

June 2021



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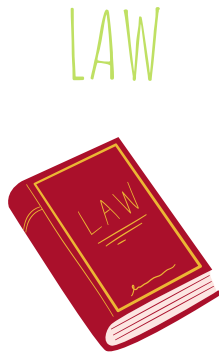
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Design and layout: Charles Dean  
Printing: SLFEA Commercial Printers Ltd  
Address: The Office of the Ombudsman, Level 2, SNPF Plaza, Savalalo, SAMOA | PO Box 3036  
Phone: +685 25394 | Fax: +685 21862  
Email: [info@ombudsman.gov.ws](mailto:info@ombudsman.gov.ws)

# STATUS OF FREEDOM OF OPINION AND EXPRESSION IN SAMOA

Freedom of expression and speech (which embraces media freedom and access to information) is protected under Article 13(1)(a) of Samoa's Constitution



Article 19 of the ICCPR provides for the promotion and protection of the freedom of opinion and expression which includes access to information. Samoa became a party to the ICCPR in 2008



## WAYS USED TO EXPRESS VIEWS/ OPINIONS

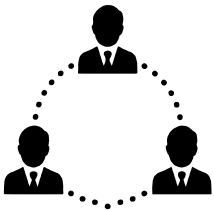


25% of those surveyed expressed that they express their views/ opinions through Facebook/ social media



49% of those surveyed expressed that they express their opinions/ views with others

## RESPONSIBILITY



No one can rely on the freedom of expression or speech to limit or undermine the human rights of others

Individuals are free to express their views and opinions (including receiving information), however, they must do so in a way that respects and does not negatively impact others which is consistent with our Fa'asamoa values of faa'aloalo and va tapuia

## RESTRICTIONS & LIMITATIONS



Article 13(2) of Samoa's Constitution provides that reasonable restrictions and limits may be imposed on freedom of speech and expression in the interests of national security, friendly relations with other States, public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in confidence, for preventing contempt of Court, defamation or incitement to any offence

Article 19 of the ICCPR (which Samoa is a party) provides that freedom of opinion is absolute and should be subject to no restrictions. Freedom of expression on the other are subject to certain restrictions that must be provided by law, necessary for pursuing a legitimate aim in a democratic society, and proportionate

Source: Constitution of Samoa, ICCPR

# STATUS OF FREEDOM OF OPINION AND EXPRESSION IN SAMOA

## PUBLIC UNDERSTANDING



11% of those surveyed expressed that freedom of expression allows individuals to express views without limitation

22% of those surveyed expressed that freedom of opinion and expression comes with responsibilities e.g. expressing views in a way that does not negatively impact on others

23% of those surveyed expressed that freedom of opinion and expression allows individuals to share personal problems without fear or judgment

## FREEDOM OF OPINION

Freedom of opinion guarantees the right to every person to hold opinions without interference and is not to be subject to exceptions or restrictions

Freedom of opinion encompasses the right to change an opinion whenever and for whatever reason a person so freely chooses

Freedom of opinion also includes the freedom not to express one's opinion



## FREEDOM OF EXPRESSION

Freedom of expression guarantees to every person freedom to exchange information, debate ideas and express speech. These could be exchanges on political issues, private or public affairs, discussions on human rights, general well being or whatever else people may choose to address

Freedom of expression is viewed by international human rights law as a cornerstone right due to two main reasons – development (personal level) and good governance (state level)



Freedom of expression and information goes hand in hand with press freedom. It allows for inclusivity of all voices including marginal groups and allow people to participate in decision-making process

The freedom of expression is not absolute. It carries with it special duties and responsibilities and is subject to certain restrictions e.g. you cannot express views that would incite hostility or hatred towards others



**Source:** Consultations, ICCPR, HRC General Comment No. 34.

# STATUS OF FREEDOM OF OPINION AND EXPRESSION IN SAMOA

## RIGHT OF ACCESS TO INFORMATION



Right of access to information is an integral part of the fundamental freedom of expression. It is important to a functioning democracy as it empowers citizens, promote transparency and accountability in the working of the Government or any public body

Right of access to information is not absolute. It is subject to certain restrictions e.g. confidentiality, privacy and security concerns

## WAYS PEOPLE USE TO ACCESS INFORMATION ON GOVERNMENT POLICIES, THE NEWS, RESEARCH AND OTHERS

35% of those surveyed obtain their information through newspapers



31% of those surveyed access/get their information from social media/ Facebook. This is because it is convenient and accessible

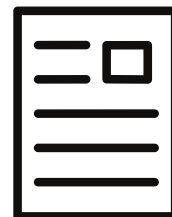


19% of those surveyed consult public bodies websites and the internet. However, they noted that using public bodies' websites is still a challenge as some public bodies' websites do not provide up to date information



13% of those surveyed submit requests for information to agencies. However, there is a challenge with processing times, and even when information is provided they are not comprehensive or relevant

2% of those surveyed rely on press releases to get their information



Source: Consultations, ICCPR, HRC General Comment No. 34.

# PROCESS FOR DISCUSSING STATE OF HUMAN RIGHTS REPORTS IN PARLIAMENT

## STEP 1:

The Office carries out assessment of human rights status in Samoa for the previous year and submits report to Speaker of Legislative Assembly (Omb Act s 40(1)).

*The Office consults relevant stakeholders (public, government ministries, NGOs, etc.)*

## STEP 2:

The Speaker receives the Report and the report is referred to the Standing Orders, Electoral, Petition and Constitutional Offices Committee (Committee) for consideration (Standing Order (SO) 51) and (Omb Act s 40(2)).

## STEP 3:

The Committee scrutinizes the report pursuant to the Standing Orders and call in relevant Government ministries to respond to any matters raised in the report (SO 54) and (Omb Act s 40(3)(a)).

## STEP 4:

The Parliamentary Committee prepares its report and recommendations and submits to the Legislative Assembly for Government's response. The Committee is to also advice responsible Minister for feedback (SO54(4)).

## STEP 5:

The Clerk refers Committee Report to Government (through relevant agency) for a response. The response to directly address Committee recommendations and affirm the Governments position on any issues raised (SO 55(1-2)).

*The Office is not responsible to answer to its recommendations and therefore the report is not to be reverted back for a response. The response is to be provided by the Government through relevant agency.*

## STEP 6

Upon receipt of Government Responses the Clerk circulates the responses to all members prior to a Whole House sitting for debate. (SO 55(3)). If a member has a matter to raise in relation to the response by Government, the Clerk refers this to the Minister to provide response to during the Whole House debate (SO 55(4)).

## STEP 7:

The Committee Chairperson during Whole House sitting moves, "That the report be adopted". There is no amendment or debate on the question (SO 128) and and (Omb Act s 40(3)(b)).

## STEP 8:

The Office monitors if recommendations have been implemented by Government.



## APPLICATION:

if a recommendation is in relation to improving access to health, then the most relevant government agency to address this would be Ministry of Health; if the recommendation is to improve water supply to rural communities the responsible agency would be Samoa Water Authority. There are also recommendations targeted to Non-Governmental Organisations (NGOs) as well as to the Office.



# SUMMARY OF KEY POINTS

- Freedom of expression is a fundamental right protected under Article 13(1)(a) of Samoa's Constitution.
- Implicit in the freedom under Article 13 is the right to access information and freedom of the press.
- No one can rely on the freedom of expression or speech to limit or undermine the human rights of others.
- Article 19 of the ICCPR (which Samoa is a party) provides that freedom of opinion is absolute and should be subject to no restrictions. Freedom of expression on the other are subject to certain restrictions that must be provided by law, necessary for pursuing a legitimate aim in a democratic society, and proportionate.
- Subject to the above conditions, freedom of expression may be limited in some circumstances and in particular does not protect statements inciting hatred and discrimination against others, particularly by reference to their race, religious belief and gender or sexual orientation.
- Article 13(2) of Samoa's Constitution provides that reasonable restrictions and limits may be imposed on freedom of speech and expression in the interests of national security, friendly relations with other States, public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in confidence, for preventing contempt of Court, defamation or incitement to any offence.
- The perception that freedom of expression allows individuals to say whatever they like, to whoever, whenever is a serious misconception. Freedom of expression is subject to restrictions. For example, freedom of expression can be restricted for the protection of the reputations of others from defamatory remarks.
- Civil defamation is governed by the *Defamation Act 1993*, while criminal defamation is regulated by the *Crimes Act 2013* – section 117A(2) and the *Electoral Act 2019* (elections context) – section 90.
- Determining what is hate speech and speech that is offensive but can be protected is a challenging task. In making the distinction it is important to consider certain factors including intention of persons making statement, the context it was made, intended audience and the particular words and form of communication.
- Addressing hate speech does not mean limiting or prohibiting freedom of speech and expression. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility, and violence, which is prohibited under international law
- Freedom of expression is integral to the enjoyment and exercise of other rights including the right to take part in the conduct of public affairs, including the right to vote.

- Freedom of expression allows individuals to express views and opinions which extends to views and opinions that may shock, disturb or offend deeply-held beliefs of others and go against and severely criticize Government policy or work.
- Media freedom is essential to the operation of a genuine democracy and is currently protected under our Constitution and generally respected in practice.
- While media freedom is essential to the operation of a genuine democracy, public confidence in the media is also crucial to its success as a trusted and reliable source of news and information.
- Freedom of expression and information goes hand in hand with press freedom. It allows for inclusivity of all voices including marginal groups and allow people to participate in decision-making process.
- Any regulation of the media is legitimate and fair and is not used to arbitrarily gag the media or censor information the public has a right to know.
- In undertaking measures to restrict or limit internet access, human rights norms call for a balanced approach where restrictions on communications conform to strict tests of necessity and proportionality.
- It is the responsibility of State parties to proactively put in the public domain Government information of public interest in order to give effect to the right of access to information.
- Right of access to information and knowledge is a prerequisite for building inclusive knowledge societies. Information not only empowers people to make better decisions, but also allows them to exercise their rights, be economically active, learn new skills and hold their governments accountable.
- Protection of whistleblowers not only promotes the right to freedom of speech and expression and the right of access to information of public interest, but also promotes good and effective governance.





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# FOREWORD

The realization of human rights of all, underlies the transformative 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs). More than 90% of the SDGs and their targets correspond to human rights obligations.<sup>1</sup> As progress is made on achieving the SDGs across their three dimensions of economic, social and environmental, so too, progress is made on human rights obligations. Commendable efforts have been taken by government to date to realize the human rights of Samoans. In Samoa's Second Voluntary National Review on the implementation of the Sustainable Development Goals, 2020, the report highlights a Human Rights approach in Sustainable Development in Leaving No one Behind.<sup>2</sup>

Samoa is currently a party to six of the nine core human rights conventions one of which is the International Convention on Civil and Political Rights (ICCPR) which Samoa ratified in 2008.<sup>3</sup> The ICCPR guarantees civil and political rights including the right to hold and express an opinion and freedom of expression (speech). The ICCPR also embraces the right of access to information held by public bodies which in turn enables the public to be informed and express views on issues important to them. In the national context, freedom of speech and expression is a fundamental right under Article 13 1(a) of the Constitution. It reinforces all other human rights by granting individuals the ability to express opinions and speak freely which is essential to bring about change in society and allowing it to develop and progress.

My Office is mandated under the *Ombudsman Act 2013* to produce a yearly report documenting the state of human rights in Samoa on a specific human rights issue. This Report will be the 7th State of Human Rights Report (SHRR) that my Office has produced and it focuses on the status of freedom of opinion and expression in Samoa, including the right to information.

Issues associated with the application of the aforesaid rights and freedoms have been raised frequently through our monitoring work and from our consultations with relevant stakeholders and the public – hence the reason to explore it further. In our first ever SHRR in 2015, freedom of expression was briefly

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<sup>1</sup> Sarah Rattray, "Human rights and the SDGs - two sides of the same coin", *UNDP Blog* (5 July 2019) <https://www.undp.org/blogs/human-rights-and-sdgs-two-sides-same-coin>.

<sup>2</sup> Government of Samoa, *Samoa's Voluntary National Review on the Implementation of the Sustainable Development Goals to Ensure: Improved Quality of Life for All* (Apia, 2020) [https://sustainabledevelopment.un.org/content/documents/26429Samoa\\_Samos2ndVNR2020reduced.pdf](https://sustainabledevelopment.un.org/content/documents/26429Samoa_Samos2ndVNR2020reduced.pdf).

<sup>3</sup> The 9 core human rights conventions include: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of a Child (CRC), Convention on Rights of Persons with Disabilities (CRPD), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Convention for the Protection of All Persons from Enforced Disappearance (CPED), International Convention of the Rights of All Migrant Workers and their Families (ICWM) and United Nations Convention Against Torture (UNCAT). Samoa is a party to the following 6 conventions: CEDAW (1992), CRC (1994), CRPD (2016), CPED (2012), ICCPR (2008), UNCAT (2019).

discussed and was noted as an emerging human rights issue at the time.<sup>4</sup> The discussion of freedom of expression in 2015 highlighted concerns that to this day remain relevant. Some of these concerns include among others – the misunderstanding that the freedom of opinion and expression allows individuals to express their views however they want on whatever they want, without taking responsibility; the lack of awareness regarding limitations or restrictions on the freedom; poor access to official information held by public bodies; and the unregulated use of online platforms to expressly defame others and/or incite hatred towards them.

Citizens’ rights to freedom of opinion and expression supported and enabled by the right of access to information, are key to our development. They keep us informed as citizens so we can discuss and debate public affairs and they empower us to make the best choices on public issues and how we are governed. Two key take home points from this Report are; (1) individuals are free to express their views and opinions (including receiving information), however, they must do so in a way that respects and does not negatively impact others which is consistent with our Fa’asamoa values of faa’aloalo and va tapuia (application); and (2) any restrictions placed on such rights and freedoms must be carefully balanced and conform with international human rights norms of necessity and proportionality and our Constitution (necessary restrictions).

I acknowledge the contributions and cooperation of all our stakeholders and the public in providing feedback and submissions which have helped to inform our analysis and recommendations to Parliament. We hope this report will be a useful resource and will assist the State and everyone to ensure respect and protection of the freedom of opinion and expression and access to information for an informed and empowered citizenry.



Luamanuvao Katalaina Sapolu

**OMBUDSMAN**

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<sup>4</sup> Samoa Office of the Ombudsman NHRI Samoa, *State of Human Rights Report 2015 - Summary* (Apia, 2015) p. 9.



# EXECUTIVE SUMMARY

The Report discusses key issues associated with the freedom of opinion and expression. It also discusses the right of access to information and its connection in enabling citizens to express views on important matters.

To better understand the key issues raised during consultations, the Report explores various aspects of the concerned rights and freedoms including – defamation; hate speech; freedom of expression and political rights; freedom of expression and the media; the internet, freedom of expression, and safety of children online; right of access to information, and whistleblower protection. The Report also considers various contexts in which such freedoms and rights are and may be restricted or curtailed.

Contained within the Report are a number of recommendations to relevant Government ministries and agencies to ensure the continuous protection and promotion of such rights and freedoms in Samoa. The recommendations relate to three broad categories: (1) *outreach and awareness*, (2) *legislative reform and policy*, (3) *resourcing and capacity building*.

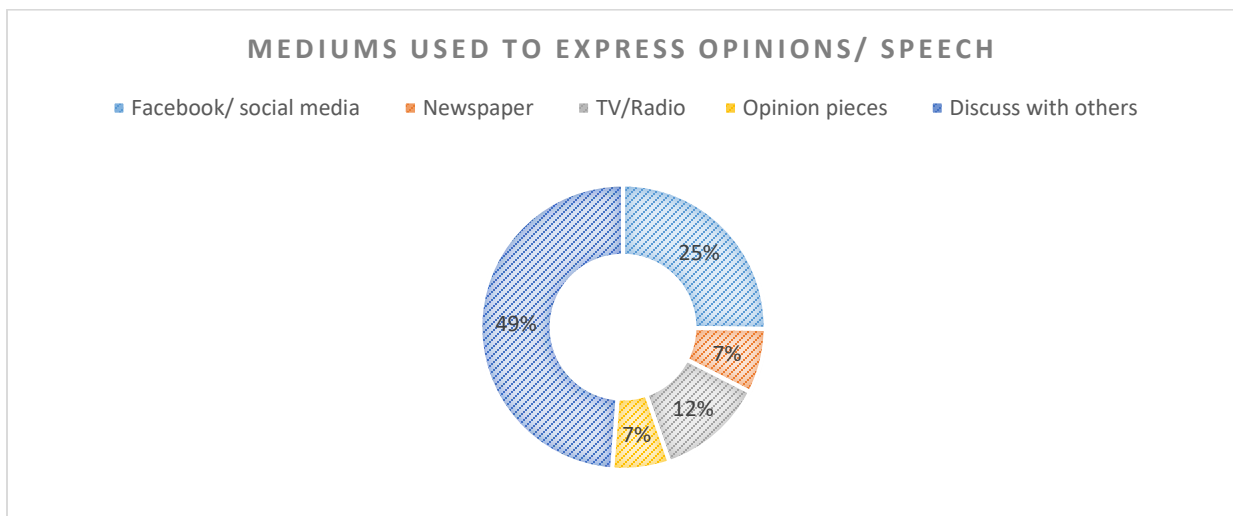
The Report endeavors to highlight the status of freedom of opinion and expression in Samoa – how they are applied, protected and promoted, and where improvements could be made for their progressive realization.

# INTRODUCTION

As Samoa continues to reap the benefits of the information age it has also been faced with many challenges towards certain freedoms and rights. The freedom of opinion and expression continue to attract debate regarding their application and limitations, as well as their importance. The same for right of access to information. The perception by some members of the public of human rights being a foreign concept continues to play into the confusion and misunderstanding therefore sharing the way people perceive the position such freedoms have in all sectors of Samoan society.<sup>5</sup>

Our freedom of opinion and expression enabled by the right of accessing official information held by public authorities play an important role in ensuring that we can express our views freely and receive information on different matters of concern to us. They are essential to the development of individuals and groups in that it allows them to participate, discuss, exchange and engage in decision-making on matters affecting them and also hold authorities to accountable.

**The graph below highlights the mediums used by those surveyed to express their opinions on various matters important to them. Overall, the two most commonly used mediums to express views in Samoa are through “discussions with others” and “social media/ Facebook”. People also use the newspaper, TV and radio as well as write opinion pieces to express views. Discussions in person is undoubtedly the most convenient and informative way, however those who responded that they use Facebook to express views stated that this is because it is easy and most people in Samoa are on Facebook especially youth.**



<sup>5</sup> For example, consultations reveal that expressing views or opinions (especially by younger persons) that may go against or disagrees with a view expressed by others (elders or leaders) is viewed as insubordination and disrespectful – Focus groups consultations (Upolu and Savaii).

Valuable as it is for Samoans to enjoy full freedom of expression and speech, it cannot be denied that there have also been challenges associated with the exercise of such freedoms similarly faced by other countries.

The increased use of the internet and social media by individuals to express their views and opinions (popular and unpopular) has brought with it many concerns supposedly towards unabated use of Facebook by faceless users to incite hate, to insult, bully, and to make false and defamatory remarks directed at individuals and their families causing great distress. In 2018 and 2021 respectively, the Government in response made calls for Facebook to be banned temporarily as a result of what it saw as inappropriate or unprincipled use of social media and the internet.<sup>6</sup> The lack of consideration for due care and individual responsibility in the exercise of the freedom of opinion and expression continues to reinforce such concerns.

There are also ongoing concerns regarding poor access by members of the public and the media to official information held by public authorities.<sup>7</sup>

### Scope and limitations

With a focus on the freedom of opinion and expression including the right of access to information, this report will discuss and analyze issues associated with their application, the necessary restrictions and limitations, as well as possible measures to address challenges and ensure that such rights and freedoms are responsibly exercised and protected in Samoa. The report will touch on various aspects of the different freedoms including defamation, privacy, cyberbullying, media freedom, access to information, and whistleblower protection.

There were two key limitations encountered in the compilation of this report. Firstly, there was the lack of time, budget and capacity to undertake focused consultations and a fully comprehensive status report and secondly, there was poor cooperation from key agencies in providing responses and information to our questionnaire surveys.

### Report methodology

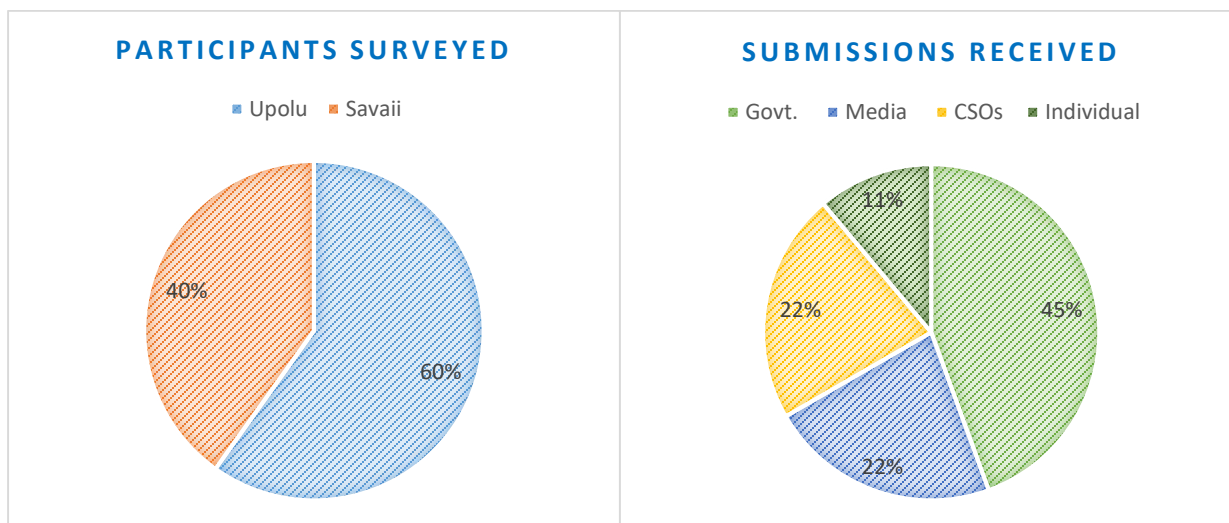
To inform the analysis and recommendations of the report the Office sought views from relevant government agencies, civil society organisations, media groups, and the general public including marginalized groups. Data was collected through questionnaire surveys distributed to key government agencies, civil society organisations (CSOs), media groups and members of the public, as well as face to face consultations and focus group discussions with village communities.

Overall we received 10 written submissions – 4 from government agencies, 2 from media organisations, 2 from CSOs and 1 individual – and surveyed 142 participants in six villages – 3 in Upolu and 3 in Savaii.

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<sup>6</sup> Joyetter Luamanu, “P.M. threatens to ban Facebook”, *Samoa Observer* (31 March 2018) <https://www.samoaoobserver.ws/category/samoa/23666>. Mata'afa Keni Lesa, “Govt’s Facebook ban plan dangerous”, *Samoa Observer* (25 July 2020) <https://www.samoaoobserver.ws/category/article/67398>. Soli Wilson “Govt. Facebook ban could backfire”, *Samoa Observer* (27 July 2020) <https://www.samoaoobserver.ws/category/samoa/67488>.

<sup>7</sup> Talamua News Media written submission (30 April 2021). Samoa Observer written submission (13 May 2021).



Desktop research on international standards and other relevant laws, cases, general comments, human rights reports, and articles both local and international were also consulted to strengthen analysis and expand discussions on certain matters.

### Structure of the report

Throughout this report, several devices are used to help the reader better understand the rights and freedoms discussed. These include:

*'Quotations'* from questionnaire surveys, consultations, and reports. Quotations are used to highlight common themes and extreme views on the issues discussed. The quotations are meant to provide an insight into the perspectives collected rather than reflect the views of the Office.

**'Did you know?'** and **'Information Points'** sections will also be featured to provide key facts and explanations of specific subject matters for knowledge building and readers' information. It is hoped that the narrative formed will help inform (1) rights holders about their rights and freedoms as well as their special duties and responsibilities associated with the application of such rights and freedoms, and (2) duty bearers about their responsibility and obligations of ensuring the respect, promotion, and protection of such rights and freedoms in Samoa.

### Recommendations within the report

Recommendations made are targeted to various actors who play a role in ensuring the respect, promotion and protection of freedom of expression, opinion and right of access to information in Samoa. They are also classified under three broad categories: **outreach and awareness, legislative reforms and policy, resourcing and capacity building.**



# REGULATORY FRAMEWORK: INTERNATIONAL HUMAN RIGHTS LAW

Freedom of opinion and expression including the right of access to information are important rights and freedoms for us all. The fulfillment of other rights depends upon the fulfillment of these rights. They are essential to human existence in a free society because they enable people as social beings to relate and to communicate with one another. They are also critical to keep necessary watch on the instruments of governance and make the government more accountable.<sup>8</sup>

In a democracy like Samoa, the protection and promotion of such freedoms and rights by the State as guaranteed to every Samoan citizen under our Constitution<sup>9</sup>, is strongly encouraged. It is also well established in international law under the Universal Declaration on Human Rights<sup>10</sup> and the ICCPR in which Samoa is a party.<sup>11</sup>

## Freedom of opinion

*Freedom of opinion* guarantees the right to every person to **hold opinions** without interference and is not to be subject to exceptions or restrictions.<sup>12</sup> The right to **express opinions**, on the other hand, is not absolute.<sup>13</sup> Freedom of opinion encompasses the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.<sup>14</sup> The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold is a violation of such right and any effort to coerce the holding or not holding of any opinion is prohibited.

<sup>15</sup> Freedom of opinion also includes the freedom not to express one's opinion.<sup>16</sup>

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<sup>8</sup> See Ban Ki-Moon, "Freedom of Expression, a Fundamental Human Right", *UN Chronicle*, <https://www.un.org/en/chronicle/article/freedom-expression-fundamental-human-right>. See also UNESCO, "About Freedom of Information", <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>.  
<sup>9</sup> *Constitution of Samoa*, Article 13(1).

<sup>10</sup> *Universal Declaration of Human Rights*, Article 19.

<sup>11</sup> Samoa became a party to the ICCPR in 2008.

<sup>12</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, <https://www.refworld.org/docid/4ed34b562.html>.

<sup>13</sup> Centre for Law and Democracy & International Media Support, "Briefing Note Series: Freedom of Expression", (July 2014), p. 3, <https://www.mediasupport.org/publication/briefing-note-series-freedom-expression/>. See also UN HRC, *General comment no. 34, Article 19*, para 11.

<sup>14</sup> UN HRC, *General comment no. 34, Article 19*, para 9.

<sup>15</sup> UN HRC, *General comment no. 34, Article 19*, para 9.

<sup>16</sup> UN HRC, *General comment no. 34, Article 19*, para 10.



### **DID YOU KNOW?** Freedom to hold versus freedom to express opinion<sup>17</sup>

Did you know that the freedom to ‘hold’ opinions is not to be subjected to any restrictions while the freedom to ‘express’ opinions is. This is because every person is entitled to having his or her own opinion or not having one about something.

The **freedom to hold an opinion** includes the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights on the basis of his or her actual, perceived or supposed opinions.

**Freedom to express opinions** on the other hand, focuses on the manner in which an individual’s opinion is articulated. If an opinion which you hold is expressed in a way that is detrimental to the good reputation of others or incite hostility for instance, then these can be restricted.

### Freedom of expression

Article 19(2) of the ICCPR provides that *freedom of expression* guarantees to every person freedom to exchange information, debate ideas and express speech. These could be exchanges on political issues, private or public affairs, discussions on human rights, general wellbeing or whatever else people may choose to address.<sup>18</sup> Given the broad scope of such freedom it could also include the expression of opinions and ideas that can be offensive and harmful to others.<sup>19</sup>

Freedom of expression is viewed by international human rights law as a cornerstone right due to two main reasons – development (personal level) and good governance (state level).<sup>20</sup>

*At a personal level, freedom of expression is a key to the development, dignity and fulfilment of every person. People can gain an understanding of their surroundings and the wider world by exchanging ideas and information freely with others. People feel more secure and respected if they are able to speak their minds. At a state level, freedom of expression is necessary for good governance and therefore for economic and social progress. It ensures accountability by enabling people to freely debate and raise concerns with government, including for the protection and promotion of other human rights.<sup>21</sup>*

**The freedom of expression is however not absolute. It carries with it special duties and responsibilities therefore subjecting it to certain restrictions.** Freedom of expression can be restricted on several grounds provided by law and necessary for pursuing a legitimate aim (such as respect of the rights or reputations of others, protection of national security or of public order, or of public health or morals<sup>22</sup>); proportionate; and reasonable.<sup>23</sup>

<sup>17</sup> UN HRC, *General comment no. 34, Article 19*, paras 9-12.

<sup>18</sup> UN HRC, *General comment no. 34, Article 19*, para 11.

<sup>19</sup> UN HRC, *General comment no. 34, Article 19*, para 11.

<sup>20</sup> See Article 19, *‘Hate Speech’ Explained: A Toolkit*, (2015) pp. 6-7, [https://www.article19.org/data/files/medialibrary/38231/%27Hate-Speech%27-Explained---A-Toolkit-\(2015-Edition\).pdf](https://www.article19.org/data/files/medialibrary/38231/%27Hate-Speech%27-Explained---A-Toolkit-(2015-Edition).pdf).

<sup>21</sup> See Article 19, *‘Hate Speech’ Explained: A Toolkit*, p. 7.

<sup>22</sup> ICCPR, Articles 19(3) and 20.

<sup>23</sup> UN HRC, *General comment no. 34, Article 19*, para 20.

For the purpose of this Report, freedom of expression refers to the expression of speech and views, it will not cover other forms of expression such as that of identity or, artistic work.

#### **DID YOU KNOW?** *Freedom of expression/speech and right holder special responsibilities*<sup>24</sup>

Did you know that **the freedom of expression is not absolute and carries with it special duties and responsibilities therefore subjecting it to certain restrictions**

When a right or freedom is ‘not absolute’ this means that it can and is subject to certain restrictions and limitations. With such restrictions it also means that rights holders have a duty and responsibility to ensure that the exercise of such right or freedom is not detrimental or impedes on the rights and freedom of others.

Freedom of expression although a fundamental freedom is subject to certain restrictions outlined in the law, legitimate, and necessary and proportionate. See *Restrictions and Limitations section* for more information.

### Right of access to information

*Right of access to information* is an integral part of the fundamental freedom of expression.<sup>25</sup> Article 19(2) of the ICCPR provides that freedom of expression covers the freedom to seek, receive and impart information and ideas through any media and regardless of any boundaries.<sup>26</sup> In Samoa, steps are currently being undertaken to finalize the legislative framework governing public access to information through a Freedom of Information Bill.<sup>27</sup>

**Right of access to information is important to a functioning democracy as it empowers citizens, promote transparency and accountability in the working of the Government or any public body.**<sup>28</sup> Similar to freedom of expression, the right of access to information is not absolute and may be restricted on grounds of privacy and security concerns among others.<sup>29</sup>

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<sup>24</sup> UN HRC, *General comment no. 34, Article 19*.

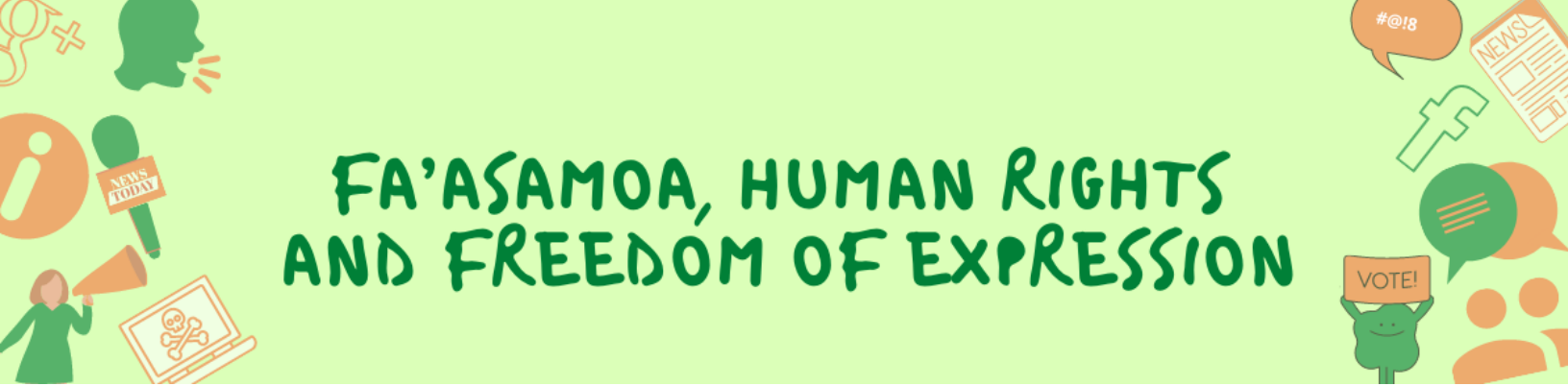
<sup>25</sup> Recognized by Resolution 59 of the UN General Assembly, *Calling of an International Conference on Freedom of Information*, 14 December 1946, A/RES/59, <https://www.refworld.org/docid/3b00f0975f.html>, and also Article 19 of the *Universal Declaration of Human Rights*.

<sup>26</sup> ICCPR, Article 19(2).

<sup>27</sup> Government of Samoa, *Samoa’s Voluntary National Review on SDGs*, p. 128.

<sup>28</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue*, A/HRC/14/23 (2010) [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf), para 31. See also UN Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, submitted in accordance with Commission resolution 1999/36*, (18 January 2000) E/CN.4/2000/63, <https://www.refworld.org/docid/3b00f3e10.html>.

<sup>29</sup> UNESCO, “Freedom of Information”, <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/>.



# FA'ASAMOA, HUMAN RIGHTS AND FREEDOM OF EXPRESSION

The Fa'aSamoa and human rights are similar in many respects. For example, Samoa is a society built on a foundation of respect and human dignity, vastly preceding the very first international human rights convention. International human rights reflect similar if not the same principles and values. It provides for a wide range of collective and cultural rights that if used properly, will help to reinforce Fa'aSamoa and individual rights in the rapidly changing modern day environment.

However, reconciling Fa'aSamoa and the international human rights system can and is still a major challenge in practice. There is a misguided perception held by many that human rights is a foreign and intruding construct. Such view is compounded by the belief that human rights are individual rights and that this threatens the collective focus of Fa'aSamoa. The entrenched biases and prejudices that some people hold due to concerns about the radical aspects of human rights activism seen to be inconsistent with Samoan culture and Christianity, further contributes to this perception.

In relation to freedom of expression and the Fa'aSamoa there have been mixed views especially in connection to its application and limitations. For example, it is convention that in the Samoan culture individuals are expected to listen to their elders or leaders. Furthermore, the traditional status of a Samoan child within the family is that the child must obey and do as s/he is told by their parents without further discussion.<sup>30</sup> According to the Samoan culture this is part of its *tu ma aganuu* of showcasing respect and obedience. One submitter wrote that it needs to be appreciated that freedom of speech, which belongs to the modern world, is introduced into a traditional and customary setting with its own system of speech structure, which is communal in nature. The application of freedom of speech in Samoa currently does not take into consideration the boundary as to how far one may exercise their freedom of speech and expression, where there is existing *tu ma aganuu* (*po o ai e saunoa ma faia tonu* – “who should speak and make decisions”) [emphasis added]<sup>31</sup>

However, it is important to emphasize that human rights is not the entitlement of one person or group of persons. It is universal. Everyone is entitled to exercise their rights including expressing opinions and views regardless of their status, background etc. with the duty of respecting the rights of others. Such clash as to the application of human rights and the Fa'aSamoa is what many view as a reason of why some human rights are inconsistent with our Fa'aSamoa.

To ensure that our human rights and Fa'asamoa are valued and respected, it is essential that any conflicts that may arise in reconciling the two are addressed and explained to ensure that the Fa'asamoa and human rights are viewed and understood as complementary. One of the ways for doing so is to appreciate the similarities of the values and principles shared by both.

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<sup>30</sup> See Office of the Ombudsman NHRI Samoa, *State of Human Rights Report 2015*, (Apia, 2015).

<sup>31</sup> Samoa Law Reform Commission (SLRC) written submission (30 April 2021).



# PUBLIC'S UNDERSTANDING OF FREEDOM OF OPINION AND EXPRESSION

It was evident from consultations that people were aware of the importance of the freedom of opinion and expression. Participants highlighted that freedom of speech and expression allows individuals to:<sup>32</sup>

- express views and opinions on issues affecting communities,
- express ideas and thoughts about certain topics that concern families and their welfare,
- encourage and inform debates, and
- inform and empower people.

Despite such importance, many expressed that there is still a great challenge especially in relation to the application of such freedoms where some individuals have exercised their freedom of expression and opinion without taking responsibility.<sup>33</sup>

*There seems to be a common belief among some that having such freedoms allows any person to 'say whatever they like, about whoever, however they like, whenever they like'. This is a serious misconception. No fundamental freedom is absolute. The enjoyment of any personal freedom in a civilized society is limited by the rights of others to enjoy their own personal freedoms. Fundamental rights are in tandem always with a fundamental responsibility not to infringe upon the legitimate rights of others.*<sup>34</sup>

Further to the exercise without care, there also seems to be a limited understanding among the general public of the limitations and the extent to which such right may be exercised, and the importance of why these restrictions are put in place.<sup>35</sup> As highlighted in the graph below 11% of those surveyed expressed that freedom of expression allows individuals to express views without limitation. The lack of responsible exercise of freedom of expression is one of the key contributing factors to concerns and issues such as defamation, privacy breaches, and misreporting among others.

However, the graph also shows that some of those consulted during focus groups (22%) were in fact aware of the responsibilities associated with such freedoms and rights with some providing that opinions and views expressed must be done so in a peaceful manner and in a way that does not negatively impact on others<sup>36</sup>. Many also expressed that freedom of opinion and expression enables individuals to share personal problems without fear or judgment (23%). There were also several survey participants who responded with no answer. One reason for this is due to the absence of understanding or awareness.

<sup>32</sup> Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021).

<sup>33</sup> Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021).

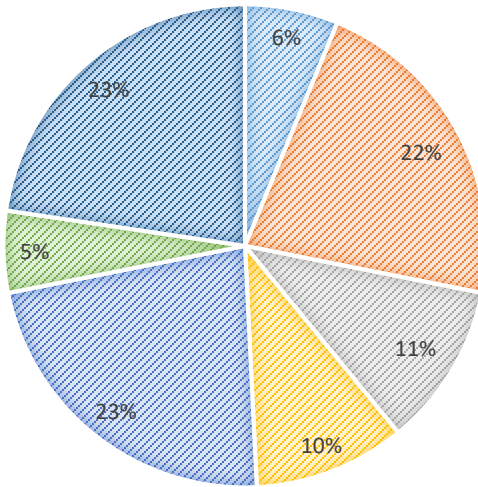
<sup>34</sup> Office of the Ombudsman NHRI Samoa, "Disentangling beliefs about freedom of opinion/expression", *Press Release* (29 July 2020), [https://ombudsman.gov.ws/wp-content/uploads/2020/07/PRESS-STATEMENT\\_-NHRI-freedom-of-speech-FINAL-version-29-july.pdf](https://ombudsman.gov.ws/wp-content/uploads/2020/07/PRESS-STATEMENT_-NHRI-freedom-of-speech-FINAL-version-29-july.pdf).

<sup>35</sup> SLRC written submission. Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021).

<sup>36</sup> Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021).

## UNDERSTANDING OF FREEDOM OF EXPRESSION/SPEECH

- freedom to express views freely and debate ideas
- freedom to express views without limitations
- freedom to share personal problems without fear or judgement
- no answer
- freedom to express views in a respectful and peaceful manner
- freedom to express views with limitations
- there is no freedom because it leads to other problems



## Recommendations:

- 1. The Government to raise awareness on freedom of opinion and expression: what it is, and the special duties and responsibilities associated with their application in all sectors of society including communities and schools.***
- 2. The Government to include in the school curriculum and lessons promotion of freedom of opinion and expression to empower students, as well as awareness on its limitations taking into account individual responsibility.***



# DEFAMATION

The Internet and Social Media have become vital communications tools through which individuals can exercise their freedom of expression and exchange information and ideas instantly and more openly. However, some individuals have taken advantage of this and without exercising responsibility, have expressed views and opinions in ways that negatively impact others.

Consultations reveal that people have used the internet and social media to express views freely with some defaming the good reputation of individuals and inciting violence on their family members<sup>37</sup>, share publications that are scandalous and slanderous,<sup>38</sup> and to create fake pages to spread false, fabricated, misleading and malicious information about individuals and government.<sup>39</sup>

The issue of breach of privacy is also a major concern with some individuals exposing private information online about others and their families.<sup>40</sup> The exposure of such information has subjected some to hate and vilification by others.

It was also voiced by some that although it is important for people to express their views and opinions on any matter that concerns them, it has also created a culture of ignorance regarding responsibilities attached to the application of such freedoms and rights.<sup>41</sup>

## **INFORMATION POINT:** *Examples of “good use” and “unreasonable use” of freedom of expression and speech*

- Accusing a politician or anyone else expressly or by innuendo of stealing or having an affair without any proof is NOT a legitimate exercise of free speech.
- Exchanging views with people on a family wedding, planning projects or on a topical public issue is exercising freedom of speech.
- A good example of free speech in exchanging views is this: “I don’t think it’s a good policy because I don’t believe in rights of children”
- An example of the misuse of free speech is this: “I don’t think your ideas are good, I think you are stupid and I do not want to hear your views again.”

<sup>37</sup> Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021).

<sup>38</sup> Ministry of Communications & Information Technology (MCIT) written submission (20 April 2021).

<sup>39</sup> MPMC written submission (26 April 2021).

<sup>40</sup> MCIT written submission (20 April 2021), MPMC written submission (26 April 2021), Samoa Observer written submission (13 May 2021).

<sup>41</sup> Focus groups consultations and feedback Upolu (March 2021) and Savaii (April 2021), SLRC written submission (30 April 2021), MPMC written submission (26 April 2021).

As stated above, there were plans by Government to place a ban on Facebook in Samoa in order to curb the spread of defamatory remarks made by faceless users online. In response to such plans, the Office issued a statement stating:

*To ban Facebook in Samoa, even for a short time because of malevolent speech, is an extremely grave step to contemplate. The Government, in no uncertain terms, would be curtailing in a very telling way the ability of the people of Samoa to speak and to communicate freely. Moreover, the people of Samoa as a whole would be deprived of a fundamental entitlement because of supposedly, malevolent activity pursued by a few via Facebook.*

### **Defamation under Samoa's laws**

The *Defamation Act 1993* governs civil proceedings in defamation.

The *Crimes Act 2013* regulates criminal defamation. Section 117A(2) of the *Crimes Act 2013*, provides that any person who publishes by any means information about another person that is false with the intention to cause harm to that person's reputation they would be liable on conviction to a fine not exceeding 175 penalty units or imprisonment for a term not exceeding three months.<sup>42</sup> It is a defense however if what was said is true.<sup>43</sup>

Publishing statements that would defame a candidate running for elections is also referenced in Samoa's electoral laws. The law provides that a person would be imprisoned for a term of 6 months for publishing untrue statements defamatory of a candidate and calculated to influence the vote of a voter.<sup>44</sup>

#### **INFORMATION POINT: *What is the difference between libel and slander?***<sup>45</sup>

Libel and slander are both types of defamation. Libel is an untrue defamatory statement that is made in writing. Slander is an untrue defamatory statement that is spoken orally.

A slanderous statement can be made in any medium – it could be in a blog comment or spoken in a speech or said on television. Libelous acts only occur when a statement is made in writing including digital statements.

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<sup>42</sup> *Crimes Act 2013*, Section 117A(1) and (3). It is important to note that defamation was reintroduced under the *Crimes Amendment Act 2017* in response to concerns by the Government of defamatory remarks made by individuals online such as O le Palemia affecting the reputation of others.

<sup>43</sup> *Crimes Act 2013*, Section 117A(2).

<sup>44</sup> *Electoral Act 2019*, section 90 provides that, Publishing defamatory matter during elections: A person is liable on conviction to a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 6 months: (a) who publishes or exposes, or causes to be published or exposed, to public view a document or writing or printed matter containing an untrue statement defamatory of a candidate and calculated to influence the vote of a voter; and (b) at a time after public notice has been given by the Commissioner under section 52 and before the close of the poll.

<sup>45</sup> Don Vaughan, "What's the difference between Libel and Slander?" *Britannica*, <https://www.britannica.com/story/whats-the-difference-between-libel-and-slander>, accessed 10 May 2021.

## ***Criminal defamation***

Samoa reintroduced criminal defamation in 2017.<sup>46</sup> Such move was heavily criticized by many including some members of the public at the local and international level and the media. According to one media personality, the reintroduction of criminal libel would be dangerous to media freedom and could be used to compel journalists to disclose their sources.<sup>47</sup> There was also the argument made that the civil action for defamation serves the same purpose and provides sufficient remedy for damages.<sup>48</sup> In the case of *Police v Malele Paulo* the court dismissed the argument that civil defamation is sufficient and provided that “criminal law (which covers criminal libel) is the law that is accessible to all members of the public especially those who are poor and cannot afford a civil suit”.<sup>49</sup>

There is a strong international consensus among international organisations as well as recognition by international and regional human rights courts of the need to decriminalize defamation laws. The Human Rights Committee has consolidated such sentiments in its general comment on Article 19 of the ICCPR on freedom of expression.<sup>50</sup> The push to decriminalize defamation laws comes as a result of attempts by some governments to stifle public debate. International experience provide that defamation laws are abused in many countries by those in power to limit criticisms made against them and the threat of imprisonment imposes a profound chilling effect on freedom of expression.<sup>51</sup> However, the use of criminal defamation to address unwarranted attacks on reputation is also still recognized in many countries including Samoa.<sup>52</sup>

In countries where criminal libel is still enforced, there have been calls for these countries to take necessary steps to minimize the potential for abuse or unwarranted restrictions on freedom of expression and speech. Such steps must conform to the certain conditions including:<sup>53</sup>

- The complainant must prove beyond reasonable doubt that all elements of defamation offence are present<sup>54</sup>
- Defamation shall not be made out unless it has been proven that the impugned statements are false and were made with an intention to cause harm to the party complainant

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<sup>46</sup> See *Crimes Amendment Act 2017, No. 20*, section 2, <https://www.palemene.ws/wp-content/uploads/Crimes-Amendment-Act-2017-Eng.pdf>, now consolidated under the *Crimes Act 2013* section 117A.

<sup>47</sup> Mata’afa Keni Lesa, “Media freedom ‘at risk’ in Samoa”, *RNZ* (21 December 2017) <https://www.rnz.co.nz/international/pacific-news/346675/media-freedom-at-risk-in-samoa>.

<sup>48</sup> See Tabangacor, B “Ua Se Vaa Ua Tu Matagi: The Revival of Criminal Libel in Samoa” Post graduate paper for Pacific Law and Culture Conference University of Canterbury July 2018 cited in the case of *Police v Paulo* [2019] WSDC 3 (25 October 2019) para102, [http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSDC/2019/3.html?stem=&synonyms=&query=title\(Police%20and%20Paulo%20\)](http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSDC/2019/3.html?stem=&synonyms=&query=title(Police%20and%20Paulo%20)).

<sup>49</sup> *Police v Paulo* [2019] WSDC 3 (25 October 2019) para103, [http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSDC/2019/3.html?stem=&synonyms=&query=title\(Police%20and%20Paulo%20\)](http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSDC/2019/3.html?stem=&synonyms=&query=title(Police%20and%20Paulo%20)).

<sup>50</sup> UN HRC, *General comment no. 34, Article 19*.

<sup>51</sup> UN HRC, *General comment no. 34, Article 19*, para 47.

<sup>52</sup> See Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, *Policy Brief* (2017) p. 11, [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf).

<sup>53</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, *Policy Brief* (2017) p. 10, [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf).

<sup>54</sup> The elements of defamation offence include: publishing a statement (1) about another person, (2) that is false (3) with the intention to cause harm to that person’s reputation – see *Crimes Act 2013*, section 117A(1).



- Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official
- Harsh penalties including imprisonment or excessive fines for instance should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

An analysis of Samoa’s criminal defamation laws (which was reintroduced in 2017) provide that the burden of proof is on the complainant to prove beyond reasonable doubt that the elements of defamation as provided by section 117A(1) of the *Crimes Act 2013* are represent. The elements include that the statement made about the complainant was false and that the person making the statement had the intention to cause harm to the complainant’s reputation. The onus on the complainant to prove all elements of the offence of criminal defamation is high. Moreover, the offence of criminal libel imposes a shorter maximum imprisonment penalty of 3 months compared to six months under the repealed enactment.<sup>55</sup> All in all, Samoa’s current law on criminal defamation is for the most part proportionate noting the criteria that police, prosecutors or any senior public official should not take part in initiating a case for criminal defamation.

### **Civil defamation**

In many countries the protection of one’s reputation is treated primarily or exclusively as a private interest.<sup>56</sup> Consultations revealed concerns regarding individuals expressing political views which also targets politicians personally and their families rather than on matters of politics.<sup>57</sup> This has resulted in some politicians bringing civil suits and also laying criminal charges against these individuals for defamation. The latter as highlighted above is unnecessary to provide adequate protection for reputations.<sup>58</sup>

The civil law of defamation can legitimately be used to protect reputations against false statements.<sup>59</sup> Civil defamation allows individuals to bring a claim for damages as a result of an injury to the reputation of a person – harm made to the goodwill or character of an individual.<sup>60</sup>

The importance placed on protecting a person’s reputation over freedom of expression was explained by the court in the civil defamation case of *Alesana v Samoa Observer Company Ltd*.<sup>61</sup> The court recognized

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<sup>55</sup> see *Police and Paulo* at para 101

<sup>56</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 11.

<sup>57</sup> See for example Civicus, “Defamation laws being used to silence criticism in Samoa”, (27 September 2019) <https://monitor.civicus.org/updates/2019/09/27/defamation-laws-being-used-silence-criticism-samoa/#>.

<sup>58</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 11.

<sup>59</sup> The ACE Electoral Knowledge Network, “Media and Elections”, *ACE Encyclopedia*, [https://aceproject.org/ace-en/topics/me/mea/mea01i/mobile\\_browsing/onePag](https://aceproject.org/ace-en/topics/me/mea/mea01i/mobile_browsing/onePag), accessed 12 May 2021.

<sup>60</sup> Amit Sinha, “Difference between Civil Defamation and Criminal Defamation”, *Blog* (15 May 2019)

<https://medium.com/@sinhaamit095/difference-between-civil-defamation-and-criminal-defamation-3c6451627ba6>, accessed 16 May 2021.

<sup>61</sup> *Alesana v Samoa Observer Company Ltd* [1998] WSSC 1; CP 042 1997 (6 July 1998) <http://www.pacii.org/cgi-bin/sinodisp/ws/cases/WSSC/1998/1.html?stem=&synonyms=&query=tofilau%20eti%20alesana>.

that the purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech.<sup>62</sup> In striking this balance the court stated that<sup>63</sup>

*the defendant (Samoa Observer) had their role as a watchdog in the public interest to expose corruption in holders of political office and in the conduct of public affairs to overstep the mark by not keeping in balance the right of an individual not to be defamed. Although freedom of expression is fundamental, it is important to recognize the right in everyone to their good name and the right not to have their reputation disparaged by defamatory statements made about them by third persons without lawful justification or excuse (emphasis added).*

### **Defamation and restrictions on freedom of expression**

It must be acknowledged that the freedom of expression is a complex right. This is because it is not absolute and can be subjected to restrictions provided by law.<sup>64</sup> Therefore, although individuals are free to express their views and opinions about various matters that concern them, it can be restricted on specific grounds, including for the protection of the reputations of others from defamatory remarks.<sup>65</sup> Any restriction on freedom of expression that is sought to be justified on the grounds that it protects the reputations of others must have the genuine purpose and demonstrable effect of protecting a legitimate reputational interest.<sup>66</sup> (See part on **Restrictions and Limitations** for further information). The justification of defamation for the purpose or effect of protecting individuals against serious harm to a reputation that they do not have or do not merit **cannot** be justified.<sup>67</sup>

#### **INFORMATION POINT: Legitimate purpose of defamation laws<sup>68</sup>**

It is important that any justification of defamation laws is for a legitimate purpose only such as the protection of the reputation of individuals. Imposing defamation laws **cannot** be justified if their purpose or effect is to:

- i. Prevent legitimate criticism of officials and public figures or the exposure of official wrongdoing or corruption;
- ii. Protect the reputation of the State or nation, as such;
- iii. Enable individuals to sue on behalf of persons who are deceased;
- iv. Allow individuals to sue on behalf of a group which does not, itself, have status to sue; or
- v. Protect subjective feelings or a subjective understanding of the sense of honour.

Prior censorship, or restrictions occurring prior to publication, on the basis of defamation, are never permissible.<sup>69</sup>

<sup>62</sup> *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 145 A.L.R. 96, cited in *Alesana v Samoa Observer Company Ltd* [1998] WSSC 1; CP 042 1997 (6 July 1998) <http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSSC/1998/1.html?stem=&synonyms=&query=tofilau%20eti%20alesana>.

<sup>63</sup> *Alesana v Samoa Observer Company Ltd* [1998] WSSC 1; CP 042 1997 (6 July 1998) <http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSSC/1998/1.html?stem=&synonyms=&query=tofilau%20eti%20alesana>.

<sup>64</sup> UN HRC, *General comment no. 34, Article 19*, paras 22-26.

<sup>65</sup> See *Constitution of Samoa*, Article 13(2) and *Crimes Act 2013*, section 117A.

<sup>66</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 6.

<sup>67</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 6.

<sup>68</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 7.

<sup>69</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p.5.

## Recommendations:

- 3. The Government to ensure that enforcement of the law on criminal defamation does not disproportionately impact on the freedom of expression and speech of the individual.*
- 4. The Government to adopt necessary measures to protect the privacy of individuals.*



# HATE SPEECH

Hate Speech is an issue which some countries around the world are struggling to cope with. Dark motivation intrinsic to this phenomenon needs no explanation. The particular contexts, in which hate speech has emerged as a problem in countries that have acted to counter it, are not areas of evident concern in Samoa at the present time. The dimensions and the realities of malevolent speech which may be considered problematic within our shores are manifestly different.

There have been several anecdotal accounts of hatred towards foreigners especially Chinese in Samoa.<sup>70</sup> Ridicule and discrimination towards Chinese has been fuelled by concerns of some about their [Chinese] intentions and the perception that they are taking over businesses and Samoan land.<sup>71</sup> It is important to highlight that any person regardless of their religion, ethnicity, nationality, race, color, descent, gender or other identity should not be subjected to hate speech or hatred at all.

Hate speech is not defined under international law and definitions under national laws vary.<sup>72</sup>

*“Many proposed definitions of ‘hate speech’ have been formulated in response to specific and perniciously discriminatory social phenomena or incidents. Definitions have also been adapted over time to address new situations, and to accommodate shifts in language, shifting understandings of equality, and the harms of discrimination, or developments in technology”.*<sup>73</sup>

Generally ‘hate speech’ is, “any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factor”.<sup>74</sup>

Hate speech as a form of attack is a menace to democratic values, social stability and peace. When left unchecked it can generate violence. It is for this reason that some countries have taken legislative measures to address it in particular areas of concern.

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<sup>70</sup> See for example, Sam Sam, “Speaking out for Chinese, Asians”, *Letter to the Editor, Samoa Observer*, <https://www.samoaoobserver.ws/category/letters/7648>.

<sup>71</sup> See for example, Radio NZ, “Samoa promotes Chinese investors”, *RNZ News* (12 January 2018) <https://www.rnz.co.nz/international/pacific-news/347937/samoa-promotes-chinese-investors>.

<sup>72</sup> Equality and Human Rights Commission, *Freedom of Expression: Guidance Legal Framework*, (March 2015) [https://www.equalityhumanrights.com/sites/default/files/20150318\\_foe\\_legal\\_framework\\_guidance\\_revised\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/20150318_foe_legal_framework_guidance_revised_final.pdf).

<sup>73</sup> Article 19, *‘Hate Speech’ Explained: A Toolkit*, p. 9.

<sup>74</sup> Yayha Fares, “Fighting hate speech and incitement to violence in the Syrian media”, *UNOHCHR News* (11 February 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/HatespeechSyrian.aspx>.

**INFORMATION POINT:** *Why do some countries regulate hate speech?*

Human Dignity . . . is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person’s basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction. That is what hate speech attacks, and that is what laws suppressing hate speech aim to protect.

*- Professor Jeremy Waldron, author of The Harm of Hate Speech.*

It is important to note that addressing hate speech does not mean limiting or prohibiting freedom of speech and expression. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law. Reasonable and legitimate restrictions as outlined in **Restrictions and Limitations** section must therefore be followed. It is important for Government to establish sound legal frameworks on hate speech which hold perpetrators accountable, uphold human dignity, protect marginalized groups, while still balancing the right to freedom of expression.<sup>75</sup>

*Combating hate speech cannot simply be left to the law to address. Such problems call for the combined effort of EVERYONE – parents, schools, religious leaders, policymakers, journalists and the general public to address the main drivers of hate speech so that the fundamental freedoms of our society are upheld.*

## Recommendations:

- 5. The Government to progressively adopt legislative measures to address instances of hate speech (including racist content, xenophobia) in Samoa both off and online.**
- 6. The Government to ensure that any laws on hate speech achieves a balance between protecting people from speech inciting hatred and discrimination and the freedom of speech and expression. Furthermore, political opinion should not be included within any incitement provisions as it will greatly impact on political debate and public discourse.**
- 7. The Government to encourage village councils to enforce laws on hate speech and take the lead in ensuring that peace and harmony within communities are maintained.**

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<sup>75</sup> See also recommendation by Amnesty International in its *Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression* organized by the United Nations Committee on Elimination of Racial Discrimination (28 August 2012) <https://www.amnesty.org/download/Documents/24000/ior420022012en.pdf>.



# FREEDOM OF EXPRESSION AND POLITICAL RIGHTS

Freedom of opinion and expression also form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment and exercise of the right to take part in the conduct of public affairs, including the right to vote which is at the core of democratic governance based on the will of the people.<sup>76</sup>

*Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. In order to ensure the full enjoyment of rights to take part in the conduct of public affairs including the right to vote, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>77</sup>*

Concerns were raised during the 2021 elections with regard to the individual's right to properly participate and express their right to vote. Some of these concerns include village council activities that were seen to be discriminatory or coercive of the individual in their effect; and political campaigns designed to influence voters' preference by unacceptable electoral practices including bribery.<sup>78</sup> There were also issues raised with alleged interference by officials.<sup>79</sup> These concerns impact upon the right of voters to choose who they want to represent them in public office.

Furthermore, citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives.<sup>80</sup> Concerns with regard to the lack of open debate between citizens and their representatives on important issues that affect them were also raised by some.<sup>81</sup>

In 2000, the Samoa Supreme Court decided on the case concerning the freedom of expression of the opposition leader and his ability to take part in the conduct of public affairs was denied by the Government of the day where his access to State-owned media to address the people of his constituency, and all the

<sup>76</sup> UN HRC, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, <https://www.refworld.org/docid/453883fc22.html>.

<sup>77</sup> UN HRC, *CCPR General Comment No. 25: Article 25*, para. 19.

<sup>78</sup> Office of the Ombudsman NHRI Samoa, "Citizens right to free and fair elections", *Press Release* (1 March 2021), [https://ombudsman.gov.ws/wp-content/uploads/2021/03/OMB-PR-Free-and-Fair-Elections\\_FINAL.pdf](https://ombudsman.gov.ws/wp-content/uploads/2021/03/OMB-PR-Free-and-Fair-Elections_FINAL.pdf).

<sup>79</sup> See for example Matai'a Lanuola Tusani-Ah Tong, "Policeman removed after political interference complaint", *Samoa Observer* (8 April 2021) <https://www.samoaoobserver.ws/category/samoa/82125>. The article provided that a Police officer posted to the Utuali'i polling booth was removed on Wednesday after allegedly interfering with the political process by asking after and then criticizing a voter's choice of candidate.

<sup>80</sup> UN HRC, *CCPR General Comment No. 25: Article 25*, para 8.

<sup>81</sup> Focus groups consultations (Upolu and Savaii). See also Sapeer Mayron, "Samoa needs whistleblower protection: Fiaame", *Samoa Observer* (17 March 2021).

people of Samoa, so that they may be aware of the applicant's views, and those of his Party, on all important questions relating to the well-being and good government of Samoa.

In its assessment of issues concerning the applicant's freedom of expression the court stated:<sup>82</sup>

*Indispensable to .... accountability and .... responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.*

*Absent of such freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.*

*The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process.*

The court also addressed the issue of imposing restrictions in order to maintain the integrity of the political process as argued by the defendants in the case. It provided that:<sup>83</sup>

*The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests and that is one reason why the Court should scrutinise very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.*

More recently, several concerns were expressed that changes to be brought about by the constitutional reforms in 2020 in Samoa were not properly debated nor comprehensively consulted on by the

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<sup>82</sup> *Efi v Attorney-General of Samoa* [2000] WSSC 22 (1 August 2000) Mason J [138].

<sup>83</sup> *Efi v Attorney-General of Samoa* [2000] WSSC 22 (1 August 2000) Mason J [145].

Government.<sup>84</sup> Consequent to those concerns being voiced, national consultations were carried out by the relevant Select Parliamentary Committee after the second reading of the three Bills before Parliament – *Constitution Amendment Bill 2020*, *Land and Titles Court Bill 2020* and the *Judicature Bill 2020*. The concerns highlighted the importance and the necessity of adequately engaging the public in public debate on important issues to ensure transparency and accountability.

Finally, concerns were also raised regarding criticisms being made against certain politicians and political parties with some not only criticizing politicians and political parties regarding their agendas but also criticizing and defaming their families. The issue of politicians and their families being defamed is covered and addressed in **Defamation** section of this Report.

It is important to highlight that public officials<sup>85</sup> (including politicians) as well as public figures<sup>86</sup> are exposed to various kinds of criticism. Under international standards on freedom of expression, both categories have to tolerate more, rather than less, criticism than ordinary citizens, since they are directly involved in matters of public concern and that consequently the law will offer them less protection.<sup>87</sup> Any laws providing special protection for public officials would thus be inconsistent with such standard.<sup>88</sup>

*In the context of freedom of expression and political debate it has been established by several international courts that there should be greater latitude in criticizing a public official, even to the extent of mistaken or inaccurate statements, provided that these were not made maliciously... public figures had far easier access to channels of communication to counteract false statements (emphasis added).<sup>89</sup>*

The above case studies highlight the importance of the need to promote and protect the right of citizens to effectively and adequately engage in public debate on important matters such as major reforms to the constitution, health system and customary land for instance, or criticizing politicians and government policy. Citizens must be able to express themselves and voice ideas freely on such important matters even if it involves a great amount of time and resources as well as severe criticisms. This also promotes the rights of citizens to be consulted and participate which is a core principle of a human rights based approach.

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<sup>84</sup> New Zealand Law Society, “Serious concerns raised about constitutional law changes in Samoa”, *Legal News* (4 May 2020) <https://www.lawsociety.org.nz/news/legal-news/serious-concerns-raised-about-constitutional-law-changes-in-samoa/>. See also Anna Dziedzic, “Debating constitutional change in Samoa”, *The Interpreter* (5 May 2020) <https://www.lowyinstitute.org/the-interpreter/debating-constitutional-change-samoa>.

<sup>85</sup> *Public officials* are persons who hold a function within the State administration, including heads of State, heads of government, other senior officials, or a function that is officially sanctioned by the State – defined in Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 23.

<sup>86</sup> *Public figures* are individuals who also attract attention from the public, but do not hold any official role – defined in Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 23.

<sup>87</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 23.

<sup>88</sup> Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, p. 23.

<sup>89</sup> *New York Times Co. v. Sullivan*, 376 US 254 (1964). In recent years this approach has been adopted, in different ways, in a wide variety of other jurisdictions, including the United Kingdom, Australia, Pakistan, India and Zambia – see Joanna Stevens, “Sullivan’s Travels”, *Southern African Media Law Briefing*, Vol.2 No. 1, April 1997.



## Recommendations:

- 8. The Government to continuously and proactively promote the right to participate in decision-making processes of all citizens especially vulnerable and marginalized communities including youth, women, persons with disabilities, persons of diverse gender identities and others.*



# FREEDOM OF EXPRESSION AND THE MEDIA

*Freedom of expression and information goes hand in hand with press freedom. It allows for inclusivity of all voices including marginal groups and allow people to participate in decision-making process.<sup>90</sup>*

The media has played and continues to play an important role in Samoa's democracy keeping citizens informed of various issues and holding governments and public bodies to account on matters of public interest. Media freedom is currently protected under our Constitution<sup>91</sup> and it is generally respected in practice. The question regarding respect for media freedom in Samoa revealed mixed responses with some expressing that media freedom must be respected to ensure transparency and accountability<sup>92</sup> while others expressed the need for responsible reporting by media groups on issues and Government practices.<sup>93</sup>

Various concerns have been raised in the past and echoed in submissions about quality and accurate reporting by the media in Samoa. Feedback received highlighted that misreporting and misinformation have become serious concerns in the media industry.<sup>94</sup> Private newspapers tend to misinform the public through inaccurate and inadequate reporting.<sup>95</sup> In response, one media practitioner expressed that they (media industry) have been pushing for quality media training and journalism studies for Samoa through a dedicated course at Samoa's national university, however this has failed miserably after 15 years due to the lack of proper and qualified trainers.<sup>96</sup> Recently, the university has begun offering media and journalism courses as part of its Foundation Arts certificate programme.<sup>97</sup> Despite such step it does not adequately provide a robust training ground to produce qualified and ethical practitioners who should have skills to access and use information for the benefit of the public. According to one submitter, this is needed more now with information explosion online, distorted stories, misreporting and others.<sup>98</sup>

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<sup>90</sup> Samoa Observer written submission (13 May 2021).

<sup>91</sup> See *Constitution of Samoa*, Article 13.

<sup>92</sup> Samoa Observer written submission (13 May 2021). See also Office of the Ombudsman NHRI Samoa, *State of Human Rights Report 2015*, (Apia, 2015).

<sup>93</sup> MPMC written submission (26 April 2021). Office of the Regulator (OOTR) written submission (30 April 2021). See also Office of the Ombudsman NHRI Samoa, *State of Human Rights Report 2015*, (Apia, 2015).

<sup>94</sup> MPMC written submissions (26 April 2021), OOTR written submission (30 April).

<sup>95</sup> MPMC written submissions (26 April 2021), OOTR written submission (30 April). See also Press Release by the Attorney General, "Accuracy in Media Reporting, Media Freedom, Whistle blower, Protected Disclosure and Conflicted Comments", (18 March 2021) <https://hi-in.facebook.com/samoagovt/posts/4053360824694909>.

<sup>96</sup> Talamua written submission (30 April 2021).

<sup>97</sup> See, Marc Membrene, "Media course included in N.U.S. Foundation studies", *Samoa Observer* (6 July 2021) <https://www.samoaoobserver.ws/category/samoa/86771>.

<sup>98</sup> Talamua written submission (30 April 2021).

In 2009 concerns about process and social norms such as the protection of rights to privacy prompted the Government to look into how the media in Samoa could be regulated which included the consideration of establishing a Media Council to oversee standards of balanced and accurate media reporting.<sup>99</sup>

In 2015, a survey carried out by the Office revealed an overwhelming percentage of participants supporting the idea that the media should be strongly regulated.<sup>100</sup> Such view was based in the gap of the public's understanding of the direct relationship between freedom of speech and media freedom whereby they saw media freedom as a privilege of the industry as opposed to an avenue for the public to express their views and opinions.<sup>101</sup>

In a comprehensive review by the SLRC in 2012 on Media Regulation in Samoa it provided that:<sup>102</sup>

*Effective media regulation protects individuals and society from harm by preventing and remedying the wrongful publication of private, false, biased or otherwise harmful information and in so doing, it is said to protect and deepen the fundamental right to freedom of expression. It is important, however, that any regulation of the media is legitimate and fair and is not used to arbitrarily gag the media or censor information the public has a right to know.*

The review recommended the need for Samoa to establish a media council and a media code of practice to guide the work of media practitioners in Samoa to address issues including basic errors of detail; ignorance of the law; failure to confirm facts, corroborate allegations, or to observe the rules of journalistic confidence; poor editing of articles or broadcasts; fairness and balance in relation to editorial matters; false or dubious claims in advertising material; and a perceived lack of political impartiality.<sup>103</sup>

In 2015 the *Media Council Act* was passed which established the Journalists Association of Samoa responsible for developing and maintaining freedom of information and expression in Samoa.<sup>104</sup> The law also established the Media Council responsible for establishing the Media Code of Practice. The Code represents an attempt to balance the concepts of media and freedom of responsibility. Its core principles include being accurate, reporting fairly and with respect for others, establishing and administering an in house process for complaints handling (self-regulation).<sup>105</sup> Despite such Code, concerns remain especially with regard to distorted stories and misinformed reports being published both off and online,<sup>106</sup> inaccurate reporting and failure to confirm facts or corroborate allegations,<sup>107</sup> as well as biased and perceived lack of political impartiality.<sup>108</sup>

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<sup>99</sup> Prime Minister's Remarks, Post Tsunami Samoa Editors' Forum, 17 November 2009 <http://jawsamoa.blogspot.com/2010/01/post-tsunami-samoa-editors-forum-pm.html> (21 January 2010).

<sup>100</sup> Office of the Ombudsman NHRI Samoa, *State of Human Rights Report* (2015).

<sup>101</sup> Office of the Ombudsman NHRI Samoa, *State of Human Rights Report* (2015).

<sup>102</sup> Andrew Puddephatt, *The Importance of Self-Regulation of the Media in Upholding Freedom of Expression* (UNESCO, 2011) p. 7.

<sup>103</sup> Samoa Law Reform Commission, *Media Regulation in Samoa Final Report* (June 2012) <https://www.samoalawreform.gov.ws/wp-content/uploads/2014/08/Media-Regulation-Final-Report-Final-1.pdf>.

<sup>104</sup> *Media Council Act 2015*, s 31(f)

<sup>105</sup> *Media Code of Practice*, preamble.

<sup>106</sup> Talamua written submission (30 April 2021).

<sup>107</sup> MPMC written submission (26 April 2021). OOTR written submission (30 April 2021). Talamua written submission (30 April 2021).

<sup>108</sup> MPMC written submission (26 April 2021).

According to one media company, articles produced by the paper always requires balance of coverage, objective, factual representation of issues that are in the interest of the community.<sup>109</sup>

*“While media freedom is essential to the operation of a genuine democracy, public confidence in the media is also crucial to its success as a trusted and reliable source of news and information”.*<sup>110</sup>

On the contrary, concerns were also raised by media groups regarding laws that restrain and compromise media freedom. These concerns include the reintroduction of criminal libel in 2017 under the *Crimes Amendment Act 2017* which would use to compel journalists to disclose their sources<sup>111</sup>; the lack of access by media groups to official government information that would be in the public interest<sup>112</sup>; prosecution of media sources that are public servants for leaking information<sup>113</sup>; as well as attacks by Government alleging inaccurate news reporting.<sup>114</sup>

In relation to the concern regarding the disclosure of sources, one submitter raised that journalists have a moral obligation to protect confidential sources of information so as to protect such sources from any reprisals if their names are made public.<sup>115</sup> Moreover, such revelation could seriously undermine media freedom due to the chilling effect such disclosure would have on the free flow of information.<sup>116</sup> The protection of media confidential sources of information is currently protected under *Newspapers and Printers Act*.<sup>117</sup> Despite such protection, it is important to also note that journalists and the media should not use the obligation of confidence as a shield to defend inaccurate reporting.

*“Wherever possible, efforts should be made to obtain on-the-record corroboration of a story from unnamed sources. If a complaint hinged on material from an unnamed source, editors involved would be expected to produce corroborative material to substantiate the allegations or to demonstrate that the complainant had a suitable opportunity to comment on them. There would be a particular responsibility on editors to give a reasonable opportunity of reply to complainants who felt they were victims of allegations from an unnamed source.”*<sup>118</sup>

In light of the above issues, it is crucial that the State encourages an independent media and provides an enabling environment through effective information sharing and the imposing of reasonable and legitimate restrictions (as outlined in section on **Restrictions and Limitations**) so that it does not arbitrarily

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<sup>109</sup> Samoa Observer, written submission.

<sup>110</sup> Samoa Law Reform Commission, *Media Regulation in Samoa Issues Paper* (2010) <https://www.samoalawreform.gov.ws/wp-content/uploads/2014/08/Discussion-Paper-Media-Regulation-1.pdf>.

<sup>111</sup> Mata’afa Keni Lesa, “Media freedom ‘at risk’ in Samoa”, *RNZ* (21 December 2017) <https://www.rnz.co.nz/international/pacific-news/346675/media-freedom-at-risk-in-samoa>.

<sup>112</sup> Talamua written submission, Samoa Observer written submission.

<sup>113</sup> The concern here go towards imprisonment of whistleblower who reveal information e.g. about a corrupt practice by a public body that would be in the public interest. The protection of whistleblower is discussed in **Whistleblower** section. It is important to note that the *Newspapers and Printers Act 1993* provides for the protection of journalist’s sources whereby a journalist is not compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant (section 10).

<sup>114</sup> See for example, Sapeer Mayron, “A.G. threatening press freedom: global journalists”, *Samoa Observer* (17 March 2021) <https://www.samoaoobserver.ws/category/samoa/80934>.

<sup>115</sup> Talamua written submission.

<sup>116</sup> Talamua written submission. See also The Editor’s Codebook, “Confidential Sources”, <http://www.editorcode.org.uk/downloads/codebook/codebook-clause-14.pdf>, pp. 96-99.

<sup>117</sup> *Newspapers and Printers Act 1993*, section 10.

<sup>118</sup> The Editor’s Codebook, “Confidential Sources”, <http://www.editorcode.org.uk/downloads/codebook/codebook-clause-14.pdf>, pp. 96-99.

impact on media freedom or censor information the public has a right to know. At the same time media groups need to ensure they maintain high standards of reporting including training journalists, reporting on the facts and truths and maintain journalistic confidence.<sup>119</sup>

## Recommendations:

9. *The media industry must equip journalists with adequate trainings on proper reporting taking into account the Code of Conduct developed by the Media Council to maintain journalistic and media confidence.*
10. *The Government is encouraged to make official information readily available and support media training and learning. Support offered by Government should not compromise the independence of the media.*
11. *The Government to ensure that any laws imposed to regulate or may impact media freedom are legitimate and fair and is not used to arbitrarily gag the media or censor information the public has a right to know.*

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<sup>119</sup> See for example, The Editorial Board, "Journalist must return to basic principles", *Samoa Observer* (21 July 2021) <https://www.samoaoobserver.ws/category/editorial/87198>.



# THE INTERNET, FREEDOM OF EXPRESSION AND SAFETY OF CHILDREN

The internet has provided new spaces in which rights and freedoms can be exercised including the freedom to publish, freedom to express and the freedom to receive information. At the same time, the exercise of these freedoms through the internet may challenge other fundamental human rights such as the right to privacy and respect for human dignity.<sup>120</sup> As highlighted in sections on **Defamation** and **Hate Speech**, there have been various concerns regarding the use of online platforms to spread misinformation, inciting of violence and expressing views that defame individuals.

Community consultations widely acknowledged the benefits of the internet for communication and sharing of information.<sup>121</sup> According to the Special Rapporteur on freedom of expression and opinion, “the Internet has dramatically improved the ability of children and adults in all regions of the world to communicate quickly and cheaply. It is therefore an important vehicle for children to exercise their right to freedom of expression...”<sup>122</sup>

However, concerns were also raised by some during consultations and in submissions particularly regarding the proper use by children (and adults) of the internet to express views without bullying or inciting violence online.<sup>123</sup> Moreover, there was a serious concern regarding the exposure of children to unsafe online content and use.<sup>124</sup> Concerns about cyberbullying, cyber-grooming and access to pornographic content by children were also raised as problematic leading to some suggesting imposing strict restrictions on internet and social media access.<sup>125</sup> The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also highlighted similar concerns and risks associated with Internet use and children in his report to the UN General Assembly.<sup>126</sup>

According to one submitter, despite laws in place to regulate matters such as cyberbullying, defamation and libel online, it does not go far to regulate matters including racist content, xenophobia and hate speech on the internet.<sup>127</sup> It is important therefore that as technology evolves and people resort to online platforms more to express opinions, more robust laws are put in place. Efforts to combat cybercrime for

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<sup>120</sup> See New Zealand Human Rights Commission, *Freedom of opinion and expression* (2010)

[https://www.hrc.co.nz/files/6914/2388/0492/HRNZ\\_10\\_Freedom\\_of\\_opinion\\_and\\_expression.pdf](https://www.hrc.co.nz/files/6914/2388/0492/HRNZ_10_Freedom_of_opinion_and_expression.pdf).

<sup>121</sup> Focus groups consultations (Upolu & Savaii).

<sup>122</sup> UNGA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (21 August 2014) <https://undocs.org/A/69/335>, para 65.

<sup>123</sup> Focus groups consultations (Upolu & Savaii).

<sup>124</sup> MCIT written submission, Samoa Observer written submission, Focus groups consultations (Upolu & Savaii).

<sup>125</sup> Focus groups consultations (Vaie'e).

<sup>126</sup> UNGA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (21 August 2014) <https://undocs.org/A/69/335>, para 69.

<sup>127</sup> MCIT written submission.

instance has been slow with negotiations still underway for Samoa to accede to the Budapest Convention.<sup>128</sup>

### **INFORMATION POINT: *What is the Budapest Convention?***<sup>129</sup>

The Convention on Cybercrime also known as the Budapest Convention is the first international treaty seeking to address Internet and computer crime (cybercrime) by harmonizing national laws, improving investigative techniques, and increasing cooperation among nations.

Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international cooperation. The Convention aims principally at:

- Harmonizing the domestic criminal substantive law elements of offenses and connected provisions in the area of cyber-crime
- Providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offenses as well as other offenses committed by means of a computer system or evidence in relation to which is in electronic form
- Setting up a fast and effective regime of international cooperation

The Convention is accompanied by an additional protocol i.e. Additional Protocol to the Convention on Cybercrime which requires States who are parties to this protocol to criminalize the dissemination of racist and xenophobic material through computer systems, as well as threats and insults motivated by racism or xenophobia.

Negotiations still underway for Samoa to accede to the Budapest Convention

To address issues relating to internet access and use, the majority of those consulted agreed that Samoa needs to create legislation to protect online safety of children.<sup>130</sup> Additionally, non-legislative measures were also suggested including the need for online service providers to commit their resources to provide public awareness and educational programmes about online safety of children and their access to unsuitable materials, online abuse and bullying.<sup>131</sup>

Get Safe Online Pacific together with the Ministry of Communication and Information Technology (MCIT) recently launched the GET SAFE ONLINE Samoa platform which provides information and advice for parents and children on staying safe online.<sup>132</sup>

<sup>128</sup> MCIT written submission. The Office of the Attorney General is currently conducting a review of Samoa's legislative framework to prepare for accession to the Convention. For more information on cybercrime see Council of Europe Action against cybercrime webpage: <https://www.coe.int/en/web/cybercrime/home>.

<sup>129</sup> See *Convention on Cybercrime 2001* here: <https://rm.coe.int/1680081561>.

<sup>130</sup> Focus groups consultations (Upolu & Savaii). Samoa Observer written submission.

<sup>131</sup> Talamua written submission.

<sup>132</sup> See Samoa Get Safe Online platform here: <https://www.getsafeonline.ws/personal/articles/your-child-and-social-networking/>. The platform provides information in English and Samoan on matters including children and social media, cyber-bullying etc.

Moreover, to ensure the safety of children when expressing themselves online it was suggested that it be included in **the curriculum**. This will allow students to become more responsible in exercising their freedoms and not do so in an abusive and bullying manner.<sup>133</sup> Suggestions were also made to consider the blocking of certain sites or placing strict controls in place.<sup>134</sup>

### **DID YOU KNOW? GET SAFE ONLINE SAMOA PLATFORM**

Get Safe Online Samoa platform was launched in 2021 by Get Safe Online (UK-based organization) and the MCIT under the Get Safe Online Pacific project.

The Get Safe Online websites provide simple, helpful tips on a wide range of online security issues. The platform raises awareness of the risks and safety measures which will protect people from online security risks including phishing scams, identity theft, ransomware, malware, viruses and other online threats. It also provides useful information for parents, youth and children regarding safe use of social media, misinformation, oversharing and blogging.

Get Safe Online Samoa Platform is in both English and Samoan languages and has both a business and personal component. Browse Get Safe Online Samoa platform here: <https://www.getsafeonline.ws/>

The potential risks associated with children accessing the Internet, has seen many countries placing restrictions on internet use, with protection policies tending to focus exclusively on the risks posed by the Internet.<sup>135</sup> Samoa almost took a similar stance with its plans to ban Facebook, although mainly for curbing defamation and breaches to individual privacy.<sup>136</sup> However, it is important to note that while intentions to restrict internet access may be good, others have used it as a way to curb freedoms of expression and speech. Therefore in undertaking measures to restrict or limit internet access, “human rights norms call for a balanced approach where restrictions on communications conform to strict tests of necessity and proportionality”.<sup>137</sup>

## **Recommendations:**

- 12. The Government to introduce legislative and non-legislative measures to ensure the safety of children online.**
- 13. Awareness raising in schools regarding the safe and responsible use of the internet must be ongoing and included in the curriculum.**
- 14. Technology service providers must provide resources to assist with public awareness and educational programmes about online safety of children and their access to unsuitable materials, online abuse and bullying, based on the principle of corporate responsibility.**

<sup>133</sup> Talamua written submission.

<sup>134</sup> Focus group consultations (Vaie’e).

<sup>135</sup> UNGA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (21 August 2014) <https://undocs.org/A/69/335>, para 65.

<sup>136</sup> See Soli Wilson, “Govt. Facebook ban could backfire” *Samoa Observer* (27 July 2020) <https://www.samoaoobserver.ws/category/samoa/67488>.

<sup>137</sup> UNGA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (21 August 2014) <https://undocs.org/A/69/335>, para 4.



- 15. The Government to ensure that any measures to restrict or limit internet access on the basis of child safety online must take into account a balanced approach where restrictions on communications conform to strict tests of necessity and proportionality.**
- 16. The Government to prioritize finalizing negotiations and accelerate Samoa's accession to the Budapest Convention informed by a comprehensive review of Samoa's legislative framework and context.**



# WHISTLEBLOWER PROTECTION

The issue of whistleblowing or public disclosure of information is not comprehensively protected in Samoa. Several concerns were raised regarding the lack of protection afforded to whistleblowers or those who make public disclosures especially on important matters that is within the public interest.<sup>138</sup>

Proposed laws that could see public officials for disclosing official information to a third party for any reason was condemned by media groups stating it to be “heavy-handed as there are already laws protecting government information.”<sup>139</sup> Justification for the proposed change was a result of public officials leaking official and confidential information for corrupt use and purposes.<sup>140</sup> Such justification was however dismissed by some providing that “the problem is not the leaking, but the lack of information provided by the government on matters of public interest”.<sup>141</sup> The issue of the absence of a freedom of information framework and its impact is explored in detail in the **Right of Access to Information** section.

Moreover, one submitter provided that there have been several cases where officials have resorted to legal threats to investigate leaks and hacking of how media accessed information and those in the system that blow the whistle<sup>142</sup>. For example, in 2013 a report by the Auditor General was leaked to the media prior to it being considered and reported on by the Parliamentary Select Committee in which a case was brought before the court.<sup>143</sup> Most recently, information leaked about an alleged conflict of interest between the Office of the Attorney General and a consultant company who carried out work for the Office led to investigations into the matter by Police.<sup>144</sup>

Currently, protection is provided for those who disclose information concerning suspected irregularities or wrongdoing by public entities and officials under the *Public Finance Management Act* (PFMA):<sup>145</sup>

*A person who has knowledge that an offence— e.g. making any statement or declaration knowing it to be false, improperly makes payment of public or trust money, or improperly uses public*

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<sup>138</sup> Talamua written submission. Samoa Observer written submission. Sapeer Mayron, “Samoa needs whistleblower protection: Fiamé”, *Samoa Observer* (17 March 2021) <https://www.samoaoobserver.ws/category/samoa/80892>.

<sup>139</sup> Journalists Association of Samoa, Rudy Bartley quoted in RNZ, “Samoa journalists worried about proposed whistleblower law”, *RNZ* (9 September 2019) <https://www.rnz.co.nz/international/pacific-news/398382/samoa-journalists-worried-about-proposed-whistleblower-law>.

<sup>140</sup> See section 147, *Crimes Act 2013*.

<sup>141</sup> Journalists Association of Samoa, Rudy Bartley quoted in RNZ, “Samoa journalists worried about proposed whistleblower law”, *RNZ* (9 September 2019) <https://www.rnz.co.nz/international/pacific-news/398382/samoa-journalists-worried-about-proposed-whistleblower-law>.

<sup>142</sup> Talamua written submission.

<sup>143</sup> Apulu Lance Polu, “Samoa AG Won’t Seek Charges Over Leaked Report”, *Pacific Islands Report* (18 December 2013) <http://www.pireport.org/articles/2013/12/18/samoa-ag-won%27t-see-charges-over-leaked-report>. It is important to note that prosecution of the leak did not proceed due to the cost such case would impose on the public.

<sup>144</sup> See International Federation of Journalists, “Samoa: Attorney General attacks Samoa Observer”, *IFJ News* (16 March 2021) <https://www.ifj.org/media-centre/news/detail/category/asia-pacific/article/samoa-attorney-general-attacks-samoa-observer.html>.

<sup>145</sup> *Public Finance Management Act 2014*.

*property – may have been committed can report this to the Controller and Auditor General, Minister or Financial Secretary or both and in n alleging such breach in good faith would be immune from civil suit and shall not be penalized in any way whether the allegation is proved or not... [emphasis added].<sup>146</sup>*

Despite such protection, this is limited to matters of suspected irregularities or wrongdoing in relation to public finances. It does not cover protection for those who reveal information on other important matters of public concern such as substantial and specific danger to public health and safety including reporting of domestic violence, unsafe workplaces, systemic harassment etc. In 2017, the Office provided a submission to the CEDAW Legislative Compliance Review recommending the need for protection of informers of family violence in Samoa.<sup>147</sup> The recommendation was one of the key recommendations made by the SLRC in its Final report to Parliament<sup>148</sup> and was again reiterated in our Family Violence Inquiry Report in 2018.<sup>149</sup>

In 2018, there were calls for Samoa to develop whistleblower legislation in addition to provisions in the PFMA which provide protection for whistleblowers in the public sector who report fraud and other irregularities.<sup>150</sup> This is captured in the *2020-2025 Public Administration Sector Plan (PASP)* where one of the activities to be implemented is the development of guidelines or a Manual on reporting abuses in the public service.<sup>151</sup> A policy paper is currently being formulated which will inform a law on whistleblower protection in Samoa.<sup>152</sup>

Having a specific legislation or policy on whistleblower protection will assist in strengthening integrity in the public sector and promote good governance.<sup>153</sup> Various Pacific Island States have also recognized the importance of having in place whistleblower protection and earlier this year shared on best practices which Samoa could learn and adopt in developing its laws on this issue.<sup>154</sup>

Overall, research and submissions reveal the need to create and develop laws to protect whistleblowers in Samoa from being exposed and retaliated against for disclosing misconduct.<sup>155</sup> Such protection is

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<sup>146</sup> *Public Finance Management Act 2014*, section 116.

<sup>147</sup> Samoa Office of the Ombudsman NHRI, *Submission on Legislative Compliance Review on the Convention on the Elimination of All Forms of Discrimination against Women* (2016) <https://ombudsman.gov.ws/wp-content/uploads/2021/03/NHRI-response-to-CEDAW-Discussion-Paper-2016-by-SLRC.pdf>.

<sup>148</sup> See recommendation 7 – Samoa Law Reform Commission, *Samoa’s Legislative Compliance with the Convention on the Elimination of all forms of Discrimination Against Women Final Report* (2016) <https://www.samoalawreform.gov.ws/wp-content/uploads/2017/05/CEDAW-FINAL-REPORT-English-FINAL-compressed.pdf>.

<sup>149</sup> See Samoa Office of the Ombudsman NHRI, *National Public Inquiry Report into Family Violence in Samoa* (2018) <https://ombudsman.gov.ws/wp-content/uploads/2019/01/2018-SHRR-2018-National-Public-Inquiry-into-Family-Violence-English.pdf>.

<sup>150</sup> See *Public Finance Management Act 2014*, section 116.

<sup>151</sup> Public Service Commission, *Public Administration Sector Plan 2020-2025* (2020) <https://www.psc.gov.ws/public-administration-sector-plan-2020-2021-2024-2025-completed/>.

<sup>152</sup> Public Service Commission consultations (8 July 2021).

<sup>153</sup> See Public Service Commission, *Public Administration Sector Plan 2014-2018 Annual Review Narrative Report* (2015) <https://www.psc.gov.ws/wp-content/uploads/2016/07/Final-Narrative-Report-PASP-Annual-Review.pdf>. See video on best practices for whistleblower protection in the Pacific – [https://www.youtube.com/watch?v=Ei\\_ZFCbI3s](https://www.youtube.com/watch?v=Ei_ZFCbI3s).

<sup>154</sup> See Dr Ashley Savage, “Developing comprehensive whistleblower protections: An overview”, PILON Corruption Working Group & UN-PRAC Webinar (March 2021) [https://www.youtube.com/watch?v=Ei\\_ZFCbI3s](https://www.youtube.com/watch?v=Ei_ZFCbI3s).

<sup>155</sup> See OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris. <https://www.oecd-ilibrary.org/docserver/9789264252639-5-en.pdf?expires=1625713056&id=id&accname=guest&checksum=1A6E80E0A3816857419ED7B89E253C13>.

necessary as the actions of those who disclose such information are critical to national interests.<sup>156</sup> Having adequate protection for whistleblowers in Samoa not only promotes freedom of speech and expression including the right of access to information of public interest, but also promotes good and effective governance.

## Recommendations:

***17. The Government is encouraged to adopt laws for the protection of those who blow the whistle or disclose information on important matters of public concern not limited to matters of suspected irregularities or wrongdoing in relation to public finances as provided by the PFMA. For example, information relating to substantial and specific danger to public health and safety including reporting of domestic violence, unsafe workplaces, systemic harassment etc.***

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<sup>156</sup> Samoa Observer written submission, Ben Harding written submission (5 April 2021), Talamua written submission.



# RIGHT OF ACCESS TO INFORMATION

The ICCPR embraces the right of access to information held by public bodies regardless of the form in which the information is stored, its source and the date of production.<sup>157</sup> It is the responsibility of State parties to proactively put in the public domain Government information of public interest in order to give effect to the right of access to information.<sup>158</sup> It is incumbent on the State to put in place necessary procedures to ensure easy, prompt, effective and practical access to official information. Such procedures must provide for the timely processing of requests for information according to clear rules and that grounds for withholding official information must be legitimate and articulated.<sup>159</sup>

*Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject to clearly defined rules established by law.*<sup>160</sup>

One submitter noted the importance of citizens' (including the media) right of access to information and having a law in place to promote this will be greatly beneficial to progress and development<sup>161</sup>

*Access to Information is a key enabler of development. We live in a fast changing world where lack of information or knowledge may contribute to marginalization.*<sup>162</sup>

However concerns were raised by some consulted about the poor access to official information held by government and public bodies by media sources and members of the public therefore denying citizens of their right to be informed on issues that may affect them.<sup>163</sup>

*There is a major gap with regard to right of access to information in Samoa in that it is not promoted through law, policy or practice.*<sup>164</sup>

**The graph below highlights mediums people use to obtain or access information on government policies, the news, research and others. The most common mediums used to obtain information according to those surveyed are the newspapers (35%) and social media/ Facebook (31%). Some also approach websites and the internet (19%) while others submit requests for information (13%). Only 2% of those surveyed provided that they rely on press releases.**

**Those who use social media to access information provided that the main reason for doing so is because it is convenient, accessible and that everyone in Samoa has access to Facebook nowadays. The same**

<sup>157</sup> ICCPR, Article 19(2). UN HRC, *General comment no. 34, Article 19*, para 18.

<sup>158</sup> ICCPR, Article 19(2). UN HRC, *General comment no. 34, Article 19*, para 18.

<sup>159</sup> UN HRC, *General comment no. 34, Article 19*, para 19.

<sup>160</sup> *Declaration of Principles on Freedom of Expression in Africa*, Article IV.

<sup>161</sup> Samoa Observer, written submission.

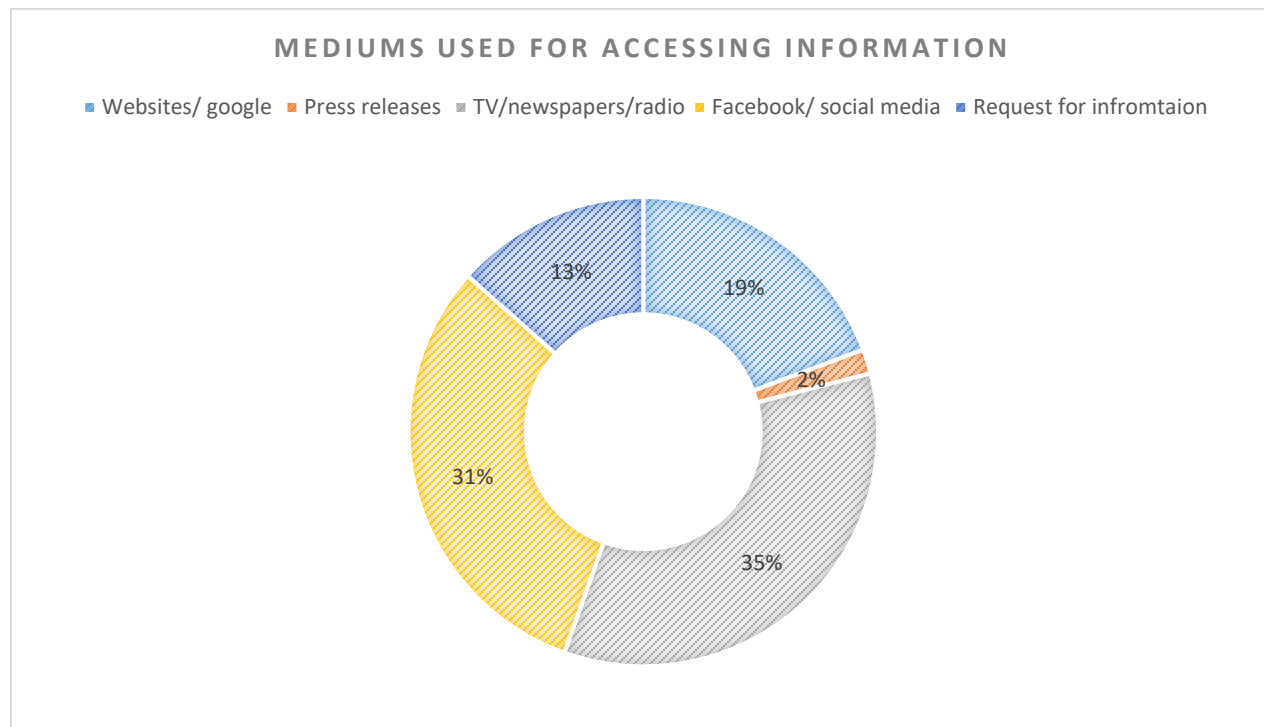
<sup>162</sup> See Tina Mata'afa-Tufele, "Freedom of Information Act in the works", *Samoa Observer* (7 May 2020)

<https://www.samoaoobserver.ws/category/article/62468>.

<sup>163</sup> Pasefika Mana written submission (30 April 2021). Talamua written submission. Samoa Observer written submission.

<sup>164</sup> Talamua written submission.

with newspapers. Others provided that although they consult websites and submit requests for information it is still challenging as some public bodies websites do not provide up to date information and the process for requesting information directly can be very long; and even when information is provided they are not comprehensive or relevant.



In 2018, SLRC submitted a review of exchange of information in the public sector.<sup>165</sup>The review focuses on information exchange between government agencies only. It did not explore the exchange of information between public bodies and the public. Therefore Samoa does not have in place a freedom of information legislation or policy. The regulation of information sharing between government and the public is managed through internal processes and practices. This is through their websites, newsletters, press releases and media conferences and programmes.

The *Public Administration Sector Communication Strategy 2021-2025* outlines processes and systems for sharing information including process for ensuring Government’s timely response to questions from media and public as well as provide guidance for managing misreporting.<sup>166</sup> Some government agencies have set up information spaces in their offices for public use to access government websites with all necessary information including government policies etc.<sup>167</sup>

Moreover, there have been efforts by whole of government including ministries, state-owned enterprises and standalone agencies to strengthen systems and mainstream communications with the creation of a

<sup>165</sup> Samoa Law Reform Commission, *Review of the Exchange of Information in the Public Sector Final Report* (2018) <https://www.samoalawreform.gov.ws/wp-content/uploads/2020/10/Review-of-the-Exchange-of-Information.pdf>.

<sup>166</sup> MPMC written submission. See also Public Service Commission, *Public Administration Sector Communication Strategy 2021-2025* (2020) <https://www.psc.gov.ws/wp-content/uploads/2021/07/Public-Administration-Sector-Communication-Strategy-Revised-Final-July-2021.pdf>.

<sup>167</sup> MPMC written submission.

Communications Liaison Officers Network (CLN) in 2021. The CLN is comprised of designated communications liaison officers from different agencies responsible for preparing and providing information to the press secretariat for dissemination.<sup>168</sup>

The *Public Records Act 2011* which regulates the custody, control, management, preservation and use of public records<sup>169</sup> although it provides some access to public records, is still generally restrictive. For example, unless approved by authority that a public record can be accessed early, all public records can only be accessed after the passage of 25 years.<sup>170</sup> In general, the *Public Records Act* is limited in scope to enable the effective and efficient flow and exchange of official information between the public and public bodies.

Despite these practices and processes, a robust system for free flow of information between the government and the public is required.<sup>171</sup> The development of a policy and/or law that provides for its application will have many benefits including opening the way for the public to access official information that was previously only privy to authorities, allow people to stay informed, and benefit the media industry as it enables publications on government work that would otherwise be outside public scrutiny.<sup>172</sup>

*Such law will also improve accountability between governments and the governed, strengthen public institutions against abuse of power and improve use of national resources.*<sup>173</sup>

Unless is it legitimate to withhold information for reasons such as likely prejudice to security and maintenance of the law, endanger the safety of any person, or cause serious damage to the economy<sup>174</sup> – it is crucial that official information is made available. Considerations of the right to privacy for instance must also be a key consideration when sharing information.

Any information that is within the public interest to know must not be perceived as private property by those who are in possession of it. Some media groups expressed that there is a misinformed perception among those who hold or in possession of official information that such information is private property and only they are privy to it.<sup>175</sup> Furthermore, most official information is classified confidential despite it being information that the public should be made aware of.<sup>176</sup> This creates a barrier for accessibility and inhibits the ability of reporters to report effectively. It also impacts readers who will not be kept up to date on issues and government policies that affect them.<sup>177</sup> This can further create issues of lack of transparency and accountability.<sup>178</sup>

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<sup>168</sup> MPMC written submission.

<sup>169</sup> “Public Record” means any Record made and kept, or received and kept, by any person in the course of the exercise of any official functions of a Public Entity, or for any purpose relating to a Public Entity, or for the use of by a Public Entity, and for the avoidance of any doubt, includes any Records which were created prior to the commencement of this Act – section 2, *Public Records Act 2011*.

<sup>170</sup> See Part 8, *Public Records Act 2011*.

<sup>171</sup> Talamua written submission. Samoa Observer written submission.

<sup>172</sup> Samoa Observer written submission.

<sup>173</sup> Talamua written submission.

<sup>174</sup> See for example, *New Zealand Official Information Act 1982*.

<sup>175</sup> Samoa Observer written submission.

<sup>176</sup> Talamua written submission.

<sup>177</sup> Samoa Observer written submission.

<sup>178</sup> Talamua written submission.

It was highlighted that although Samoa does not have a freedom of information law there are existing practices which facilitate the free flow of information between government agencies and public bodies.<sup>179</sup> For example, in regards to press releases, these must all go through the Government’s Press Secretariat before public dissemination. Despite these processes, some public authorities still raised concerns about uninformed reporting by the media.<sup>180</sup>

The existence of such practices although provide some form of information sharing, but are inadequate to provide an enabling environment for the free flow of information. There seems to be a lot of restrictions placed around who is privy to information, what type of information must be shared and many others.

Therefore, it is crucial that clear and robust procedures and guidelines are put in place to regulate the right of access to information, especially public information that impact on people’s lives. From a human rights perspective is it crucial that such information be made available and accessible to inform and empower people to take part in decision-making processes. Such procedures and guidelines should also help differentiate between what is public and what is confidential information and where such information can be obtained from.<sup>181</sup> Adequate and appropriate resources/ infrastructure to manage and store information for the purpose of dissemination would also be highly necessary and required.<sup>182</sup>

One of the activities contained within the *Public Administration Sector Plan 2020-2025* to strengthen accountability and transparency is the development of a freedom of information legislation led by the Public Service Commission and the Ministry of the Prime Minister and Cabinet.<sup>183</sup>

Currently, the Government through MCIT with the assistance of UNSECO under the Samoa Knowledge Society Initiative (SKSI) is in the process of developing freedom of access to information policy which is anticipated to result in a right to information legislation in the near future. The policy is expected to create:<sup>184</sup>

- i. Better relations between government and citizens with regard to information sharing.
- ii. Boost trust and confidence in public sector decision making
- iii. Boost and encourages participation from public
- iv. Promotes better accountability and transparency and ultimately sustainable development

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<sup>179</sup> This process provides that any official release must go through the Government Press Secretariat who then disseminates the information to the media and public. For matters that require Cabinet approval, approval is first sought before any information is published or disseminated – MPMC written submission.

<sup>180</sup> MPMC written submission. OOTR written submission.

<sup>181</sup> SLRC written submission.

<sup>182</sup> SLRC written submission.

<sup>183</sup> See *Public Administration Sector Plan 2020-2025*, Objective 1.2: Strengthen transparency and accountability – Activity 15.

<sup>184</sup> MCIT written submission. The policy is a component of the Samoa Knowledge Society Initiative Project – a multi-pillar project to promote knowledge-based sustainable development in Samoa, as inclusive knowledge societies are paramount for economic, social and political development. The Samoa Knowledge Society Initiative will contribute towards Samoa’s vision of placing Samoa as a knowledge hub in the Pacific region and in accordance with the Strategy for the Development of Samoa Key outcome 11, will also “develop E Governance services, improve information sharing services and increase access to E-education and E-health services by individuals, rural communities and vulnerable groups”. – see

[https://info.undp.org/docs/pdc/Documents/WSM/Samoa%20Knowledge%20Society%20Initiative%20PRODOC\\_12%20Oct%202019\\_FIN\\_AL.pdf](https://info.undp.org/docs/pdc/Documents/WSM/Samoa%20Knowledge%20Society%20Initiative%20PRODOC_12%20Oct%202019_FIN_AL.pdf).



The development of such policy is a step in the right direction for Samoa and one that has been long overdue. It is important for Samoa to consider that any framework to enable the right of access to information is supported with the right infrastructure. Despite the costs associated, it is a necessary step for Samoa to continue to meet its obligations under the ICCPR.

*“Samoa needs to progress to the next stage using the basic freedoms by the Consultation guaranteed including the freedom of expression and right to access information as foundation to fight corruption...”<sup>185</sup>*

As Samoa continues to venture into the information era it is timely that it puts in place a framework guided by the principle of maximum disclosure for sharing of information with the public. This will enable a transparent and accountable government and also to help keep citizens informed of matters that affect them and their overall development.

*“Access to information and knowledge is a prerequisite for building inclusive knowledge societies. Samoa’s population is exposed to living in hardship, with underlying vulnerabilities intensified by limited participation in decision-making at many levels. Information not only empowers people to make better decisions, but also allows them to exercise their rights, be economically active, learn new skills and hold their governments accountable.”<sup>186</sup>*

**INFORMATION POINT: *What is the principle of maximum disclosure?*<sup>187</sup>**

The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances where the disclosure would cause substantial harm to a legitimate aim in the law and that such harm is greater than the public interest in having the information.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. In other words, the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions which includes law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of Government decision-making processes.

<sup>185</sup> Samoa Observer written submission.

<sup>186</sup> Christina Mualia-Lima, “Samoa Knowledge Society Initiative gains momentum with handover of ICT equipment & software”, *UNDP Press Release* (21 March 2021) [https://www.ws.undp.org/content/samoa/en/home/presscenter/pressreleases/2021/SKSI\\_Handover\\_NUS.html](https://www.ws.undp.org/content/samoa/en/home/presscenter/pressreleases/2021/SKSI_Handover_NUS.html).

<sup>187</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>.

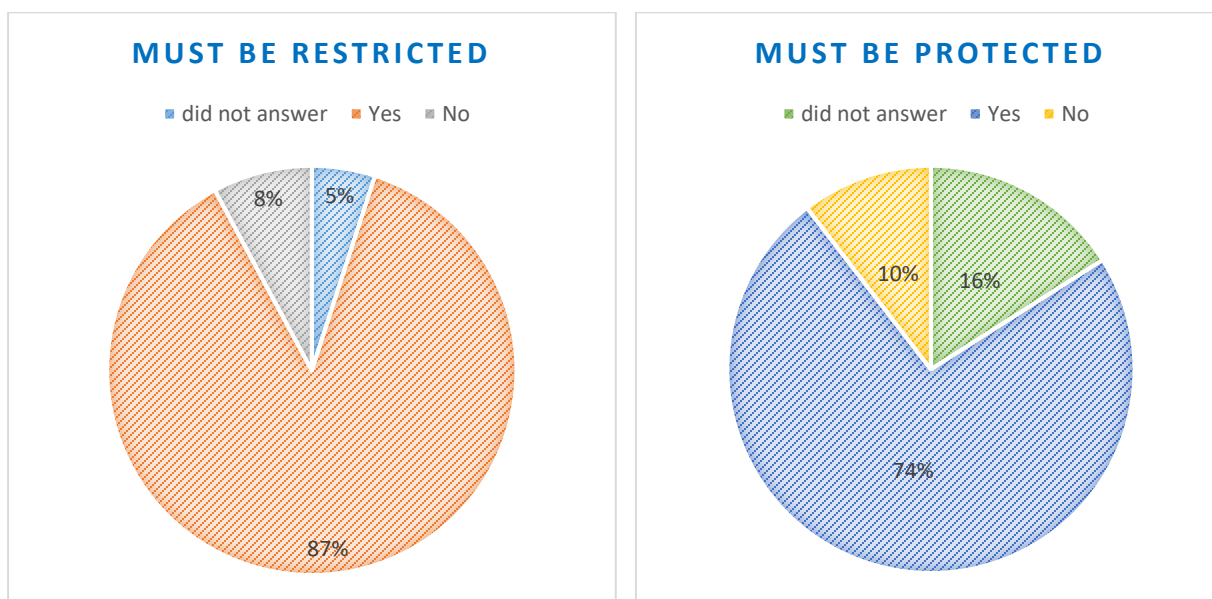
Restrictions whose aim is to protect Governments from embarrassment or the exposure of wrongdoing can never be justified.

## Recommendations:

- 18. The Government to accelerate the finalization of the Freedom of Information Policy and subsequently a legislation to regulate access to official information by the public. To ensure efficient implementation, any freedom of information law must be done in incremental steps.*
- 19. The Government to ensure that any freedom of information policy or law must be supported by the right infrastructure and contain robust security measures for managing information.*
- 20. The Government to ensure that clear and robust procedures and guidelines are put in place for sharing official information which must be governed by the principle of maximum disclosure.*

# RESTRICTIONS AND LIMITATIONS

There were mixed views expressed during consultations regarding the protection on the one hand and the need to impose restrictions on the other for the freedom of expression and speech as highlighted in the graphs below. Overall, many people agreed that the freedom of expression and speech should be strongly regulated, but when analyzed qualitatively, a different picture emerged. Submissions in support of imposing strict restrictions were mainly due to the lack of responsibility exercised by individuals when exercising their freedom of speech where it has led to reputations of individuals, families and villages being affected.<sup>188</sup> However, those who were against imposing strict restrictions provided that freedom of opinion and expression must be protected to ensure transparency and accountability, encourage debate and exchanging of ideas on important issues (as highlighted in the section on **Public's Understanding of Freedom of Opinion and Expression** above).



Although many provided for the freedom of opinion and expression to be restricted, it was also evident from responses that there was lack of awareness of restrictions already put in place by the law. This lack of awareness on restrictions was also expressed by some government agencies.<sup>189</sup> As provided above the freedom of speech and expression in Samoa although guaranteed by the Constitution under Article 13(1) are subject to certain restrictions.

*Every individual in an open, peace loving society has to be free to express his/her ideas, or to explain any view he/she may hold to inform, edify or entertain fellow citizens. On the other hand, no one should be free to use abusive or insulting language to harass or distress another, much less to excite*

<sup>188</sup> Focus groups consultations (Upolu and Savaii)

<sup>189</sup> SLRC written submission.

hostility against him/her, or to bring him/her into contempt. In the nature of things then, it is necessary to subject freedom of speech to restrictions that are reasonable and consistent with the needs of a free democratic society.<sup>190</sup>

Appropriate restrictions may be imposed on freedom of speech and expression to combat intolerance, discrimination and incitement to hatred. Article 19 (3) of the ICCPR emphasizes that the exercise of the freedom of expression carries with it special duties and responsibilities. Restrictions are permitted in two areas: (a) respect for the rights<sup>191</sup> or reputations of others; and (b) the protection of national security<sup>192</sup>, public order (ordre public) or public health or morals<sup>193</sup>.

Samoa's *Constitution* (Article 13 (2)), provides that reasonable restrictions and limits may be imposed on freedom of speech and expression in the interests of,

- national security,
- friendly relations with other States,
- public order or morals,
- for protecting the privileges of the Legislative Assembly,
- for preventing the disclosure of information received in confidence,
- for preventing contempt of Court, defamation or incitement to any offence.

These limitations are also contained in the *Crimes Act 2013* where it is an offence to incite hostility against others<sup>194</sup> and also for publishing false information with intention to harm another person's reputation.<sup>195</sup>

Accordingly, Governments are entitled to impose restrictions on freedom of speech and expression to address issues including incitement, hate speech, likely prejudice to national security and/or to protect a specific public interest or the rights and reputations of others. However, any restrictions imposed on the exercise of freedom of expression must not, however, put the right itself in jeopardy and must meet the "strict tests of justification".<sup>196</sup> Any restrictions on freedom of expression (including access to information) must be clearly set out in the law, necessary and legitimate, and also proportionate.<sup>197</sup>

The Human Rights Committee noted that the restrictions/exceptions under Article 19(3) of the ICCPR are narrowly defined and the burden is on the Government to justify restrictions. Restrictions must meet the following 3 conditions:<sup>198</sup>

1. **Legality:** restriction must be provided by law, precise, public and transparent and appropriate notice given to those whose speech is being regulated,
2. **Legitimacy:** restriction must be justified one or more of the interests define in Article 19(3) of ICCPR, and
3. **Necessity and proportionality:** Government must demonstrate that the restriction is necessary to protect a legitimate interest and to be the least restrictive means to achieve the purported aim.

**INFORMATION POINT:** *What are the 'strict tests' of justification?*<sup>199</sup>

<sup>190</sup> Samoa Office of the Ombudsman NHRI, "Disentangling beliefs about freedom of opinion/ expression", *Press Release* (29 July 2020) [https://ombudsman.gov.ws/wp-content/uploads/2021/04/NHRI\\_Freedom-of-speech-awareness-PR\\_FINAL.pdf](https://ombudsman.gov.ws/wp-content/uploads/2021/04/NHRI_Freedom-of-speech-awareness-PR_FINAL.pdf).

<sup>199</sup> IPU, *Human Rights: Handbook for Parliamentarians*, 161-62. UN HRC, *General comment no. 34, Article 19*, para 22.

The 'strict test' of justification means:

- The restriction must be provided by law (legislation enacted by parliament, common law articulated by the courts or professional rules). The restriction must be precise and meet the criteria of legal certainty and predictability: it must be accessible to the individual concerned and its consequences for him or her must be foreseeable. Laws that are too vague or allow for excessive discretion in their application fail to protect individuals against arbitrary interference and do not constitute adequate safeguards against abuse.
- The restriction must be necessary for the legitimate purpose of:
  - respecting the rights or reputations of others; or
  - protecting national security, public order, public health or morals.

The latter criterion can be met only if the restriction addresses a specific, well-defined social need and is proportionate to the legitimate aim pursued, so that the harm to freedom of expression does not outweigh the benefits.

There are also *mandatory limitations on freedom of expression* that States must adopt as provided for under Article 20 of the ICCPR. These include legal prohibitions on both “propaganda for war” and “advocacy of national, racial or religious<sup>200</sup> hatred that constitutes incitement to discrimination, hostility or violence”. Such mandatory limitations however must still conform and meet the necessity and proportionality requirements contained in Article 19 (3) of the ICCPR.<sup>201</sup>

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<sup>192</sup> “It is not compatible with Article 19(3) of the ICCPR, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.” - UN HRC, *General comment no. 34, Article 19*, para 30.

<sup>193</sup> The Human Rights Committee observed in general comment No. 22 that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination – see UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, <https://www.refworld.org/docid/453883fb22.html>.

<sup>194</sup> See section 41, *Crimes Act 2013*. Persons found guilty are given a prison sentence of not more than 2 years.

<sup>195</sup> *Crimes Act 2021*, section 117A(2). If a person is found guilty the penalty is either a fine (not more than 175 penalty units), or imprisonment for not more than 3 months.

<sup>196</sup> Inter-Parliamentary Union and the United Nations (IPU), *Human Rights: Handbook for Parliamentarians No. 26*, (2016) 161-62. UN HRC, *General comment no. 34, Article 19*, para 22.

<sup>197</sup> UNGA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/74/486 (9 October 2019) [https://www.ohchr.org/Documents/Issues/Opinion/A\\_74\\_486.pdf](https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf).

<sup>198</sup> UN HRC, *General comment no. 34, Article 19*, <https://www.refworld.org/docid/4ed34b562.html>.

<sup>199</sup> IPU, *Human Rights: Handbook for Parliamentarians*, 161-62. UN HRC, *General comment no. 34, Article 19*, para 22.

<sup>200</sup> It is important to note that any legislation favoring or penalizing particular religions or belief systems, or measures preventing or punishing criticism of religious leaders or doctrine, are not permitted under the ICCPR.

<sup>201</sup> UN HRC, *General comment no. 34, Article 19*, para 48.

Governments are also encouraged to take legal measures to restrict the publication or dissemination of obscene and pornographic material portraying women and girls as objects of violence or degrading or inhuman treatment.<sup>202</sup>

**INFORMATION POINT:** *Restrictions on freedom of expression – checks and balances*<sup>203</sup>

- **Specifics:** Any restriction should be as specific as possible. It would be wrong to ban an entire website because of a problem with one page.
- **National security and public order:** These terms must be precisely defined in law to prevent them being used as excuses for excessive restrictions.
- **Morals:** This is a very subjective area, but any restrictions must not be based on a single tradition or religion and must not discriminate against anyone living in a particular country.
- **Rights and reputations of others:** Public officials should tolerate more criticism than private individuals. So defamation laws that stop legitimate criticism of a government or public official, violate the right to free speech.
- **Blasphemy:** Protecting abstract concepts, religious beliefs or other beliefs or the sensibilities of people that believe them is not grounds for restricting freedom of speech.
- **Media and journalists:** Journalists and bloggers face particular risks because of the work they do. Countries therefore have a responsibility to protect their right to freedom of speech. Restrictions on Newspapers, TV stations, etc. can affect everyone’s right to freedom of expression.
- **Whistleblowers:** Government should never bring criminal proceedings against anyone who reveals information about human rights abuses.

## Recommendations:

- 21. The Government is encouraged to ensure that any restrictions on the freedom of speech and expression are narrowly defined as per ICCPR Article 19(3) and must meet the “strict tests of justification”. Restrictions must be provided by law, legitimate, necessary and proportionate.**
- 22. The Government to adopt legal prohibitions on both “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” in conformity with Article 20 of the ICCPR.**
- 23. The Government to impose legal measures to restrict the publication or dissemination of obscene and pornographic material portraying women and girls as objects of violence or degrading or inhuman treatment.**

<sup>202</sup> UN HRC, CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, <https://www.refworld.org/docid/45139c9b4.html>.

<sup>203</sup> Amnesty International UK, “What is freedom of speech?” *Issues* (18 May 2020) <https://www.amnesty.org.uk/free-speech-freedom-expression-human-right>.



# CONCLUSION

The recommendations made in this Report framed from a human rights perspective will greatly contribute to the promotion and protection of our rights to freedom of opinion and expression and access to information. The guaranteeing of such freedoms and rights in law and in practice will not only further strengthen our participation in decision-making processes that impact on our lives, but will also demonstrate and make certain that our government is kept accountable and transparent.

On a bigger scale, the realization of our freedom of opinion and expression and right of access to information will help build knowledge communities that in turn contribute towards our national goals and priorities and also the SDGs (SDG 16 broadly and specifically to SDG 16.10.2).

We strongly urge and encourage the Government to consider and implement the recommendations made to not only promote and protect freedom of opinion and expression in Samoa including media freedom and right to information, but contribute to Samoa's overall development.

To end, we would like to reiterate two key take home points from this Report:

- (1) individuals are free to express their views and opinions (including receiving information), however, they must do so in a way that respects and does not negatively impact others which is consistent with our Fa'asamoa values of faa'aloalo and va tapuia (application); and
- (2) any restrictions placed on such rights and freedoms must be carefully balanced and conform with international human rights norms of necessity and proportionality and our Constitution (necessary restrictions).

# FULL LIST OF RECOMMENDATIONS

Listed in the matrix below is the full list of recommendations classified under three broad categories: outreach and awareness, legislative reform and policy, resourcing and capacity building. The matrix also indicates the responsible agency and implementation timeframe for each recommendation.

## Key:

Outreach and awareness
Legislative reform and policy
Resourcing and capacity building

AREA	RECOMMENDATIONS	RESPONSIBLE	IMPLEMENTATION TIMEFRAME
Public's understanding of freedom of opinion and expression	<b>1. The Government to raise awareness on freedom of opinion and expression: what it is, and the special duties and responsibilities associated with their application in all sectors of society including communities and schools.</b>	OOTR, MCIT, OMB/NHRI	Immediate-Ongoing
	<b>2. The Government to include in the school curriculum and lessons promotion of freedom of opinion and expression to empower students, as well as awareness on its limitations taking into account individual responsibility.</b>	MESC, OMB/NHRI	2-3 years
Defamation	<b>3. The Government to ensure that enforcement of the law on criminal defamation does not disproportionately impact on the freedom of expression and speech of the individual.</b>	OAG, SLRC, MCIT	Ongoing
	<b>4. The Government to adopt necessary measures to protect the privacy of individuals.</b>	OAG, SLRC	2-3 years
Hate speech	<b>5. The Government to progressively adopt legislative measures to address instances of hate speech (including racist content, xenophobia) in Samoa both off and online.</b>	OAG, SLRC	2-3 years
	<b>6. The Government to ensure that any laws on hate speech achieves a balance between protecting people from speech inciting</b>	OAG, SLRC, MCIT	2-3 years



	<b><i>hatred and discrimination and the freedom of speech and expression. Furthermore, political opinion should not be included within any incitement provisions as it will greatly impact on political debate and public discourse.</i></b>		
	<b><i>7. The Government to encourage village councils to enforce laws on hate speech and take the lead in ensuring that peace and harmony within communities are maintained.</i></b>	MWSCD, OAG, MCIT, OOTR, MPPS	2-3 years
Freedom of expression and political rights	<b><i>8. The Government to continuously and proactively promote the right to participate in decision-making processes of all citizens especially vulnerable and marginalized communities including youth, women, persons with disabilities, persons of diverse gender identities and others.</i></b>	MWSCD, OMB/NHRI	Immediate
Freedom of expression and the media	<b><i>9. The media industry must equip journalists with adequate trainings on proper reporting taking into account the Code of Conduct developed by the Media Council to maintain journalistic and media confidence.</i></b>	Media Council. JAWS, MPMC	Immediate-Ongoing
	<b><i>10. The Government is encouraged to make official information readily available and support media training and learning. Support offered by Government should not compromise the independence of the media.</i></b>	Govt.	2-3 years
	<b><i>11. The Government to ensure that any laws imposed to regulate or may impact media freedom are legitimate and fair and is not used to arbitrarily gag the media or censor information the public has a right to know.</i></b>	OAG, SLRC, MPMC, JAWS, Media Council.	2-3 years
The internet, freedom of expression and safety of children	<b><i>12. The Government to introduce legislative and non-legislative measures to ensure the safety of children online.</i></b>	OAG, SLRC, OOTR, MWSCD	2-3 years
	<b><i>13. Awareness raising in schools regarding the safe and responsible use of the internet must be ongoing and included in the curriculum.</i></b>	OOTR, MCIT, OMB/NHRI	Immediate-ongoing
	<b><i>14. Technology service providers must provide resources to assist with public awareness and educational programmes about online safety of children and their access to unsuitable materials, online abuse and</i></b>	Digicel, Vodafone, CSL etc.	Immediate-ongoing

	<b><i>bullying, based on the principle of corporate responsibility.</i></b>		
	<b><i>15. The Government to ensure that any measures to restrict or limit internet access on the basis of child safety online must take into account a balanced approach where restrictions on communications conform to strict tests of necessity and proportionality.</i></b>	OAG, SLRC, MCIT	2-3 years
	<b><i>16. The Government to prioritize finalizing negotiations and accelerate Samoa's accession to the Budapest Convention informed by a comprehensive review of Samoa's legislative framework and context.</i></b>	OAG, MCIT	Immediate
Whistleblower protection	<b><i>17. The Government is encouraged to adopt laws for the protection of those who blow the whistle or disclose information on important matters of public concern not limited to matters of suspected irregularities or wrongdoing in relation to public finances as provided by the PFMA. For example, information relating to substantial and specific danger to public health and safety including reporting of domestic violence, unsafe workplaces, systemic harassment etc.</i></b>	OAG, PSC, Audit Office, OMB/NHRI	2-3 years
Right of access to information	<b><i>18. The Government to accelerate the finalization of the Freedom of Information Policy and subsequently a legislation to regulate access to official information by the public. To ensure efficient implementation, any freedom of information law must be done in incremental steps.</i></b>	MCIT, PSC	Immediate
	<b><i>19. The Government to ensure that any freedom of information policy or law must be supported by the right infrastructure and contain robust security measures for managing information.</i></b>	MCIT, PSC	Immediate - Ongoing
	<b><i>20. The Government to ensure that clear and robust procedures and guidelines are put in place for sharing official information which must be governed by the principle of maximum disclosure.</i></b>	MCIT, PSC, MPMC	2-3 years
Restrictions and limitations	<b><i>21. The Government is encouraged to ensure that any restrictions on the freedom of speech and expression are narrowly defined as per ICCPR Article 19(3) and must</i></b>	OAG, SLRC	2-3 years

	<i>meet the “strict tests of justification”. Restrictions must be provided by law, legitimate, necessary and proportionate.</i>		
	<b>22. The Government to adopt legal prohibitions on both “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” in conformity with Article 20 of the ICCPR.</b>	OAG	2-3 years
	<b>23. The Government to impose legal measures to restrict the publication or dissemination of obscene and pornographic material portraying women and girls as objects of violence or degrading or inhuman treatment.</b>	OAG, MWCS D	2-3 years

**Office of the Ombudsman**  
National Human Rights Institution Samoa

Level 2, SNPF Plaza  
PO Box 3036  
Apia, Samoa

[www.ombudsman.gov.ws](http://www.ombudsman.gov.ws)

