



Asia Pacific Forum of National Human Rights Institutions

"A Partnership For Human Rights In The Region"

Explanatory Memorandum for the APF's Constitution

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PURPOSE

The purpose of this document is to provide a brief overview of the provisions of the draft constitution for the Asia Pacific Forum of National Human Rights Institutions (the Forum).

BACKGROUND

In reviewing the draft constitution the following contextual points should be noted:

Preparation

This draft Constitution has been prepared by Freehills Solicitors in Melbourne by an acknowledged expert in Australian law as it relates to not-for-profit organisations. The working group is indebted to Freehills for its expertise.

Rationale for Australian Law as the basis for the Constitution

As per the Forum's working group recommendations and as endorsed by Forum members at the last annual meeting, the Forum is to be incorporated under the Australian Corporations Law. This is in accord with the expert advice provided to the working group that this legal framework currently provides the most transportable and flexible arrangement. This fact is particularly relevant given the future potential of the Forum to be based more centrally in the region, away from Australia.

Rationale for comprehensive constitutional wording

Under this legal framework two approaches were open to the working group in developing a draft constitution:

- (i) a "bare-bones" simple constitutional framework; or
- (ii) a more detailed constitution incorporating the major legal obligations required under the Australian Corporations law.

Under the first option, it would be necessary for the Forum to have on hand at all meetings and other relevant times a copy of the Australian Corporations Law (and/or a person cognisant with the law) to ensure that any procedural issue or question was determined in accordance with the law. This was deemed not to be preferable as the law itself is 2000 pages long.

The alternative, a longer, more detailed Constitution (as has been drafted), ensures that the main legal obligations are already embraced within the Constitution itself – thereby minimising the need to reference back to the Corporations Law. **The working group was strongly advised by its legal advisers that this was the most sensible and secure option for not-for-profit organisations such as the Forum.**

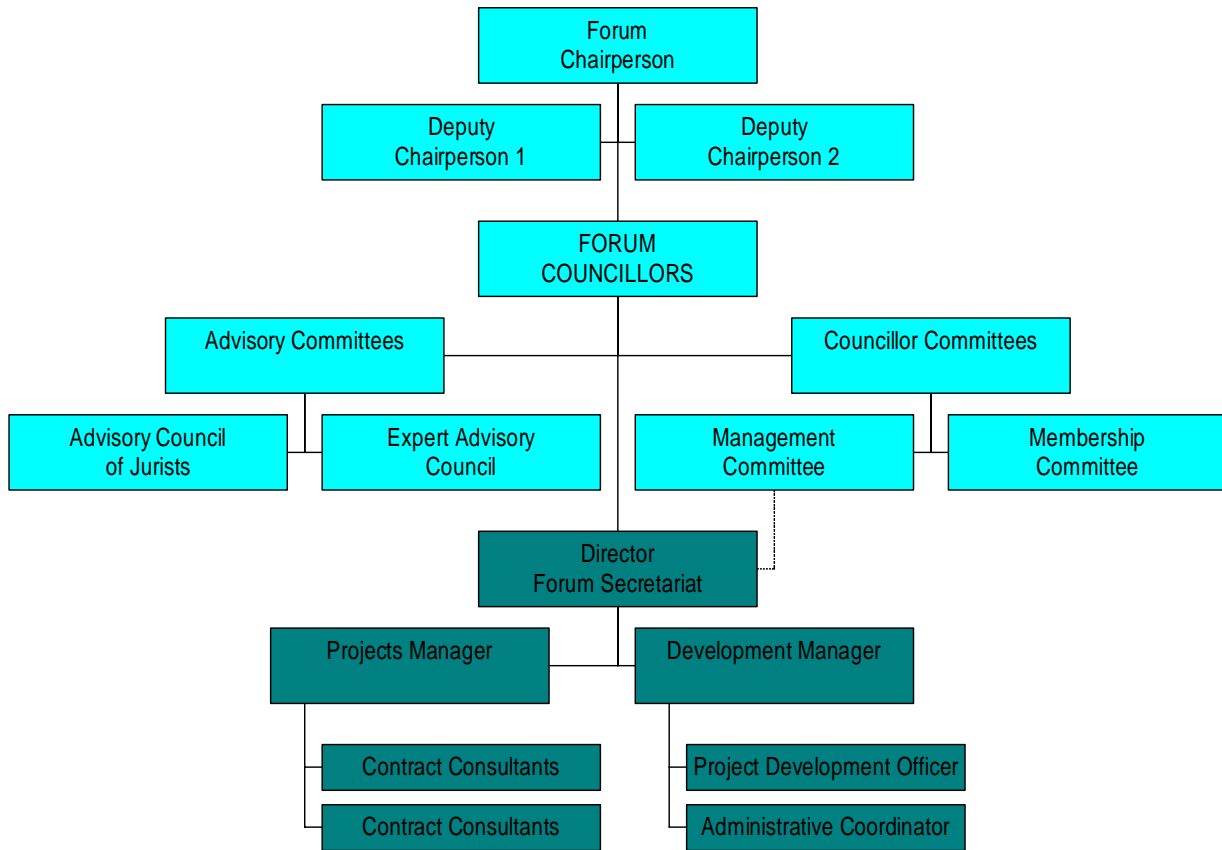
PROPOSED STRUCTURE

The draft constitution creates a more democratic and participatory structure for the Forum. The main elements of this structure is as follows:

1. The constitution establishes a *Forum Council* which is comprised of one councillor nominated by each full member institution of the Forum. The Forum councillors are the decision-making body of the Forum and exercise all the powers conferred by the constitution.
2. The Forum councillors are responsible for electing a *Chairperson* of the Council. The role of the Chairperson is to lead the Council and be the official spokesperson of the Forum. Forum councillors may also elect two *Deputy Chairpersons*.
3. The Forum councillors may decide to establish a number of *committees of councillors*. It is recommended that Forum councillors establish a *management committee* to oversee the work of the Forum and a *membership committee* to assess and make recommendations on new applications for membership to the Forum.
4. The Forum councillors may also decide to establish a number of *advisory committees*. It is recommended that the Forum councillors establish two such committees. The *Advisory Council of Jurists* is already operational and would fall within this structure. The second proposed advisory committee would be the *Expert Advisory Council* which would be comprised of prominent individuals from a variety of professions.
5. The *Director* of the Forum Secretariat will be responsible for implementing the decisions of the Forum councillors and managing the staff of the Forum. The Director will report to the Chairperson on a regular basis and to the Forum councillors through the proposed management committee. Staffing of the *Secretariat* will be divided into two broad areas of responsibility:
 - ◆ **Projects:** this function will include management of membership and donor projects. This would include working with members to develop projects as well as being responsible for managing the members' communication strategy. This function will require contract and specialist consultants to assist in project development, implementation and evaluation.
 - ◆ **Administration and Finance:** this function will include donor grants and administration. This would include working with donors to obtain core funding, providing appropriate and timely reporting arrangements and administering the general work of the Forum.

Below is a diagrammatic view of the structure that the new organisation will take:

Asia Pacific Forum Organisational Chart



RULES OF THE CONSTITUTION

To aid Forum members consideration of the constitution a brief description of the key provisions is provided below:

- **Rules 1-4: Company’s name; Forum’s object; Forum’s powers; Additional powers**

These rules stipulate the *name, object and powers* of the Forum. You will note in Rule 2(b) that the manner in which the Forum’s object is to be pursued is to be determined by the Forum councillors. Rules 3 and 4 contain a list of the powers conferred upon the Forum for the purpose of carrying out its object. These powers are derived from two sources – the first being the objectives of the Forum as agreed by Forum members at the First Annual Meeting of the Forum and as contained in the resulting *Larrikia Declaration*.¹ The second source was the advice of the legal

¹ See the Forum’s website for the full text of the Larrikia Declaration: www.apf.hreoc.gov.au/about/index.html

advisers to the working group on the general range of powers required to run a ‘not for profit’ organisation (that advice was to the effect that powers such as those relating to funding, trusteeships, real property etc should be included in the Constitution). Rule 3.2 states that the independence, authority and national status of each of the full members of the Forum and their powers, duties and functions shall in no way be affected by the establishment of the Forum and its incorporation or functioning.

- **Rule 5: Income and property**

As the Forum will be constituted as a ‘not for profit’ organisation, this rule provides that the Forum’s income and property must be applied solely towards the Forum’s object. Unlike a commercial corporation, that income and property may not be paid by way of dividend etc to the members (or to the Forum councillors).

An exception to this general rule relates to the payment of Forum councillors for, amongst other things, out-of-pocket expenses and the provision of services.

- **Rules 6-7: Liability of members; Guarantee by full members**

These rules provide that the *liability* of the full member institutions of the Forum is limited to AUD \$100 each. This ensures that if the Forum ceases operation but still has debts and liabilities, then each full member will only be required to contribute up to a maximum of \$100 – rather than the full amount required to settle the debts and liabilities.

- **Rules 8-9: Establishment and operation of Public Fund; Winding up**

These rules provide for the establishment and maintenance of a ‘public fund’ and for the distribution of any property held by the Forum at the time of its dissolution.

The use of a public fund and the associated accounting requirements ensure that the finances of the Forum are maintained in a transparent way. Any income received by the Forum must be used for the object of the Forum.

Due to the ‘not for profit’ nature of the Forum, in the event of its dissolution, excess income and property will be transferred to a charitable institution (as defined under Australian Law) the identity of which will be determined by the Forum councillors. Examples of the type of charities to which any excess income and property could be transferred include the United Nations Children’s Fund (UNICEF), Save the Children Fund, Community Aid Abroad and the Red Cross Society.

- **Rule 10: Altering this constitution**

This rule lists certain provisions of the constitution which may not be materially altered unless such alterations are necessary to comply with the relevant fundraising

or collections legislation or are approved in writing by an Australian Deputy Commissioner of Taxation. This rule also lists certain other provisions of the constitution which may not be materially altered without the agreement of all affected members.

- **Rule 11: Membership**

This rule provides for three categories of membership to the Forum.

- (i) In the first category, *Full Members* of the Forum shall be national institutions which, in the opinion of the Forum councillors, meet the Paris Principles. This is in accordance with current practice and all current members of the Forum fall into this category.² Rule 11.1(b) states that the initial members of the Forum are the current eight member institutions (which already comply with the Paris Principles).
- (ii) The second category of *Candidate Members* relates to those institutions which apply for membership and which can theoretically comply with the Paris Principles, but currently do not do so. It is envisaged that this category of membership will apply to those institutions largely in compliance with the Paris Principles apart from one or two deficiencies. Admission as a candidate member requires a commitment from the institution that active steps will be taken to meet the Paris Principles. A *candidate member* can become a full *Member* of the Forum by applying for membership once it complies with the Paris Principles.
- (iii) The third category of *Associate Members* relates to those institutions which do not comply with the Paris Principles and are unlikely to do so within a reasonable period. Forum councillors may determine that it would be in the interests of the Forum to admit a specific institution as an associate member of the Forum. For example if the Hong Kong Equal Opportunities Commission applied for membership, Forum councillors may decide to admit the institution as an associate member. The Hong Kong Commission cannot be a full member or a candidate member of the Forum because it cannot meet the Paris Principles as it is not a ‘national’ institution but rather an institution with responsibilities for an administrative region of China. The decision to admit or not admit institutions as associate members is entirely at the discretion of the Forum councillors.

The major difference between full members and candidate and associate members relates to an institution’s ability to participate in the Forum’s decision-making process. Candidate and associate members will be able to participate in virtually all of the Forum activities – such as, for example, our annual meetings and workshops.

² See for example the recent application process of the Human Rights Commission of Nepal. Papers from the Fifth Annual Meeting of the Forum – Forum website:
http://www.apf.hreoc.gov.au/about/meetings/fifth_meeting/nepal_application.html

However candidate and associate members will not be able to vote or take part in the decision-making processes of the Forum – this right will be limited to full members. Candidate and associate members will not, therefore, be able to nominate a representative to sit on the Forum’s governing Council. Another significant difference between Candidate and Associate members is that Candidate members will be requested to make a commitment to the members of the Forum that they will work towards compliance with the Paris Principles. It is envisaged that this commitment will include the development and implementation of an institutional strengthening program in cooperation with the Forum.

All decisions on membership – whether a decision to admit new members, candidate members or associate members – rests with the Forum councillors.

Finally, rules 11.4 and 11.5 provide for a review of the compliance of a full member or candidate member with the Paris Principles. A review of compliance can be initiated by the Forum councillors or it can be initiated in response to a notification from a full member or candidate member that there has been a change to its constitution and/or legislative base or administrative functioning which materially impacts upon its compliance with the Paris Principles.

- **Rule 12: When membership ceases**

This rule deals with the circumstances in which an institution ceases to be a member, candidate member or associate member of the Forum (including by resignation or expulsion). The Forum councillors may expel a member, candidate member or associate member (by resolution) if they determine it is not in the interests of the Forum for the institution to remain a member. The rule also puts in place certain procedural requirements for an expulsion resolution.

- **Rule 13: General meetings**

This rule sets out the procedure for the holding of general meetings of the Forum. It deals with various matters, including the provision of notice of general meetings, the number of members required for a quorum, the position of chairperson, the admission of observers, the process of decision-making, voting rights and representation. Rule 13.7(a) states that, as per the practice of the Forum, decisions at general meetings should, as far as possible, be arrived at by consensus.

- **Rule 14: Forum councillors**

This rule relates to the Forum’s *governance structure*. The key decision making body of the Forum will be the Forum’s Council. Various relevant powers are conferred upon the Forum councillors.

Each full member institution will be represented by one councillor on the Forum Council (see 14.1(d)). The representatives will be nominated by the individual Forum

member institutions. In line with the demarcation between classes of members, candidate and associate members will not be entitled to nominate a representative to the Council.

You will note that under Section 14.1 (e), the Constitution provides for two Forum councillors to be appointed by the Australian Human Rights and Equal Opportunity Commission. In addition, Section 14.2 requires that at least two Forum councillors must be residents of Australia. These provisions are a legislative requirement of the Corporations Law and cannot be avoided. However, to ensure equality among the Forum councillors and in the decision-making process, the second Forum councillor resident in Australia will be a silent member, with no voting rights. This is reflected in rule 14.17 of the Constitution which states that only one of the two Forum councillors appointed by the Australian Human Rights and Equal Opportunity Commission may vote at meetings of councillors.

Section 14.5 details the powers and duties of Forum councillors. The Forum councillors are responsible for managing the Forum's affairs and can exercise all the powers of the Forum.

Section 14.10 relates to the election of the Chairperson of the Forum councillors. This position will replace the current position of 'Regional Coordinator' of the Forum.

Section 14.11 allows the Forum councillors to elect one or more Deputy Chairpersons.

Section 14.14 allows, with the approval of the Forum councillors, for an individual Forum councillor to appoint a person as his or her alternative Forum councillor for a set period.

Sections 14.15 and 14.16 allow for the delegation of any of the powers of the Forum councillors to committees of Forum councillors or to individual Forum councillors.

- **Rule 15: Executive officers**

This rule relates to the Forum's *executive management structure*. While it is the role of the Forum councillors to determine the Forum's policy and direction, it is the role of the Forum's executive to manage the Forum and implement the decisions of the Forum councillors. The executive of the Forum will therefore operate under the direction and guidance of the Forum councillors.

Rule 15.1(a) enables the Forum councillors to appoint an executive director.

Rule 15.2 requires that the Forum councillors must appoint at least one secretary and may appoint additional secretaries.

Rule 15.3 regulates the relationship between executive officers and the Forum councillors.

The current officers in the Forum Secretariat will initially comprise the executive.

- **Rule 16: Advisory committees**

This rule allows for the setting up of advisory committees. These committees may be comprised of Forum councillors or individuals from outside the Forum (or a mixture of both).

The full members in general meeting and/or the Forum councillors decide the functions of such committees and may also specify the manner in which the proceedings of such committees are to be conducted and the matters to be considered by them.

- **Rule 17: Indemnity and insurance**

This rule ensures that Forum councillors and members of the executive are indemnified by the Forum for all losses or liabilities incurred by the individual as an officer of the Forum (to the extent that those liabilities are not covered by insurance). This rule also provides that the Forum may take out relevant insurance policies for officers of the Forum.

- **Rule 18: Auditor**

This rule requires that the Forum must appoint a qualified auditor.

- **Rule 19: Notices**

This rule sets out provisions in relation to notices (how they are to be delivered and when they are taken as being given).

- **Rule 20: Definitions and interpretation**

This rule defines certain terms used in the constitution. It also contains provisions relating to the interpretation of the Constitution.

- **Rule 21: Application of the Law**

This rule provides that certain sections of the Corporations Law either apply in relation to the Constitution or are displaced by the Constitution.