

Republic of Nauru - 18<sup>th</sup> Parliament

**Referendum Procedures Bill 2009**

**EXPLANATORY MEMORANDUM**

**BACKGROUND AND INTRODUCTION:**

The *Constitutional Review Committee Act* was passed by Parliament in 2004 to establish the Standing Committee on Constitutional Review (the ‘CRC’) and to charge it with the task of undertaking a review of the 1968 Constitution. The Act also made provision for the conduct of a referendum, in the event that the constitutional review resulted in a proposed law to alter any of the provisions of the Constitution that require approval by referendum under Article 84 of the Constitution. The CRC commenced a process of constitutional review in 2006, and in August 2009 Parliament passed two proposed laws to alter the Constitution: the *Constitution of Nauru (Parliamentary Amendments) Bill 2009*, and the *Constitution of Nauru (Referendum Amendments) Bill 2009*. The second of these two bills contains proposed amendments to the Constitution that require the approval of referendum. A referendum has therefore been scheduled for 27 February 2010.

In the course of planning for the 2010 referendum, the CRC discovered that the provisions contained in the *Constitutional Review Committee Act* that relate to the procedure for conducting a referendum do not appear to satisfy the constitutional requirements of Article 84. The main problem with the existing referendum provisions is that they provide for voters to be asked in respect of each proposed constitutional amendment contained within the proposed law, whether they approve of it. Article 84(3) of the Constitution provides:

‘**A proposed law** to alter or having the effect of altering the Fifth Schedule or any of the provisions of this Constitution specified in the Fifth Schedule shall not be submitted for the certificate of the Speaker under Article 47 unless, after it has been passed by Parliament, **it** has been approved by not less than two-thirds of the votes validly cast on a referendum held... as prescribed by law’.

This means **the proposed law as a whole** must be approved by referendum. It is therefore necessary, when conducting a referendum, to ask voters whether they approve of the proposed law, rather than asking them whether or approve of each individual provision within the proposed law.

The Bill would effectively replace the invalid provisions currently contained in the *Constitutional Review Committee Act*, and would operate together with, and as a complement to, the *Electoral Act*.

The main objective of this Bill in the immediate short term is to enable the referendum that is scheduled for 27 February 2010 to be conducted in a manner that is consistent with the constitutional requirements of Article 84. However, the scope of the Bill is not confined to the referendum in 2010 - this law would apply to the conduct of all future referenda.

## **NOTES ON CLAUSES:**

### **Part 1 – Preliminary**

**Clauses 1 to 5** cover preliminary matters. Clauses 1 and 2 are standard provisions relating to the short title and commencement of the law. The law would commence on the day of certification by the Speaker. Clause 3 defines a number of the terms used in the Bill, including definitions of the terms ‘Article 84 referendum’ and ‘Article 84A referendum’ by reference to the relevant provisions of the Constitution. Clause 4 provides that the law will apply to Article 84 and Article 84A referenda, and clause 5 provides that the Act binds the Republic.

### **Part 2 – Preparing for a Referendum**

**Clause 6** stipulates the time within which a date for an Article 84 referendum must be fixed by Cabinet (within 30 days after Parliament has passed the proposed law), and the period within which the referendum must be conducted (2-12 months after the passage of the proposed law). The date is by notice in the Gazette.

**Clause 7** provides for the date of an Article 84A referendum to be fixed by Gazette notice.

**Clause 8** sets out the additional information that must be published in the Gazette notice at the time the date of the referendum is fixed, namely, where and when people can inspect or access a copy of the proposed law, and that in order to vote at a referendum a person must be enrolled no later than the end of the sixth day before the referendum.

**Clause 9** provides for the appointment by Cabinet of a returning officer for the referendum, or, if none is appointed, for the Chief Secretary to serve as returning officer.

**Clause 10** provides for the establishment of polling places. The clause requires the returning officer to establish enough polling places, and to distribute them appropriately, to ensure each voter can access a polling place and has an opportunity to vote at the referendum without unreasonable delay.

**Clause 11** provides for the returning officer to appoint a presiding officer for each polling place.

**Clause 12** provides for the Speaker to appoint up to 6 scrutineers for the counting of the votes.

### **Part 3 – Voting**

**Clause 13** applies the provisions of the *Electoral Act 1965-2007* that relate to polling at an election to the conduct of a referendum, with certain modifications. This application of these provisions means that the conduct of voting at a referendum will be the same as the conduct of voting at an election. This clause also applies any prescribed alternative method for voting under the *Electoral Act 1965-2007* to a referendum.

**Clause 14** stipulates that a person who is enrolled to vote at the end of the sixth day before an Article 84A referendum is entitled to vote at the referendum. This provision has been included because, unlike Article 84, Article 84A will not stipulate who is entitled to vote at a referendum held under that Article.

**Clause 15** prescribes the form of ballot paper for each type of referendum. The ballot papers contain a single question.

**Clause 16** provides for voting at a referendum to be conducted by ballot and describes how a person may mark their ballot paper to cast a vote.

#### **Part 4 – Returns and Scrutiny**

**Clause 17** requires each presiding officer to take ballot boxes to a place specified by the returning officer at the close of polls, where each box will be opened in the presence of the presiding officer, the Clerk and each scrutineer.

**Clause 18** requires the votes to be counted in the presence of each scrutineer and any other person who wishes to be present, but gives the returning officer discretion to limit the numbers of other persons present in order to ensure the count is not interfered with by, for example, overcrowding of the room in which the count occurs.

**Clause 19** specifies what an informal ballot paper is, and stipulates that an informal ballot paper is not a validly cast vote. This provision reflects the equivalent provisions in the *Electoral Act 1965-2007*.

**Clause 20** requires the returning officer to certify the result, give the certificate to the Speaker, and publish the certificate in the Gazette within 7 days after counting is completed.

**Clause 21** provides that the Speaker must not certify a proposed law approved at the referendum until the time for filing a notice of dispute expires and any dispute filed has been determined by the Court, so long as the determination by the court does not alter the result of the referendum.

## **Part 5 – Disputes**

**Clause 22** establishes the Supreme Court as the Court of Disputed Returns for a referendum and gives the Court jurisdiction to hear a dispute regarding the validity of the result of a referendum.

**Clause 23** provides that a person may dispute the validity of the result of a referendum within 5 days after the result is published in the Gazette.

**Clause 24** requires the Court to determine the dispute as soon as practicable, and provides for the Court to make a variety of orders in determining the dispute.

## **Part 6 – Offences**

**Clause 25** creates an offence for failing to vote at a referendum. The exceptions to this offence reflect the corresponding provisions of the *Electoral Act 1965-2007*.

**Clause 26** provides that a list of persons who failed to vote, signed by the returning officer, is evidence of the failure to vote.

**Clause 27** requires the returning officer to give a person who failed to vote a prescribed notice requiring the person to provide a declaration of the reason the person failed to vote.

**Clause 28** applies the offences in the Criminal Code relating to elections to referenda.

## **Part 7 – Administrative matters**

**Clause 29** is the standard regulation-making power, and also provides that the regulations may prescribe modifications to the Electoral Act and the Criminal Code that are necessary or convenient to give effect to the Act.

## **Part 8 – Amendment of Electoral Act**

**Clauses 30 and 31** amends the Electoral Act. This amendment is necessary because Article 84 of the Constitution provides that a person is eligible to vote at a referendum if the person is qualified to vote at an election at the time the referendum is held (*emphasis added*). Without the amendment to the Electoral Act, Article 84 would create a practical problem because there is no provision in the Electoral Act for the electoral roll to close before a referendum. A person who enrolls to vote on the day of the referendum could claim an entitlement to vote at the referendum because the person is qualified to vote at an election at the time the referendum is held. It would be impossible to administer the roll on referendum day if the roll does not close before the day of the referendum. In addition, voters need to be given the opportunity to inspect the roll before referendum day so that any disputes over the accuracy of the roll can be dealt with. The amendment provides a practical solution to this problem by providing that, for Article 84, a person is taken to be

qualified to vote at an election of members at the time a referendum is held if the person is enrolled at the end of the sixth working day before the date of the referendum.

**Schedule 1** prescribes forms for ballot papers, the certificate of results and the notice to a person who has failed to vote.