

REPUBLIC OF NAURU
LEADERSHIP CODE BILL 2016
EXPLANATORY MEMORANDUM

The *Leadership Code Bill 2016* is a Bill for the *Leadership Code Act 2016*.

EXPLANATION OF CLAUSES

Part 1 - Preliminary

Clause 1 provides that, once enacted, the short title of the Bill will be the *Leadership Code Act 2016*.

Clause 2 provides that the Act will commence once it is certified by the Speaker. Sub-clause (2) is important in that it explicitly provides that the Act will apply only to actions that occur after the commencement of the Act.

Clause 3 sets out the purpose of the Act. This Act shows a commitment of Nauru's Leaders and to the people whom they serve to establish a Code of Ethical Conduct that will govern and guide the conduct of leaders. This Act will also establish the office of the Ombudsman who will administer this Act. The Act will require Leaders to be publicly accountable to the people who voted them in.

Part 2 - Interpretation

Clause 4 contains the interpretation of certain words used in the Act.

Clause 5 provides the meaning of the term '*benefit*' as it is used in the Act.

Clause 6 is similar to Clause 5 as it provides for the meaning of the term '*conflict of interest*'. A Leader has a conflict of interest if the Leader directly or indirectly controls property, a close member of his or her family directly or indirectly controls property or the Leader has a beneficial interest of any kind in any property.

Clause 7 provides the meaning of the term '*interest*' which links with Clause 6 above.

Clause 8 sets out the scope of the meaning of the expression 'Leader'.

Clause 9 states that any reference to property or to a benefit or advantage in this Act is also a reference to any of these situated outside of Nauru.

Clause 10 provides for custom and its application to the Act and to the giving or accepting of gifts. This is an important provision for Nauru considering the culture and tradition that exists and the ceremony that comes with it.

Clause 11 covers other persons who are not Leaders but commit a breach against this Act if that person takes part in conduct that breaches the Act, obtains a benefit that breaches this Act or exercises influence over or in any other way brings pressure upon a Leader to influence the Leader to breach this Act.

Part 3 – Principles of Good Governance and the Code of Ethical Conduct

Clause 12 makes it clear that any Leader who breaches the provisions of this Part of the Act is guilty of misconduct and liable to a penalty under Clause 65.

Clause 13 sets out certain things that a Leader must do in the exercise of his or her power. They include compliance with the law, upholding democratic processes and respecting the separation of the powers of the State, showing respect for the customs, cultural heritage and traditions of Nauru and of the Nauruan people, respect for the natural environment, religious belief, independence of the media and a Leader must never have preferential treatment to any group or individual.

Clause 14 provides the principles of ethical conduct that Leaders are bound by and must adhere to. The principles include a Leader displaying honesty and compassion, making decisions in accordance with the law, arrange their affairs so as to prevent conflicts of interest, not solicit gifts or economic benefits. Leaders must also never step out of their official roles to assist any private entities dealing with government where this would result in any preferential treatment to any person, or to use government property for purposes that would afford that Leader any type of economic benefit and finally Leaders, after they have left their public office, act in any manner that takes improper advantage of their previous office.

Clause 15 states that in making any appointments or recommending any person to a position for which the Leader has responsibility, the Leader must make these decisions on merit alone and must never discriminate based on any factors apart from the fact that the person is the most qualified for such appointment.

Clause 16 provides that a Leader must not accept a loan, advantage or other benefit whether financial or otherwise from any person, group, company or organisation for his or her own personal benefit.

Clause 17 makes it clear that a Leader must not exercise undue influence over any person so it influence that person to breach this Act or another legislation or in any manner that is contrary to the requirements of that person's office or position.

Clause 18 deals with bribery and the Clause makes it clear that it is an offence for a Leader to ask for, receive or obtain, or agree or attempt to receive or obtain any property, benefit, or favour for the Leader, a close relative of the Leader or an associate.

Clause 19 deals with a Leader using information that is gained in the execution of his or her office and which isn't available to the general public. The Leader commits a breach against this Act if the Leader uses that information to further or seek to further his or her private interests.

Clause 20 states that a Leader must not hold more than one public office at one time or any office for the purposes of remuneration or allowance.

The exception to this Clause is if the Leader is permitted by law to hold more than one office.

Clause 21 makes it clear that a Leader must not use any public assets, resources or funds for purposes outside of the purpose of those funds and in any other manner that is grossly uneconomic or wasteful.

Clause 22 makes provision for Leaders and the abuse of defamation laws. This clause states that a Leader must not:

- (a) threaten or institute proceedings for defamation without pursuing the proceedings to court;
- (b) use any public funds to finance any proceedings for defamation;
- (c) bring or continue any proceedings for defamation claiming that an instrumentality of the Republic has been defamed;
- (d) seek or accept punitive damages for defamation in cases where this is likely to deter further public discussion of matters of public benefit, unless the Leader alleges that the defendant in the proceedings was motivated by malice against the Leader or by reckless pursuit of profit.

Clause 23 makes it an offence for a Leader to offer or accept from an associate any ex-gratia payment made out of public funds if it is obvious that the average citizen would assume that the payment would not have been made at all or a smaller amount would have been paid if it had person's other than the Leader's associate had been involved. Ex-gratia payments in this section refer to funds that are made available from public funds to settle a civil case out of court.

Clause 24 provides that a Leader must under no circumstances participate in any discussions or deliberations of a public body, a board, council, commission or committee in which the Leader has a person interest. There is a duty on the Leader to inform the person or institution concerned that the Leader has an interest

Clause 25 deals with the divesting of interests by Leaders. This clause states that Leaders must always detach themselves from any situation or interests that is likely to cause or does cause a conflict of interest for that Leader. If after applying for a certificate of clearance under Clause 44 and the Ombudsman has given that Leader a decision/certificate that confirms that there is in fact a conflict of interest then the Leader must sell or give away the interest or transfer the interest to a blind trust managed by others (not an associate or close relative) for as long as that Leader remains in office or retains that interest.

Clause 26 states that a Leader must not have any direct interest in any contract or agreement with the Government or any Government instrumentality. This is a safeguard against that Leader receiving any funding from Government or any other involvement in any other way. There are exceptions to this rule and they are if:

- (a) the Leader does so as a member of, and in common with, other members of a registered business consisting of at least 10 persons or shareholders; and
- (b) the contract or agreement was awarded to that registered business on a competitive commercial basis and through a transparent and impartial process.

If a case occurs that a Leader must void, repudiate or escape a binding contract or agreement in order to comply with this section, the Leader must not do so if this would disadvantage others. The Leader must do so only in a way that others are not disadvantaged.

Clause 27 deals with customary gifts or benefits in kind. This Clause states that any gift or donation to a public Leader on any public or ceremonial occasion, or commission to a Leader on any transaction shall be treated as a gift or donation or commission to the Government and must be declared to the Ombudsman no later than 30 days after the gift was received.

An exception to this rule is if the gift was given or accepted:

- (a) according to the customs of Nauru;
- (b) according to the customs of another sovereign nation; or
- (c) for the benefit of a group or community rather than that of an individual.

It is on the Leader who is making the claim to prove that the gift was actually made in the Nauruan custom or another custom and this is proven on the balance of probabilities.

The Ombudsman will keep a register in which all gifts will be registered. Where the Leader is in doubt about a gift the Leader may seek the Ombudsman's advice on the matter. The

rules regarding gifts are clear in that anything above the value of \$1,000 (including those given or received in custom) must be declared and reported to the Ombudsman. All gifts valued in excess of \$2,000 must be surrendered to the Commission and auctioned off with any proceeds going into the Government Treasury and clearly marked as being proceeds from the auctioning of gifts.

Clause 28 deals with the previous convictions of Leaders. A Leader must always declare whether they have been charged, convicted or sentenced for any offence in Nauru or in any other jurisdiction. Any Leader falling into that category must immediately inform the Ombudsman and vacate his or her seat or office. A Leader who within the last 3 years before holding such position of leadership must immediately inform the Ombudsman and vacate their seat or office.

Clause 29 creates an offence for any person who knowingly aids, abets, counsels, procures or conspires with or encourages a Leader to engage in conduct or behaviour which may lead to or does lead to a breach of this Act.

Clause 30 makes attempt an offence under this Act. So any person who attempts to commit a punishable offence under this Act is deemed to have committed that offence.

Clause 31 sets out the liability of a Leader when there are actions taken or omitted to be taken by a person as the Leader's employee, agent or associate. In these cases, the actions taken or omitted to be taken is considered as being done or omitted to be done by that Leader. It is a defence under this Clause if the Leader proves that:

- (a) in the case of an employee or associate, the Leader took such steps as were reasonably practicable to prevent that employee, agent or associate from doing or omitting to do that thing; or
- (b) in the case of an agent, the act or omission exceeded the express or implied authority given by the Leader.

Part 4 – Office of the Ombudsman

Clause 32 establishes the office of the Ombudsman.

Clause 33 sets out the functions of the Ombudsman which are:

- (a) to investigate and report on any complaints or allegations of misconduct by a Leader;
- (b) to enquire into any defects in administrative practice appearing from any matter being enquired into;

- (c) issue rulings or interpretations, clarifying the meaning and effect of the provisions of this Act;
- (d) to enquire into any case of an alleged or suspected discriminatory practice by a Leader;
- (e) to give prior advice or clearances on potential breaches of this Act;
- (f) to provide reasonable and appropriate assistance and advice to Leaders;
- (g) to devise and carry out programmes of public education, including the dissemination of information on this Act;
- (h) to enquire into any complaint or matter referred by a Parliamentary Committee; and
- (i) such other functions as may be prescribed.

Clause 34 provides for the appointment and removal of the Ombudsman. The Ombudsman is appointed by the President on the recommendation of a Committee consisting of the Leader of opposition, the Chief Justice (or a Judge of the Supreme Court of Nauru) and a community representative agreed to by the President and the Leader of Opposition. This panel is set up to ensure that no one person chooses or appoints the Ombudsman as the person must be one that is impartial to all.

The removal process has also been made difficult with the Ombudsman only being removed with the recommendation of the appointment committee and upon the approval of that recommendation by two-thirds majority of the members of Parliament. This is again done to ensure that no one person can remove the Ombudsman simply because of disagreement or other factors.

Clause 35 states that the Ombudsman is appointed for a term of 5 years on the conditions approved by the President and on the recommendation of the initial appointment committee in Clause 34.

Clause 36 states that the Ombudsman must swear an oath of office upon appointment. The Oath is included in Schedule 1 of this Act.

Clause 37 sets out the qualifications of the Ombudsman. The qualifications set out ensure a person who is able to maintain impartiality and independence from the politics of the country becomes the Ombudsman.

This Clause also sets out the disqualification clause and they disqualify a person if he or she:

- (a) holds a public office, including any instrumentality of the Republic; or

(b) has been declared bankrupt; or

(c) has been convicted and is under sentence or is subject to be sentenced for an offence punishable by imprisonment for one year or longer.

Clause 38 provides that the Ombudsman is an independent office and he or she must comply with the provisions of this Act and is not subject to the direction or control of any other person or authority.

Clause 39 states that decisions of the Ombudsman must be communicated through a written notice delivered to the parties affected under this Act and any decisions made must be signed.

Clause 40 allows the appointment and employment of any other staff of the Office of the Ombudsman that would be required to carry out the duties and functions of the office.

Clause 41 places a requirement on the Ombudsman to provide an annual report to Parliament at the end of each financial year. The report must detail the performance of the Ombudsman's functions for that particular financial year.

Clause 42 places an obligation on Parliament to ensure that the Office of the Ombudsman is allocated sufficient resources and funds from the national budget in order to allow the Ombudsman to carry out his or her duties and functions.

Clause 43 sets out the validity of any rulings made by the Ombudsman under this Act. If any ruling is challenged then the Supreme Court must make a declaration as to the validity of any such ruling. So any ruling of the Ombudsman is valid once it is published and may only be questioned if it is challenged in the Supreme Court and at that point the decision of the Supreme Court will decide its validity.

Clause 44 allows the Ombudsman to give advice and issue clearance declarations to any Leader seeking such advice or clearance. Clearances may only be given by the Ombudsman if:

(a) the clearance relates to a possible breach of this Act that has not yet occurred or commenced;

(b) the clearance relates to the Leader who requested it;

(c) the clearance is requested by written notice that is signed by the Leader and that discloses all relevant information that the Leader does or should know about the possible breach;

(d) the clearance is given in writing;

- (e) the clearance contains all information given to the Ombudsman by the Leader concerned; and
- (f) if the Ombudsman considers that the clearance should be conditional on certain terms, the clearance must specify those terms.

This Clause further sets out the process that Leaders must comply with when seeking a clearance declaration from the Ombudsman regarding any advice they have sought.

Clause 45 sets out the relevant factors that must be considered by the Ombudsman when considering whether to give a clearance or not.

Clause 46 allows the Ombudsman to revoke a clearance if the clearance was invalid or if it was granted valid under mistaken circumstances. Revoking a clearance does not make the Leader guilty of misconduct under this Act for any action taken before the revocation of the clearance.

Part 5 – Supplementary Provisions Applicable to Ministers of Government

Clause 47 clarifies the relationship between this Part of the Act and the Oath that Ministers swear in accordance with the Constitution.

Clause 48 sets out Minister’s responsibilities under this Act. These responsibilities do not replace any existing responsibilities, rather they add to those.

Part 6 – Financial Disclosures

Clause 49 places a requirement on the Ombudsman to keep a register to be known as the Register of Leader’s Interests which will be a record for each Leader and the information that the Leader submits with the information in Clause 51.

It is important that the Ombudsman examines every record filed by Leaders and before making any adverse decisions, allow the Leader to be heard.

Clause 50 provides for the lodging of annual statements of interest by every Leader. This annual statement must be delivered to the Ombudsman every year, within 3 months of the day on which the person became a Leader (whether or not for the first time) or on or before the last day of December, whichever is the later. This statement will form part of the register in Clause 49.

Clause 51 provides for the contents of the annual statements Leaders file in accordance with Clause 50. The contents must include the income, assets and liabilities of the Leader, their spouse (including de-facto) and dependent children of the Leader and any Trust of which the Leader or spouse, de-facto or child is a beneficiary.

Clause 52 states that where, in a statement lodged with the Ombudsman in accordance with Clause **Error! Reference source not found.**, a Leader discloses an income, property or assets which are insufficient to support the accretion in value of the net assets disclosed so as to raise the inference that there must have been other income to account for the extent of acquisition of such income, property or assets the Leader will be deemed to have been in possession of such income, property or assets which have not been disclosed and the burden is on him or her to establish the source of that further income.

Clause 53 places an obligation on the Ombudsman and any staff to maintain the highest level of secrecy and confidentiality with regard to information that they receive, hear or see during the course of carrying out their functions and duties under the Act. Staff of the Commission must swear an oath of secrecy set out in Schedule 2 of the Act.

Clause 54 makes it a breach of the Act if a Leader fails to lodge an annual statement even after receiving a written notice reminding the Leader or if a Leader files a statement knowing that it is false or misleading.

Clause 55 allows the Ombudsman to grant an extension for a period not exceeding 6 weeks and this extension may be granted to a Leader only once in any calendar year and failure to abide will result in a breach of the Act.

Clause 56 places an obligation on the Ombudsman to publish by May 30 every year:

- (a) the names and positions of all Leaders who have lodged their annual statements; and
- (b) the names and positions of all Leaders who have not lodged their annual statements by the required deadline.

Part 7 – Investigation of Breaches

Clause 57 provides for the investigation of complaints by the Ombudsman. The Ombudsman may either investigate a Leader based on a complaint from a person or if the Ombudsman believes on his or her own accord that the Leader has committed a breach. If the complaint is about or includes the Ombudsman than that complaint must be brought to the attention of and forwarded to the Commissioner of Police who will conduct the investigation.

Every other investigation will be conducted by the Ombudsman and all investigations and the final decision must be completed within a period of 2 months.

Clause 58 states that a complaint to the Ombudsman must be made in writing and must be signed by the person making the complaint.

Clause 59 provides for the Commissioner of Police to investigate complaints when requested by the Ombudsman. When the Commissioner has been requested to investigate he or she must ensure that the police force investigates and that it is completed within 60 days with results being forwarded to the Director of Public Prosecutions if the Commissioner thinks that prosecution should be conducted and inform the Ombudsman in writing giving reasons for the decision if the Commissioner finds insufficient evidence to support the complaint.

Clause 60 places an obligation on the Ombudsman to ensure that the principles of natural justice are adhered to in the exercise of his or her powers and functions under this Act.

Clause 61 protects the identity of informants to ensure that people are not afraid of being victimised whenever they bring forward complaints.

Clause 62 allows the Ombudsman to reject trivial and vexatious complaints or to suspend investigations if he or she feels that the complaint is in fact not validly and truthfully made.

Clause 63 provides for the conduct of proceedings and the tabling of evidence according to the ordinary rules relating to the admissibility of evidence in criminal trials and proceedings must be conducted in the same way as any other criminal trial and forfeiture proceedings must be conducted as normal civil proceedings would be conducted.

Clause 64 provides the process for which a completed report must be dealt with under this Act. If criminal proceedings must be conducted then the Ombudsman must forward the report to the Commissioner of Police. The Ombudsman must ensure to obtain the response of a Leader and incorporate that into the report. The Commissioner may conduct further investigation if required by otherwise must forward the report to the Director of Public Prosecutions.

No action for defamation may lie against the Ombudsman for making such a report.

Clause 65 provides the penalties for misconduct under this Act.

Clause 66 sets out the factors for determining whether or not misconduct is serious misconduct.

Clause 67 allows appeals from the decisions of the Ombudsman. Appeals may be filed with the Supreme Court within 45 days of a decision being made.

Clause 68 gives the Supreme Court certain powers when it concerns appeals from decisions of the Ombudsman.

Part 8 – Prosecution of Breaches

Clause 69 relates to criminal related allegations that arise from an investigation conducted under this Act. In this case the DPP must consider the report of the Commission of Police and within 45 days of receiving that report, decide whether to prosecute or refer the matter back to the Commissioner for further investigation.

It is on the DPP to decide whether or not to prosecute a Leader based on reports received.

Clause 70 states that if the DPP does decide to prosecute then this must be conducted within 3 months of receiving a report from the Commissioner of Police.

Clause 71 allows the Supreme Court to order that any property obtained through a breach of the Act must be forfeited to the Government, that the Leader pay a pecuniary penalty equivalent to the benefit she or he received or to do both. The Supreme Court can only make these orders if the matter is referred back to it by the Ombudsman.

Clause 72 states that once the Supreme Court has made a forfeiture order then that property becomes vested in the Government and any persons responsible for recording property etc must be made aware of the order.

Clause 73 provides for the hardship factor that the Supreme Court must consider before making an Order. The Supreme Court must consider the hardship that making the order would cause to any other person who did not breach this Act and would be affected by such order, especially if such person is not himself or herself a Leader.

Clause 74 states that upon the request of the Ombudsman, the Supreme Court may make an order suspending a Leader from office if that Leader is under suspicion and investigations are being conducted. A Leader suspended from office may continue to receive 50 % of all allowances, entitlements and privileges.

Clause 75 provides that is not a defence to a prosecution if the Leader was no longer a Leader at the time he or she was being investigated, prosecuted, convicted or sentenced. If the breach was conducted at time when the person was a Leader then he or she is still liable.

Part 9 – Miscellaneous

Clause 76 gives the Minister the power to make regulations that are not inconsistent with this Act.

Clause 77 states that nothing in this Act affects the privileges of the members of Parliament.

Clause 78 provides for the amendment of this Act. Any amendment cannot be made except:

- (a) through a two-thirds majority vote in its favour; and
- (b) if there has been an interval of not less than 90 days between the introduction of the proposed amendment in Parliament and the passing of the proposed amendment by Parliament.

Clause 79 makes it an offence for any person to make any allegation under this Act knowing that the allegation is false.

Clause 80 allows payment to the Ombudsman to be made from the Government Treasury.

Clause 81 states that nothing in this Act has the effect of limiting or derogating from any other law of Nauru and the conclusion of proceedings under this Act does not prevent the institution of criminal or other proceedings under any other law in respect of the Leader concerned.

Schedule 1 – Oath of Office – this is an oath to be taken by the Ombudsman before a Judge of the Supreme Court.

Schedule 2 – Oath/Affirmation of Secrecy - an oath to be sworn by staff of the Ombudsman’s office.

