

REPUBLIC OF NAURU
MARITIME SECURITY BILL 2019
EXPLANATORY MEMORANDUM

The *Maritime Security Bill* is a Bill for the *Maritime Security Act 2019*.

This memorandum provides an explanation of the Bill and is only intended to indicate the general effect.

EXPLANATION OF CLAUSES

PART 1 – PRELIMINARY

Clause 1 provides that, once enacted, the short title of the Bill will be the *Maritime Security Act 2019*.

Clause 2 sets out when the Bill's provisions will commence which will be 1 February 2020.

Clause 3 sets out the objectives of the Bill. The major objects are to domesticate the International Ship and Port Facility Security Code and the Suppression of Unlawful Acts against the Safety of Maritime Navigation Protocol of 2005.

The ISPS Code

Following the attacks on the United States by *Al Qaeda* on 11 September 2001, the Diplomatic Conference on Maritime Security held in London in December 2002 adopted new provisions in the International Convention for the Safety of Life at Sea, 1974 (SOLAS) and the International Ship and Port Facility Security Code (ISPS Code) to enhance maritime security. Part A of the Code is mandatory and Part B contains recommendations. These new requirements form the international framework through which ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector. The main objectives of the ISPS Code include:

- establishment of an international framework that fosters cooperation between Contracting Governments, Government agencies, local administrations and the shipping and port industries, in assessing and detecting potential security threats to ships or port facilities used for international trade, so as to implement preventive security measures against such threats;
- determining the respective roles and responsibilities of all parties concerned with safeguarding maritime security in ports and on board ships, at the national, regional and international levels;

- to ensure that there is early and efficient collation and exchange of maritime security-related information, at national, regional and international levels;
- to provide a methodology for ship and port security assessments, which facilitates the development of ship, company and port facility security plans and procedures, which shall be utilised to respond to ships' or ports' varying security levels; and
- to ensure that adequate and proportionate maritime security measures are in place on board ships and in ports.

SUA Convention and 2005 Protocol

Following the hijacking of the Italian cruise ship *Achille Lauro* on the high seas by a faction of the Palestine Liberation Organization on 7 October 1985, it became clear that the existing legal framework based on traditional definitions of piracy was inadequate to meet maritime terrorism. A similar legal regime as had been developed in response to aviation hijacking was required.

The UN General Assembly invited the International Maritime Organization to "study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures." Eventually, in March 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was adopted.

The SUA Convention ensures that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it. The Convention provides for application of punishment or extradition of persons who commit or have allegedly committed offences specified in the treaty.

Important amendments to the 1988 Convention and its related Protocol, were adopted by the Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. The amendments were adopted in the form of Protocols to the SUA treaties (the 2005 Protocols). The 2005 Protocols broaden the range of offences and contain important amendments relating to boarding of vessels and extradition.

Clause 4 describes the extent of the Bill's application, based on the ISPS Code, Part A/3 and SOLAS, Chapter XI/2.

Subclause (3) provides for wider application of clause 13, which is not connected to the ISPS Code.

Clause 5 contains a dictionary of defined words and phrases used in the Bill and provides other interpretive guidance. The dictionary is loosely based on definitions contained in the ISPS Code and SUA, subject to refinements to ensure consistency with other laws and domestic conditions.

The definition of Authority refers to the entity to be established under the *Ports and Navigation Bill 2019* and intended to replace the Port Authority established under the Port Authority Act 2015 (which is intended to be repealed).

PART 2 – ADMINISTRATION AND GENERAL PROVISIONS

Clause 6 sets out the general obligations and powers of the Director, as defined in clause 5.

The Director fulfils the role contemplated by the “Designated Authority” under the ISPS Code, meaning the person or organization responsible for ensuring the implementation of the provisions of the Code pertaining to port facility security and ship/port interface, from the point of view of the port facility. The ISPS Code specifically contemplates that states would establish such authorities.

The Director’s precise relationship with the Authority is more explicit in the *Ports and Navigation Bill 2019*. Since port authorities are not usually tasked with this role, the Director is semi-autonomous within the Authority. Nevertheless, subclause (3) requires the Authority to ensure that the Director performs the duties set out in subclause (1).

Clause 7 sets out the manner in which security levels (as defined in clause 5) are to be set, reviewed, disseminated and dealt with. This clause is intended to give effect to SOLAS, Chapter XI-2/3 and ISPS Code, Part A/7.

Security levels refer to the degree of risk that a security incident (as defined in clause 5) will occur.

Clause 8 provides for declarations of security (as defined in clause 5) in accordance with the ISPS Code, Part A/10/3. A declaration of security is essentially a written agreement between a ship and either a port facility or another ship, having regard to security risks.

Subclause (1) provides that the Director may require a declaration to be completed. A request for a declaration may also be made under subclause (5).

Subclause (2) provides for publication of the declaration in the Gazette.

Subclause (3) identifies the persons responsible for completing the declaration.

Subclause (4) provides that declarations shall be kept for 7 years.

Subclause (5) identifies the circumstances in which a request for a declaration may be made.

Clause 9 provides that Part A/12 of the ISPS Code contemplates that alternative security arrangements equivalent to those prescribed in the Code may be required, provided such security measures are at least as effective as those prescribed.

This clause makes provision for such arrangements in accordance with the Code, and for communicating such arrangements to IMO, as required by the Code.

Clause 10 provides for the process of verification (as defined in clause 5) and certification of Nauruan ships. Ships shall carry an International Ship Security Certificate indicating that they comply with the requirements of SOLAS Chapter XI-2 and part A of the ISPS Code.

Subclause (2) allows for the verification of ships to be delegated to either a recognised security organisation or another state.

Subclause (3) provides for post-verification maintenance obligations.

Subclause (6) provides for who may issue certificates. These being the Authority, a recognised security organisation or such other State as has verified the ship under subclause (2)(b).

Clause 11 provides for the appointment of maritime security guards.

It is contemplated by subclause (2) that different guards may have different powers, according to seniority, expertise, etc. The general powers are set out in subclause (4), but not all guards will be entitled to exercise the full measure of these powers.

Subclause (3) provides that guards are subject to direction by port facility security officers.

The general power of guards is set out in subclause (4) and includes controlling embarkation and disembarkation of people, baggage and cargo; supervising the movement within or entry of persons to a Nauru port; supervising cargo and ship stores; screening persons in a port security area; requiring persons in a port to produce evidence of identity; directing unauthorised persons to leave a port or aid to navigation; directing drivers of vehicles in a port to stop vehicles and remain as such for as long as is reasonably necessary to screen the vehicles or persons or items in the vehicles; removing things from ports or aids to navigation.

Subclause (6) allows for a guard to be accompanied by a visitor when such assistance is required.

Subclause (7) empowers a maritime security guard to detain a person in or in the vicinity of a port or aid to navigation where there are reasonable grounds to suspect that an offence under this Bill or the *Counter Terrorism and Transnational Crime Organised Crime Act 2004* has been or is likely to be committed by such person.

Subclause (8) allows a maritime security guard to screen any person, item and seize such item in the possession of a person so detained if the item cannot be lawfully carried; is evidence of the commission of any offence or poses an imminent risk to safety.

Subclause (9) provides that the powers of a maritime security guard will be subject to the direction of the most senior police officer present once a police officer has taken command of a situation at a Nauru port or on a ship at a Nauru port.

Subclause (10) requires the handing over of a person detained by a maritime security guard to a police officer.

Subclause (11) allows the police officer to arrest a person so detained by a maritime security guard.

Subclause (12) provides that a person so detained under this clause shall not be subject to greater indignity than is reasonable. This is to ensure that a person detained is still accorded his or her basic human rights and his or her basic human dignity are preserved.

Subclause (13) outlines the process when an item is seized by a maritime security guard. This clause aims to ensure that a proper record of items seized is made, it also allows the disposal of an item where it poses an imminent risk to safety.

Clause 12 provides for the use of Recognized Security Organizations (as defined to be prescribed by regulations). The use of such organizations is common in most jurisdictions and will be especially important in Nauru having regard to the absence of suitably qualified persons at this time. Such organizations have appropriate expertise in security matters and appropriate knowledge of ship and port operations. They are authorised to carry out assessments and verifications for which the ISPS Code provides.

Clause 13 sets out the requirements for incident reporting. The collection and dissemination of security information are important themes in the ISPS Code. IMO Guidelines also deal with incident reporting and draw a distinction between ‘serious’ and ‘routine’ incidents. Clause 5 contains definitions of ‘serious incident’ and ‘security incident’. It is also convenient to include here an obligation to report ‘reportable crimes’ (as defined in clause 5), in accordance with the object in clause 3(c). Unreported crime on ships is a major problem; victims are often deprived of justice and perpetrators are permitted to evade detection and punishment.

Clause 14 sets out the Director’s information-gathering powers. In order to achieve its objectives, the ISPS Code contains a number of provisions relating to the gathering and assessing of information with respect to security threats and the exchange of this information with other States.

Clause 15 provides for the issue of certain identity documents. ISPS Code Part B/4.18 encourages governments to issue appropriate identity documents to government officials.

The objective of the clause is to facilitate control of movement into and within a port but while accommodating the official duties of other government agents, for example, immigration, quarantine, etc.

This Clause may be supplemented by Regulations which can provide for the issuance of MSIC and visitor passes and the prescribing of fees relating to the same.

Clause 16 sets out offences under Part 2. These offences include pretending to be a maritime security guard, obstructing or hindering any person exercising power under Part 2, failing or refusing to comply with a requirement or direction of a maritime security guard under clause 11 without a reasonable excuse, failing or refusing to make an official report or failing or refusing to make an official report within the required time, failing or refusing to comply with a requirement under clause 14 within the specified time without a reasonable excuse.

Supplementary general offences may be found in Section 172 of the Crimes Act.

PART 3- SHIP SECURITY

Clause 17 sets out the obligations of companies (as defined in clause 5). These are intended to reflect those set out in ISPS Code, Part A/6 and elsewhere.

Subclause (1) requires the company of a Nauruan ship to appoint 1 or more security officers.

Subclause (2) provides that a company security officer may be appointed to deal with one or more of the company's ships. The appointment however shall provide the names of the ships for which such company security officer is responsible for.

Subclause (3) specifically states who the company of a Nauruan ship shall designate as the ship security officer. Such person to be designated is either the master or another crew member. The designation shall be by name or position.

Subclause (4) requires the company of a Nauruan ship to ensure masters, company security officers, ship security officers and other shipboard or shore-based personnel having security responsibilities not only fulfil their duties and responsibilities, but are provided with training, information and necessary support.

Subclause (5) provides additional requirements for information to be provided under subclause (4).

Subclause (6) provides further obligations of the company of a Nauruan ship relating to the ship security officer.

Subclause (7) prevents the company of a Nauruan ship from taking or executing any decision which the master deems necessary to maintain the safety and security of the ship.

Subclause (8) outlines the obligations of a Nauruan ship and a foreign ship before such ship enters a Nauru port and while in a Nauru port.

Subclause (9) requires the company of a Nauru ship to provide certain documents before a master takes responsibility of the ship.

Subclause (10) requires the company of a Nauru ship to document, review, accept and retain documents relating to the ship for not less than 7 years.

Clause 18 sets out the obligations of company security officers (as defined in clause 5). These are intended to reflect those set out in ISPS Code, Part A/11. Such obligations include ensuring that a ship security assessment is carried out for each ship and is periodically reviewed, coordinating implementation of ship security plans with ship security officers and ensuring effective coordination and implementation of ship security plans by coordinating and participating in drills and exercises at appropriate intervals.

Clause 19 sets out the obligations of ship security officers (as defined in clause 5). These are intended to reflect those set out in ISPS Code, Part A/12.

Clause 20 sets out the obligations of masters (as defined in clause 5). At all times the Master of a ship has the ultimate responsibility for the safety and security of the ship. The master is charged with specific security responsibilities under the ISPS Code. Subclause (3) is intended to reflect the specific obligation in SOLAS, Chapter XI-2/8. Subclause (5) is a convenient location to address the requirements of SOLAS, Chapter V/19.

Clause 21 provides for ship security plans (as defined in clause 5). This clause is intended to give effect to ISPS Code, Part A/6.1 and 9.

Subclause (1) requires the company of a Nauruan ship to carry out a ship security assessment of that ship and review periodically and where necessary, update such assessment taking into account changing threats and changes to the ship.

Subclause (3) provides for what a security plan should contain. A ship security plan shall have a clear statement that the master has the overriding authority and the responsibility to make decisions with respect to the safety and security of the ship and to request the assistance of the company or of any State as may be necessary, make provision for all security levels and address matters set out in SOLAS regulation XI-2/9.4.

Clause 22 sets out offences under Part 3. Such offences include having possession or control on board a ship of a prohibited item without authorisation or written permission of the ship security officer, having possession or control on board a ship of a prohibited item with authorisation and failing to comply with conditions relating to such permission, failing to provide such permission on request of a maritime security guard, and disclosing or giving access to a ship security plan of a Nauruan ship without authorisation.

PART 4 - PORT SECURITY

Clause 23 sets out the obligations and powers of port facility operators (as defined in clause 5). This clause is intended to give effect to ISPS Code, Part A/17.1, 17.3, 18.1 and 18.2.

Clause 24 sets out the obligations of port facility security officers. This clause is intended to give effect to ISPS Code, Part A/12.2.9, 13.5, 14.5, 17.2, 18.2, 18.3.

Clause 25 provides for port facility security plans (as defined in clause 5). This clause is intended to give effect to ISPS Code, Part A/16.

This clause requires the carrying out of a port facility security assessment and periodic review of such assessment taking into account changing threats and changes to ports.

Subclause (5) requires the Authority to approve a port facility plan or amendment to such plan only if consistent with the Act, Regulations and in the case of an amendment, no less effective than the extant port facility security plan.

Subclause (6) allows for the variation or cancellation of an approved plan in certain circumstances prescribed by regulations.

Subclause (7) requires the port facility security officer to ensure that an approved plan is implemented and maintained, tested, kept at the port to which it relates and kept safe from unauthorised access and disclosure.

Clause 26 provides for the creation of areas in which higher levels of security apply. Subclause (1) sets out the areas which the Director may declare to be a port security area. Such areas include: a Nauru port, in or around an aid to navigation, outside a Nauru port not being private property, in Nauru waters, an area around a ship berthed in Nauru port or at anchorage, moored at a buoy in a Nauru port or in the approaches to a Nauru port.

Subclause (2) requires that a port security area is to be signed and secured pursuant to regulations made under the Bill.

Where a port security area is declared, the Authority is required under subclause (3) to notify the master, port facility security officer, port facility operator and Harbourmaster affected by the declaration. The declaration shall be published in the Gazette.

Subclauses (5) and (6) restricts access to any port security area and only passengers or crew members of ships embarking or disembarking directly through gangways or thoroughfares in a port for that purpose approved by the port facility operator is deemed to be authorised to pass through any port security area forming part of those gangways or thoroughfares.

Subclauses (9) and (10) allows a maritime security guard where he or she is not satisfied that a person is authorised to be in a port security area may require the person to leave the area and where such person fails or refuses to leave a port security area, the maritime security guard and any person called upon to assist that maritime security guard may remove or detain such person using any force reasonably necessary.

Subclause (11) allows the maritime security guard to be assisted by another person and reasonable force may be used to remove or detain an unauthorised person.

Clause 27 regulates the screening of persons, baggage and cargo in a port and on ships. Subclause (1) provides for the establishment of control points by the Chief Executive Officer of the Authority and the Director for the screening of any person boarding a ship, any thing to be carried by a ship, any thing in a port security area, any person including personal effects or vehicle entering or within a port security area and any other place or things prescribed by regulations. A maritime security and such other persons as may be prescribed by regulations are responsible for conducting screenings under subclause (3).

Subclause (4) authorises the person conducting screening to restrain or detain any person using any force reasonably necessary if the person conducting the screening reasonably suspects a person is committing or has committed an offence under this Bill or the Counter Terrorism and Transnational Organised Crime Act 2004 and reasonably believes that it is necessary in order to prevent that person from passing through a control point.

Subclause (5) requires a person detained under subclause (4) to be handed over to a police officer as soon as possible.

Subclause (6) authorises the person conducting screenings to seize an item detected during screening that the person has reasonable grounds to believe cannot be lawfully carried or possessed by such person under this Bill or any other Act, is evidence of the commission of an offence against this Bill or any other Act or if it poses an imminent risk to safety.

Where an item is seized under subclause (6), subclause (7) requires the person who seized the item to make and keep a record of the item, make the record available to the person from whom the item was seized. Where it is believed that the item poses an imminent risk to safety, the item may be immediately destroyed or otherwise disposed of or delivered to a police officer. Where it is believed that the item cannot be lawfully carried or possessed by the person the item was seized from, the item needs to be delivered to a police officer and in all other cases to the Director.

Subclause (8) provides that where a person refuses to undergo screening, such person shall not be allowed to pass through the control point and reasonably necessary force may be used to prevent such person from doing so.

Subclause (9) prevents a person from passing through a control point if such person refuses to be screened.

Clause 28 sets out the security information and documents required to be provided to the port before arrival. This clause is modelled on provisions in SOLAS, Chapter XI-2/9/2 and also takes into account the guidance in ISPS Code, Part B/4.39.

Subclause (1) requires all ships intending to enter a Nauru port to notify the port facility operator of the ship's certificate and the issuing authority, the security level the ship is operating, the

security level the ship operated in any previous port where it conducted a ship-port interface during the period of its last 10 calls at port, whether any special or additional security measures were taken by the ship in any previous port where it conducted a ship-port interface during the period of its last 10 calls at port and of any other matters prescribed by regulations.

Subclause (2) requires such notification under this Clause to be made before the ship enters Nauru waters or if not possible, as soon as practicable after the ship has entered Nauru waters and in such form as may be required by the Director.

Subclause (3) sets out who may require evidence to be furnished to confirm matters described under subclause (1) that is, the Director, an Inspector, a port facility operator or a port facility security officer.

Subclause (4) authorises a port facility security officer to require a ship intending to enter a Nauru port to provide information such as information contained in the CSR, location of the ship when the notification under this subclause or subclause (1) is given, expected time of arrival in port, crew or passenger list, general description of cargo aboard ship, matters related to documents or information required to be carried under this Bill or SOLAS regulation XI-2/5 and information prescribed by regulations.

Subclause (5) provides that this clause ceases to apply where the master withdraws the intention to enter a Nauru port.

Subclause (6) provides that where a master or company declines to comply with the requirements of subclauses (1), (2), (3) or (4), the Director shall be notified by the port facility operator and the ship may be denied entry to the port of a port facility by the Director.

Clause 29 provides for the exercise of control measures (as defined in clause 5) over ships in accordance with SOLAS, Chapter XI-2/9 and ISPS Code, Part A/9. These measures are in addition to the usual port state control measures.

Clause 30 sets out offences under Part 4. Such offences include having possession or control in a port security area a prohibited item without authorisation or written permission of the port facility security officer, having possession or control a prohibited item without authorisation or written permission of the port facility security officer when passing or attempting to pass through a screening point, having possession or control on board a ship of a prohibited item with authorisation and failing to comply with conditions relating to such permission, failing to provide such permission on request of a port facility security guard, not being authorised to be in a port security area and disclosing or giving access to a port facility security plan for a Nauru port without authorisation. In addition, a master commits an offence where he or she makes a statement orally or in writing or provides a document that is false or misleading in a material particular.

The offences under this clause are strict liability offences which means the person's intention to commit the offence does not need to be proven. All that needs to be proven is that the person committed the offence.

PART 6- MISCELLANEOUS PROVISIONS

Clause 31 provides for limited rights of appeal against 'appealable decisions' (as defined). Having regard to the consequences of certain appealable decisions, a right of appeal is consistent with notions of procedural fairness.

An appeal shall be brought to the Court within 21 days of the appealable decision being made. The Court is empowered to uphold, reverse or vary the appealable decision or any part of such decision.

The Court may also make any order as to the costs of an appeal it considers appropriate. Until the Court determines the appeal, the appealable decision continues in force and to be in effect for all purposes.

Clause 32 provides for the keeping of records in accordance with SOLAS, Chapter XI-2/9.2.3 and ISPS Code, Part A/10.

Subclause (1) requires the records to be kept in English and where applicable, in the working language of the relevant ship.

Subclause (2) provides that records may be kept in electronic format provided they are reasonably protected from inadvertent or unauthorised deletion, destruction or amendment and unauthorised access or disclosure.

Clause 33 contains general provisions regarding offences and prosecution of offences.

Subclause (1) provides that if an offender is a body corporate, the Court may impose a fine 5 times the fine for an individual.

Subclause (2) provides that each executive officer of the body corporate commits an offence and is liable to a penalty applicable to an individual.

Subclause (3) provides the defence for an executive officer which are the executive officer did not know and could not have reasonably been expected to know the offence was being committed or, exercised due diligence to prevent the commission of the principal offence.

Subclause (5) allows for a copy of a document certified by the Director to be a true copy of the document is evidence of the document and certificates signed by the Director on a specified date is evidence of the matter certified.

Subclause (6) provides that the averment or allegation of the prosecutor in prosecuting any offence is on the face of it, evidence of the matters alleged although supporting or rebuttal evidence of the matter alleged is given by a witness or otherwise or the matter alleged is a mixed question of law and fact and in that case the allegation shall only be on the face of it, evidence of the fact and not law.

Subclause (7) requires support or rebuttal evidence given by a witness to be considered on its merits.

Subclauses (9), (10) and (11) permits a maritime security guard to issue an infringement notice to a person the maritime security guard believes has committed an offence under this Bill in the preceding 7 days. The form of the infringement notice will be prescribed by regulations and will contain a description of the alleged offence, specify a penalty in an amount prescribed by regulations and served on the alleged offender. Where the alleged offender is a crew member or owner, the infringement notice shall be served on the master of the vessel to which the alleged offence relates. Such infringement notice may be withdrawn or amended at any time before or after the modified penalty is paid provided that a modified penalty paid before the withdrawal is to be refunded.

Subclause (12) provides that where the modified penalty is paid by the due date and the infringement notice has not been withdrawn, the bringing of proceedings for the same offence against the alleged offender is prohibited to the same extent as if the alleged offender had been convicted of the alleged offence by a court.

Subclause (13) clarifies that just because the modified penalty is paid it does not mean that there is an admission of the offence for the purposes of any civil or criminal proceedings.

Clause 34 provides for the grant of injunctions for more effective enforcement and to relieve the Authority of various burdens usually attendant upon seeking an injunction.

Subclause (1) allows the Authority to apply to the Court for an injunction where a person has engaged, is engaging or is proposing to engage in any conduct which contravenes this Bill or regulations.

Subclause (2) provides that the Authority is not required to give an undertaking as to damages or security for any costs as a condition for applying for an injunction.

Subclause (3) provides that the Court may grant an injunction where it deems appropriate, by consent, whether or not the Court is satisfied that the person has engaged, is engaging or is proposing to engage in any conduct in contravention of this Bill.

Clause 35 provides for the civil and criminal immunity of the Chief Executive Officer, Director, port facility security officers, maritime security officers or any other officer of the Authority unless acting in bad faith.

Clause 36 provides for the making of regulations by the Cabinet. Such regulations shall not be inconsistent with this Bill.

Clause 37 enables the consequential amendments set out in Schedule 1. The 2 Acts amended are the *Crimes Act 2016* and the *Counter Terrorism and Transnational Crimes Act 2004*. The amendments are to ensure consistency of expression and concept with this Bill and to implement the provisions of the Suppression of Unlawful Acts against the Safety of Maritime Navigation Protocol of 2005.

Clause 38 contains savings provisions. Such savings provisions ensure that the rights of the Republic are not limited in terms of taking additional measures for national defence or national security, the application of the laws of the Republic to a ship in a Nauru port, the rights to be exercised at international law, alternative security arrangements or any obligations of the Republic under international arrangements in relation to refugees or stateless persons.