REPUBLIC OF NAURU

REFUGEES CONVENTION (DERIVATIVE STATUS) (AMENDMENT) BILL 2016

EXPLANATORY MEMORANDUM

The Refugees Convention (Derivative Status) (Amendment) Bill is a Bill for the *Refugees Convention (Derivative Status) (Amendment) Act 2016*.

PURPOSE

The purposes of this Bill are to:

- formalise Nauru's recognition of the protection needs of a person in Nauru who is dependent on an asylum seeker who has been recognised as a refugee, given derivative status or found to be owed complementary protection;
- clarify the circumstances in which an asylum seeker in Nauru, whose application for refugee status has been determined, may make a subsequent claim for asylum
- clarify the procedural fairness obligations of the Refugee Status Review Tribunal ('the Tribunal'), to ensure the efficient and effective discharge by the Tribunal of its merits review task having regard to the principles of natural justice as enshrined in the common law of Nauru.

EXPLANATION OF CLAUSES

Clause 1 provides that, once enacted, the short title of the Act will be the *Refugees Convention (Derivative Status) (Amendment) Act 2016.*

Clause 2 sets out when the Bill's provisions will commence. For the purposes of section 22 of the *Interpretation Act 2011*, that new sections 5(1B) and 6(2B), and the repeal of section 37, commence retrospectively.

Clause 3 is the enabling provision for the amendment of the *Refugees Convention Act 2012*.

Clause 4 provides definitions of two terms used in the Bill.

Clause 5 makes clear that Tribunal decisions are not invalid due to non-compliance with section 37 of the *Refugees Convention Act 2012*, which is repealed by the Bill. In this way, clause 5 supports the retrospective application of the repeal of section 37.

Clause 6 makes clear that the Tribunal continues to be bound to act according to the principles of natural justice, and to afford procedural fairness, under the common law of Nauru, despite the repeal of section 37.

Clause 7 amends by omitting and substituting the definition of 'derivative status' to reflect the three different bases on which derivative status may be granted to a dependent of a person who is owed protection by Nauru. This clause also introduces the definition of 'Refugee Determination Record', which is the common document issued to a person who is owed protection by Nauru, regardless of whether that person is recognised as a refugee, given derivative status, or found to be owed complementary protection.

Clause 8 introduces a legislative basis for an application by a person to be given derivative status, reflecting the approach taken to date as a matter of policy. Inserts a new section 5(1AA) which provides for an application to the Secretary to be made by a person to be given derivative status.

Clause 9 amends by omitting and substituting section 5(1A) to reflect the fact that only a 'dependent' – which is defined in section 3 – of an asylum seeker may be included in an asylum-seeker's application for refugee status.

Clause 10 inserts new section 5(1B) to give legislative effect to the existing practice, whereby a dependent who is included in an application for refugee status is given derivative status, if and when the person who made the application is recognized as a refugee, or found to be owed complementary protection. New section 5(1B) has no effect on whether a dependent included in an application for refugee status is taken also to have applied for refugee status in his or her own right.

The insertion of new section 5(1B) is made retrospective to the time when the concept of derivative status was introduced to the legislative regime by the *Refugees Convention (Amendment) Act 2014*, on 21 May 2014, in order to ensure legislative support for the existing practice.

Clause 11 amends by omitting and substituting section 5(2) to give effect to the prescription of the form in which an application for derivative status is to be made, in the *Refugees Convention Regulations 2013*.

Clause 12 amends by omitting and substituting section 5(3) to provide that no fee may be charged for an application for derivative status, consistent with the position for an application for refugee status.

Clause 13 amends by omitting and substituting section 6(1) to provide a legislative basis for the Secretary's determination of an application for derivative status. This clause also makes clear that the Secretary is required to determine whether an asylum seeker is recognized as a refugee, to be given derivative status, or owed complementary protection, where that person has made a relevant application.

Clause 14 repeals section 6(2), which previously contained the obligation to give derivative status to certain persons, given that the Bill introduces a more comprehensive legislative process with respect to derivative status, of application and determination by the Secretary.

Clause 15 inserts new section 6(2A) to provide a legislative basis for the issue of a Refugee Determination Record to persons who have been determined to be owed protection by Nauru. This is consistent with the practice adopted, as a matter of policy, to date.

Clauses 16 and 21 insert new sections 6(2B) and 31(5) to give legislative effect to the existing practice, whereby the issue of a Refugee Determination Record to a person is taken to conclude the determination of all protection claims made by that person.

The insertion of new sections 6(2B) and 31(5) are made retrospective to the time when the concept of derivative status was introduced to the legislative regime by the *Refugees Convention (Amendment) Act 2014*, on 21 May 2014, in order to ensure legislative support for the existing practice.

Clause 17, **18, 20 and 23** amend by omitting and substituting sections 6(3), 7(1), 31(1) and 43(1) to reflect the amendments to section 6(1) effected by clause 13.

Clauses 19 amends by omitting and substituting section 8. The purpose of the amendment is to ensure that the removal from Nauru of asylum seekers whose protection claims have been rejected, and who have exhausted all statutory avenues of review and appeal, can proceed in an orderly and efficient manner. The amendment prohibits an application under section 5 being made by a person with respect to whom a determination under section 6(1) has previously been made, unless the 'subsequent asylum claim' is permitted by the Secretary. The Secretary's power to permit a subsequent asylum claim is an absolute discretion, and neither the exercise of the discretion, nor consideration by the Secretary of whether to exercise the discretion in a particular case, can be compelled. The two circumstances, in which the discretion may be enlivened, set out in new section 8(2), are where the grounds of the subsequent application have not previously been determined, and where the grounds of the subsequent application arise as a result of a change in circumstances since the previous application was determined.

Clause 22 repeals section 37, which codified one 'important aspect of generally recognized principles of natural justice.' Under section 22(b), the Tribunal must act according to the principles of natural justice. The repeal of section 37 does not affect, limit or abrogate any aspect of that obligation. Rather, the purpose of the repeal of section 37 is to put beyond doubt that the source of the Tribunal's natural justice obligations is the common law of Nauru.

The principles of natural justice, and procedural fairness, are well-established in the common law of Nauru. Those principles formed part of the common law in force in England on 31 January 1968, which was adopted as a law of Nauru pursuant to section 4 of the *Custom and Adopted Laws Act 1971* (Nr), with effect from 5 January 1972. Moreover, those principles are regularly applied by the Supreme Court of Nauru.

As enacted, section 37 partially replicated section 424A of the *Migration Act 1958* (Cth). The similarities and differences between section 37, and section 424A of the *Migration Act 1958* (Cth), have led to some confusion about the nature of any obligation imposed on the Tribunal by section 37. The repeal of section 37 is necessary to ensure that consideration of the Tribunal's natural justice obligations is not unduly influenced by analogies with Australian legislation.

The primary difference between the legislative regimes in the two countries is that whereas the Nauruan statute expressly *preserves* generally recognized principles of natural justice, the Australian statute is expressly 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with' (see section 422B of the *Migration Act 1958* (Cth)).

The complex, prescriptive and exhaustive requirements of Division 4 of Part 7 of the *Migration Act 1958* (Cth) are necessary in Australia due to the express ouster of the common law with respect to natural justice. They are unnecessary and counter-productive for a Tribunal that is already bound to act in accordance with the principles of natural justice, which are regularly upheld by the Supreme Court of Nauru. While section 37 was not intended to impose on the Tribunal unduly onerous obligations, the similarities between section 37 and section 424A of the *Migration Act 1958* (Cth) have permitted some confusion with respect to the nature of section 37. The repeal of section 37 removes that confusion, without affecting, limiting or abrogating any aspect of the obligations owed by the Tribunal under the common law of Nauru.

The repeal of section 37 is made retrospective to the date on which the *Refugees Convention Act 2012* (Nr) commenced, on 10 October 2012. This is, first, to ensure that the Tribunal's conduct of its merits review task is assessed (on appeal to the Supreme Court of Nauru) on the same basis for all review applicants, regardless of the time merits review by the Tribunal was sought. Second, it will avoid the unnecessary, costly and time-consuming litigation of the precise nature of section 37 (and the relevance of Australian authorities to that question) before the Supreme Court. Thirdly, it will ensure that judgments on appeals to the Supreme Court of Nauru from Tribunal decisions, on procedural fairness or natural justice grounds, contribute to the development of the common law of Nauru with respect to procedural fairness and natural justice.

Clause 24 inserts new section 43(1A) to provide that the Supreme Court of Nauru has no jurisdiction to hear an appeal against a decision that a person is not to be given derivative status.

Clause 25 repeals the Note for section 43. It is implicit in the Note that in hearing and determining an appeal commenced pursuant to section 43 the Supreme Court of Nauru exercises appellate jurisdiction. The Republic has received advice from senior counsel that the Court is in fact exercising original, rather than appellate jurisdiction. While appeals do lie to the High Court of Australia from the Supreme Court of Nauru in certain circumstances – including, in certain circumstances, with respect to appeals brought pursuant to section 43 – it is inappropriate to seek to set those circumstances out clearly, and in full, in a Note for section 43.