

REPUBLIC OF NAURU

PUBLIC SERVICE (AMENDMENT) BILL 2020

EXPLANATORY MEMORANDUM

The *Public Service (Amendment) Bill 2020* is a Bill for the *Public Service (Amendment) Act 2020*.

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

EXPLANATION OF CLAUSES

Clause 1 provides that, once enacted, the short title of the Bill will be the *Public Service (Amendment) Act 2020*.

Clause 2 sets out when the Bill's provisions will commence which is upon certification by the Speaker.

Clause 3 is the enabling provision for the amendment of the *Public Service Act 2016*.

Clause 4 amends Section 3 of the Act by inserting a new subclause 3. This clause is necessary to clarify the constantly raised issue of the applicability of the Public Service Act to foreign service employees. Questions have been raised as to whether they are public servants or not. For all intents and purposes, they are public servants and will now be subject to the Act. This is necessary to ensure issues of jurisdiction or forum convenience is not raised in case of disciplinary actions.

Clause 5 amends Section 4 of the Act. The definition of 'misconduct' is amended because the classification of disciplinary conduct of the public servants into serious and minor misconduct is unnecessarily confusing. The disciplinary offences now constitute misconduct. The Regulations will now provide for the matters which the Chief Secretary must take into account when imposing penalties which is anticipated to provide mitigation for lighter penalties under the current Regulations for minor misconduct. The penalty has to be proportionate to the offence and the historical records of the employee.

The definition of '*Regulations*' is removed as the Regulations only refer to the *Public Service (Disciplinary Procedures) Regulations 2016*. This is already contained in the general regulation making powers in Section 130 of the Act. Definitions of '*adopted child*' and '*family member*' are also removed because they are not used in the Act.

Clause 6 amends Section 8 of the Act. This is to correct minor typographical errors.

Clause 7 amends Section 13 of the Act. Subsection (5) is amended to include '*Subject to section 25*'. The inclusion of this is necessary as section 25 of the Act allows the Cabinet to also engage the Secretaries or Heads of Departments on a fixed term contract.

Article 68 of the Constitution provides for the appointment of the persons to be in charge of Departments, who are the Secretaries or Heads of Departments under the Act. Section 13 provides the process for the appointment of a Head of Department. It is the relevant Minister with the approval of the Cabinet appoints a Head of Department. Section 14 provides for appointment and revocation of appointment of acting Secretaries. Section 13 does not provide for revocation of appointments of Heads of Departments. The proposed amendment now allows for the revocation of appointment of Secretaries or Heads of Departments for no cause or misconduct. It also allows the Cabinet in consultation with the relevant Minister to transfer or re-assign duties of the Head of Department. Current regulations provide for disciplinary proceedings of Secretaries similar to that of the other public servants (Regulation 9 and Schedule of the *Public Service (Disciplinary Procedures) Regulations 2016*). For the purposes of revocation for no reasonable cause, compensation of 2 months' salary must be paid in addition to the accrued benefits under the Act.

Clause 8 amends Section 15 by correcting a typographical error. The word 'of' is deleted where it appears before the words 'the Chief Secretary' and substituted with the word 'on'.

Clause 9 amends Section 21 of the Act. The word 'and' is inserted after the semicolon to ensure continuity of the clause.

Clause 10 deletes and substitutes subsections (1) and (2) of Section 27. This clause clarifies the application of the probationary period to temporary employees. Where a temporary employee is appointed to a permanent position and has served 6 months or any other period as temporary employee, has a satisfactory attendance record and the Secretary or Head of Department provides a report of satisfactory performance, the period of employment as temporary employee shall be credited to or is deemed to have served a probationary period of 6 months. This ensures that a temporary employee who performed to the satisfaction of the Secretary or Head of Department and has a satisfactory attendance record need not undergo a 6 month probationary period before being confirmed to a permanent position.

Clause 11 deletes and substitutes Section 29 of the Act. Subclause (1) now clarifies the role of the Secretary and places a duty on him or her to review the performance of an employee. Also, the extension of another temporary period is important to avoid the numerous extensions of temporary employment. The department must take all steps to fill that vacancy. If the temporary employee performs, he or she should be confirmed after 12 months of work. No further extensions are allowed now. This clause is to curb the current situation of many public servants who have remained employed on a temporary period for a long time.

Subclauses (3) and (4) are necessary to put subclause (1) into effect. Otherwise temporary employees continue their employment. It places a responsibility on the Head of Department to act under subclause (1) otherwise the employee will have to go.

Subclause (5) has been added to provide for entitlements that temporary employees are eligible for. Such leave entitlements are official travels, special leave, medical leave and official leave on the same terms and conditions as other public service employees.

Subclause (6) provides that temporary employees are now eligible for recreation leave if the temporary employee completes 12 months of continuous period of service.

Subclause (7) is now added to ensure that the temporary employees must attend to work. Often, they miss work with no remedy. This clause is sufficient to bring an end to their temporary employment with no claim for unlawful termination. This clause is limited to attendance to work and not any other matters including competence

Clause 12 deletes and substitutes section 32 which relates to contract positions. The process for determining any permanent position to be held on a contract by a public service employee is now streamlined. The Minister may now with the approval of the Cabinet determine any permanent position to be held by a public service employee on a contract. The Chief Secretary may establish a new contract position in a Department upon the request of a relevant Secretary. The Chief Secretary may fill a contract position where it becomes vacant according to the process in section 34.

Clause 13 amends section 36(3) by deleting and substituting the words ‘head of department’ with ‘Secretary’. This is to ensure consistency of the use of Secretary in this section.

Clause 14 deletes and substitutes Section 37 of the Act. This Clause now provides the basis for the termination of employment of contract employees without notice. A contract employee shall be terminated without notice where he or she:

- abandons work without prior notification;
- is absent from work for a period of 14 days without prior approval;
- whilst on a category of leave attempts to extend leave by other forms of leave without any reasonable cause; or
- leaves the Republic with no intention to return.

Clause 15 amends Section 51 of the Act by deleting subsection (1A) and amending subsection (4)(a). Subsections (1A) and (4)(a) currently contradict other provisions of the Act which deal with recreation leave. The inference of subsection (1A) is that a public servant cannot take recreation leave if such public servant has a balance of less than 5 days recreation leave.

Subsection (4)(a) is also contradictory in that it provides for a public servant to have completed 12 months of continuous service before he or she can be granted leave to the extent of his or her leave balance. The Act provides that an employee is entitled to 4 weeks of recreation leave and leave entitlement is calculated on a pro rata basis. This amendment and other provisions of the Act clarify the process for recreation leave and allows an employee to apply for recreation leave on completion of 3 months of continuous service instead of 12 months.

Clause 16 amends Section 66 of the Act by changing the reference to the repealed *Births Deaths and Marriages Act 1957* to the current *Births Deaths and Marriages Registration Act 2017*.

Clause 17 amends Section 77 of the Act by correcting a grammatical error. The word ‘satisfies’ is substituted with ‘satisfied’.

Clause 18 deletes and substitutes subdivision 9 of Part 6 of the Act which currently deals with long service leave. The new Clauses 78, 79 and 80 provide for furlough and long service leave.

A public service employee only becomes entitled to furlough leave after completing a continuous period of service of 5 years in the public service. Long service leave is only given to public service employees who have served for more than 10 years. The eligibility for long service leave only becomes available on the retirement or resignation of the public service employee.

A public service employee becomes entitled to long service leave when the employee has amassed a specified period of service. This Section is amended to include the entitlement for long service leave. This is not in the Act. The Act only provides for the calculation of long service leave. Under the Act, long service leave is payable on resignation or retirement. The change from the 1998 Act was to allow payment of long service leave where an employee earlier resigns instead of or on retirement from the public service. The current form of the Act allows for duplication of long service leave which may include a substantial number of days. That is, a potential of 398 working days of leave. The amendment now stipulates the period of long service and entitled days of leave or if a public service employee dies, the long service leave will be paid to his or her estate.

Clause 19 amends section 82 of the Act which relates to how employment terminates. The current provision provides for a limited basis for terminating an employee’s appointment and does not provide for terminating an employee for misconduct. Misconduct is now included as a ground for terminating an employee.

A typographical error is also rectified in this section.

Clause 20 inserts a new Clause 82A. This clause provides for the suspension without remuneration of a public service employee where the employee is charged with a criminal offence until the final determination of the criminal case.

Subclause (2) provides for the summary termination of a public service employee if such employee has been convicted of a criminal offence regardless of the sentence imposed by the court.

This clause applies to any person employed in the public service.

Clause 21 amends Section 94 of the Act by deleting ‘an information’ which are redundant words.

Clause 22 amends Section 96 of the Act by removing the reference to ‘repetition of minor’. Currently, the Act categorises misconduct either as minor or serious. This has caused confusion in how to deal with the same. The word ‘misconduct’ is now used throughout the Bill and does not distinguish between minor and serious misconduct. This clarifies any confusion as to the type of conduct that will result in disciplinary action.

Clause 23 deletes and substitutes section 97 of the Act which relates to disciplinary matters and procedure. The current section only provides for regulations to be made to prescribe the procedure for dealing with misconduct and other disciplinary matters. The new provision now includes reference to the Constitutional requirements of Articles 68 which vests power to the Chief Secretary to discipline employees other than heads of Departments. The grey or obscure area on disciplining Secretaries or Heads of Departments is also clarified. The Secretaries or Heads of Departments will be disciplined for misconduct by the Chief Secretary, who will submit report of findings and recommendation to Cabinet for a decision.

Clause 24 amends Section 99 removing the reference to ‘serious’ misconduct. This clarifies any confusion as to the type of conduct that will result in disciplinary action.

Clause 25 deletes and substitutes section 100 of the Act which relates to the notice requirement for termination. The existing section regarding termination of an employee for misconduct is inconsistent with the purpose of termination if compensation is to be paid which is ordinarily available to any staff made redundant or terminated without any cause or notice. The termination under subsection (1)(b) is for misconduct. If an employee is to be terminated for misconduct, there is no purpose in paying 4 weeks’ salary. It is not a termination on notice.

Clause 26 amends Section 103 of the Act which relates to the payment of accrued entitlements. A public service employee shall be paid his or her accrued annual leave and long service leave.

Clause 27 repeals and replaces Part 8 of the Act.

A new Clause 106 provides for a secretary to the Public Service Appeals Board. The Board currently does not have a secretary. The establishment of position of secretary is important for the purposes of receiving or filing documents. The Registrar of the Courts has judicial functions as such it may conflict with his current role if he were to receive all the documents himself.

Clause 107 requires each member of the Board other than the Chairperson to take an oath or make an affirmation before such member can exercise a power or perform a function.

Clause 108 provides that fees and allowances shall be paid to a member of the Board as determined by the Cabinet and published in the Gazette.

Clause 109 provides for decisions of the Chief Secretary which are appealable. Such appealable decisions are:

- appointment of a person or promotion of another public service employee;
- where the employee was found to have committed a misconduct and a penalty imposed by the Chief Secretary;
- transfer of the employee for reasons other than as a penalty for misconduct; or
- reduction of the employee's classification.

An appeal by an aggrieved employee lapses where:

- the employee is promoted to a position of the same or equivalent classification;
- the appointment or promotion of the other person is cancelled; or
- that position becomes vacant.

Clause 110 sets out decisions of the Chief Secretary which are not appealable. These include:

- (a) for the appointment or promotion of a person to a position unless:
 - (i) the employee was an applicant for that position; or
 - (ii) the position applied for would have resulted in a promotion;
- (b) to terminate the employment without any cause;
- (c) where the employee was terminated after a criminal conviction.

An employee's right of appeal is limited only to the penalty if such employee admits an allegation of misconduct against him or her.

Clause 111 sets out the procedure for commencing an appeal. An appeal against a decision of the Chief Secretary is to be commenced by a notice of appeal. The notice of appeal must be filed with the secretary to the Board. This is necessary as under the current process, appeals are left with the Chief Secretary, whose decision is subject to challenge. It is really in the hands of the Chief Secretary to pursue the appeal further. This will bring an independent, a more transparent and efficient process.

Clause 112 requires the Chief Secretary to provide relevant documents or evidence to secretary to the Board and to provide a copy of the same to the appellant within 14 days of the receipt of the notice of appeal. These documents or evidence are the documents or evidence submitted to the Chief Secretary for his or her consideration in making a decision.

Clause 113 provides for the hearing of an appeal. It is anticipated that appeals would generally be considered on the documents submitted by the aggrieved public service employee and by the Chief Secretary. This is based on the procedure for disciplinary proceedings before the Chief Secretary which requires the documents to be submitted in writing. This includes any submissions or mitigations. To allow additional or fresh evidence which were readily available and likely to subsequently change the decision would result in the Board making a decision which ought rightly to have been made by the Chief Secretary in the first instance. This will bring uncertainty to the disciplinary process. The Chief Secretary is expected to submit the entire disciplinary proceedings file to the Board for transparency and compliance with natural justice. The restriction on the calling of additional or fresh evidence is to ensure finality of the disciplinary proceedings.

In addition, every aggrieved employee must be given an opportunity to appeal the decision of the Chief Secretary. The Board must consider the appeal on merits.

Clause 114 provides for the decision of the Board on an appeal. The Board may:

- confirm part or whole of the decision;
- set aside part or whole of the decision and substitute its own decision; or
- refer the decision back to the Chief Secretary for re-determination with appropriate directions.

The Board in substituting its own decision has the same power vested to the Chief Secretary to make the decision.

Clause 115 provides for orders for reinstatement or compensation. Subclause (2) clarifies the position of the employee where the Appeals Board reverses the decision of termination. It also clarifies the payment of salary when reinstating or demoting the employee.

Subclause (6) is important for the purposes of the continuous period of service. It is also important for long service leave calculation. It is anticipated that the employee will not lose his or her eligibility for long service leave where he or she is terminated by the Chief Secretary and subsequently reinstated by the Board.

Subclause (7) is needed because the disciplinary process of public service employees up to the Appeal Board is likely to take a substantial period of time. During this period the position which the person held may be required to be filled as such, no vacancies exist to accommodate the employee where the Appeals Board reverses the decision of the Chief Secretary to reinstate that employee. This allows for a fair process by which an employee is capable of being paid his or her compensation on the basis of the eligibility for redundancy of public servants under the Act.

Clause 116 provides for compliance with order for reinstatement. Subclause (1) provides that the decision to reinstate may have certain implications in the event the position is no longer

available or immediately may not be capable of being complied. The 30 days allows the Chief Secretary to comply with the orders.

Subclause (2) allows the employee to be paid salary and benefit which he or she would legitimately be entitled to after the decision. In addition, it will also require the Chief Secretary to act with some expedition.

Clause 117 requires the Board to deliver its decision in writing within 14 days of the hearing of the appeal. Both the Chief Secretary and appellant shall each be provided a copy of the decision. In addition, the Board has no power to order costs against either party.

Clause 117A provides for a limitation on appealing a decision of the Board. Pursuant to Part II of the Constitution, every person has a right to seek redress in court. Article 70(8) of the Constitution restricts any appeals from the decisions of the Board. However, it allows for the making of laws to permit appeals from the decision of the Public Service Appeals Board. This clause allows for the decision of the Board to be judicially reviewed by the Court instead of being appealed where the Board makes a jurisdictional error or an error of law which would constitute illegality.

Clause 28 amends Section 124 of the Act. This amendment is necessary to ensure strict compliance with the Act.

Clause 29 amends Section 130 of the Act. This amendment is important because Public Service Circulars are used as a means to enforce the Public Service Act including the policies made by the Government from time to time.

Clause 30 is a general amendment clause which amends the reference to ‘head of Department’ to ‘Head of Department. This clause also amends the reference to ‘long service leave’ to ‘furlough leave’ where appropriate. This amendment is for consistency in the Act.

Clause 31 is the savings and transition clause which protects the accrued benefits of employees.