

Republic of Nauru - 20th Parliament

Courts (Amendment) Bill 2010

EXPLANATORY MEMORANDUM

BACKGROUND AND INTRODUCTION:

The Constitution of Nauru provides in clause (1) of Article 49 that the Supreme Court of Nauru ‘consists of a Chief Justice and such number, if any, of other judges as is prescribed by law.’ At present, there is one judge of the Supreme Court who is not the Chief Justice. By virtue of the definition of ‘subsidiary legislation’ in section 2 of the *Interpretation Act 1971-1997*, the instrument by which the President appointed this judge under Article 53 of the Constitution is a ‘law’. However, to avoid any doubt, it is desirable to make express provision in the *Courts Act 1972* that the President may determine the number of judges appointed to the Supreme Court. The insertion of a new subsection in section 4 of the *Courts Act* is proposed for this purpose.

The provisions of Part V of the Constitution, the Judicature, are designed in part to provide for judicial independence, by providing for security of tenure (see Articles 50 and 51). However, because Nauru has never had a resident judge, and judges have usually been non-resident expatriates over the prescribed retirement age of 65, judges of the Supreme Court have ordinarily been appointed under Article 53 (Acting judges) rather than under Article 49, and have been appointed for fixed terms. In order to enable the President to make substantive appointments under Article 49, rather than acting appointments under Article 53, and thereby to properly protect judicial independence, it is desirable to increase the retirement age of judges from 65 to 75.

An increase in the retirement age for judges was widely supported during the public consultation phase of the constitutional review process. On the basis of the public submissions, as well as legal arguments, the Constitutional Review Commission recommended that the retirement age for judges be increased to 70. When the Standing Committee on Constitutional Amendment Bills debated the clauses of the proposed *Constitution of Nauru (Parliamentary Amendments) Bill* in early 2009, the Committee recommended that the Bill be amended to increase the retirement age to 75. The Committee of the Whole agreed to this amendment. Thus, the *Constitution of Nauru (Parliamentary Amendments) Act* that was passed by Parliament and certified by the Speaker in August 2009 (but which has yet to commence) includes an amendment to Article 50 of the Constitution to increase the retirement age for judges to 75 years.

If Parliament passes the *Constitution of Nauru (Parliamentary Amendments) Consequential Amendments Bill*, the amendment to Article 50 will eventually commence, and the retirement age of 75 will be enshrined in the Constitution. However, in the

meantime, it is possible to give immediate effect to the increased retirement age by amending the *Courts Act*, because Article 50 of the Constitution, whilst currently prescribing a retirement age of 65, also empowers Parliament to provide for a greater age. It is proposed to insert in the *Courts Act* a new section 5A, prescribing a retirement age of 75, for this purpose. This will enable the new Chief Justice to be properly appointed under Article 49 as the substantive Chief Justice, rather than as an Acting Chief Justice under Article 53.

The principal objectives of this Bill are therefore to:

- satisfy the requirements of Article 49(1) by making legal provision for the President to determine the number of judges of the Supreme Court; and
- strengthen judicial independence by increasing the retirement age of judges to 75 years, thereby enabling substantive, rather than acting, judicial appointments to be made.

NOTES ON CLAUSES:

Clause 1 provides the short title of the Bill.

Clause 2 provides that the Act will come into force on the date of certification.

Clause 3 is the enabling provision for the amendment of the *Courts Act 1972*. It provides that the *Courts Act 1972* is amended in the manner set out in the Schedule.

The Schedule contains amendments to the *Courts Act 1972*.

Item [1] would amend section 4 of the *Courts Act*, by inserting a new subsection (1) that empowers the President to determine how many judges will be appointed to the Supreme Court. This new provision would be a ‘law’ for the purposes of Article 49(1) of the Constitution, which provides that ‘The Supreme Court consists of a Chief Justice and such number, if any, of other judges as is prescribed by law.’

Item [2] would insert a new section 5A in the *Courts Act*, which would provide for a retirement age of 75 for judges. This provision would be a ‘law’ for the purposes of Article 50(1) of the Constitution, which provides that ‘A judge of the Supreme Court ceases to hold office on attaining the age of sixty-five years or, if a greater age is prescribed by law for the purposes of this Article, on attaining that greater age.’