

TOKELAU AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Tokelau Act 1948.

Clause 1 relates to the Short Title and commencement. Except as provided in *clause 7 (2)*, the Bill is to come into force on a date to be appointed by Order in Council.

PART I

AMENDMENTS TO PRINCIPAL ACT

Part I makes a number of amendments to the Tokelau Act 1948 (the principal Act).

Clause 2 amends section 2 (3) of the principal Act, which defines certain terms. The amendment repeals the definitions of the terms "Faipule" and "General Fono". Those definitions are now redundant.

Clause 3 repeals sections 4A and 5 of the principal Act, and substitutes *new sections 4A to 4H*, and *new section 5*.

The existing section 4A of the principal Act provides that the law of England as existing on 14 January 1840 is in force in Tokelau except to the extent that it is inconsistent with the principal Act or is inapplicable to the circumstances of Tokelau. A proviso to that section provides that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before 14 January 1840 is in force in Tokelau unless and except so far as it is in force in New Zealand at the commencement of the section.

The existing section 5 of the principal Act provides that all laws in force in Tokelau at the commencement of the principal Act continue in force, except as far as they are inconsistent with the principal Act or any other Act of the Parliament of New Zealand in force in Tokelau or with any regulation in force in Tokelau.

The *new section 4A* provides that, subject to the *new section 4B*, all laws in force in Tokelau immediately before the commencement of the *new section 4A* shall continue in force. It is also made clear that such laws include those Imperial enactments passed before 1 January 1840 that were in force in New Zealand on the commencement of the Tokelau Amendment Act 1969 and that were in force in Tokelau immediately before the commencement of the *new section 4A*. The effect of the *new section 4A* is essentially to preserve the status quo in relation to

the law that is in force in Tokelau, but subject to the change made by *new section 4B*.

The *new section 4B* relates to the application, to Tokelau, of the common law. At present, English common law as existing on 14 January 1840, and New Zealand common law, is in force in New Zealand. This has been found to be inconvenient, as access to such law in Tokelau is difficult.

The *new section 4B* provides that English common law (including the principles and rules of equity) for the time being is to be in force in Tokelau, except to the extent that it is excluded by any other enactment in force in Tokelau or is inapplicable to the circumstances of Tokelau. Western Samoan law contains a similar provision, and because of the proximity of Western Samoa to Tokelau, the provision will mean that the law will be more accessible.

New sections 4c to 4H and new section 5 confer on the General Fono of Tokelau a general power to make rules for the peace, order, and good government of Tokelau. The power includes the following:

- (a) The power to impose tolls, rates, dues, fines, taxes, and other charges;
- (b) The power to prescribe criminal offences in respect of the contravention of, or non-compliance with, any rules made by the General Fono, and to prescribe penalties that may be imposed in respect of any such offence;
- (c) The power to declare that any Imperial enactment shall cease to be in force in Tokelau;
- (d) The power to declare that any Ordinance of the Gilbert and Ellice Islands Colony shall cease to be in force in Tokelau;
- (e) The power to declare that any regulation made under section 4 of the principal Act shall cease to be in force in Tokelau;
- (f) The power to declare any day to be a public holiday.

The power is subject to certain qualifications. No rule made by the General Fono is to be valid if it is inconsistent with any New Zealand statute in force in Tokelau, with any regulation made under section 4 of the principal Act after the commencement of the Bill, or with any international obligation of Tokelau.

New sections 4E to 4G relate to the procedures of the General Fono for making rules, the publication of such rules, and the proof of such rules.

New sections 4H and 5 provide for the disallowance, by the Administrator of Tokelau, of rules made by the General Fono.

PART II

AMENDMENTS TO TOKELAU AMENDMENT ACT 1986

Part II makes certain amendments to the Tokelau Amendment Act 1986 (the 1986 Act).

Clause 4 amends section 3 of the 1986 Act, which makes the New Zealand High Court a court of law for Tokelau. The amendment is consequential on the amendment made to the principal Act by *clause 3*.

Clause 5 amends section 5 of the 1986 Act, which relates to the appointment of Commissioners for each of the 3 islands of Tokelau. At present, such Commissioners must vacate office on attaining the age of 68. This retirement age has proved inconvenient, as it is usually Elders who will be appointed as Commissioners, and a person only becomes an Elder at around the age of 63.

The amendment to section 5 removes the retirement age, and provides for Commissioners to hold office for a 3 year term. There is no restriction on reappointment.

Clause 6 amends section 7 of the 1986 Act, which relates to the jurisdiction of Commissioners in civil and criminal cases. At present, subsection (3) of section 7

provides that a Commissioner has jurisdiction only in respect of the island for which that Commissioner is appointed. It is therefore unclear whether Commissioners have jurisdiction over matters that do not occur on land, particularly offences that are committed at sea.

The amendment to section 7 makes it clear that a Commissioner has jurisdiction only in respect of the island for which he or she is appointed, and in respect of the territorial sea of Tokelau that surrounds that island. Any Commissioner has jurisdiction where an offence is committed in the exclusive economic zone of Tokelau, or where an offence under the law of Tokelau is committed beyond Tokelau.

Clause 7 corrects a drafting error in section 18 (1) of the 1986 Act. The amendment is made retrospective to the commencement of the 1986 Act.

PART III

CONSEQUENTIAL AMENDMENTS

Part III makes certain consequential amendments.

Clause 8 effects certain consequential amendments, and a consequential revocation.

Clause 9 is a savings provision relating to the repeal of the Tokelau Amendment Act 1982 and the conferring on the General Fono of the power to impose taxes and other charges. The 1982 Act provides for the imposition of a community services levy on income. The 1982 Act is continued in force until the General Fono makes rules imposing any levy or tax on income.

Clause 10 provides that the Public Holidays Ordinance 1917 of the Gilbert and Ellice Islands Colony shall cease to be in force in Tokelau. The Ordinance is unnecessary with the conferring on the General Fono of the power to declare public holidays.

Rt. Hon. Don McKinnon

TOKELAU AMENDMENT

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A BILL INTITULED

An Act to amend the Tokelau Act 1948

BE IT ENACTED by the Parliament of New Zealand as follows:

5 **1. Short Title and commencement**—(1) This Act may be cited as the Tokelau Amendment Act 1995, and shall be read together with and deemed part of the Tokelau Act 1948* (hereinafter referred to as the principal Act).

10 (2) Except as provided in **section 7 (2)** of this Act, this Act shall come into force on a date to be appointed by the Governor-General by Order in Council.

*Reprinted 1977 (1976, Vol. 5, p. 4489)
Amendments: 1980, No. 147; 1982, No. 148; 1986, No. 31

PART I

AMENDMENTS TO PRINCIPAL ACT

2. Interpretation—Section 2 (3) of the principal Act (as enacted by section 2 of the Tokelau Amendment Act 1971) is hereby amended—

(a) By repealing the definition of the term “Faipule” (as substituted by section 19 of the Tokelau Amendment Act 1986);

(b) By repealing the definition of the term “General Fono” (as inserted by section 2 (1) of the Tokelau Amendment Act 1982).

3. New sections substituted—The principal Act is hereby amended by repealing section 4A (as inserted by section 3 of the Tokelau Amendment Act 1969) and section 5, and substituting the following sections:

“**4A. Existing laws to continue in force**—(1) Subject to section 4B of this Act, all laws in force in Tokelau immediately before the commencement of this section shall continue in force.

“(2) Without limiting the generality of subsection (1) of this section, the laws referred to in that subsection include those Acts of the Parliament of England or of Great Britain or of the United Kingdom passed before the 14th day of January 1840 that—

“(a) Were in force in New Zealand on the 22nd day of July 1969; and

“(b) Were in force in Tokelau immediately before the commencement of this section.

“**4B. Application of common law of England**—(1) After the commencement of this section, English common law (including the principles and rules of equity) for the time being shall be in force in Tokelau, except to the extent—

“(a) That it is excluded by any other enactment in force in Tokelau; or

“(b) That it is inapplicable to the circumstances of Tokelau.

“(2) The law referred to in subsection (1) of this section shall have effect in Tokelau in place of the common law (including the principles and rules of equity) that applied in Tokelau immediately before the commencement of this section, but nothing in this section shall affect—

“(a) The validity, invalidity, effect, or consequences of anything done or suffered before the date of the commencement of this section; or

“(b) Any status or capacity existing immediately before that date; or

5 “(c) Any right, interest, or title acquired, accrued, or established before that date, or any remedy or proceeding in respect of any such matter.

 “4C. **General Fono may make rules**—(1) Subject to sections 4b and 4H of this Act, the General Fono may from time to time make such rules as it thinks necessary for the peace, order, and good government of Tokelau.

10 “(2) Without limiting the generality of subsection (1) of this section, the power conferred by that subsection includes—

 “(a) The power to impose tolls, rates, dues, fines, taxes, and other charges:

15 “(b) The power to prescribe criminal offences in respect of the contravention of, or non-compliance with, any rules made under this section, and to prescribe penalties that may be imposed in respect of any such offence:

20 “(c) The power to declare that any Act of the Parliament of England or of Great Britain or of the United Kingdom shall cease to be in force in Tokelau:

 “(d) The power to declare that any Ordinance of the Gilbert and Ellice Islands Colony shall cease to be in force in Tokelau:

25 “(e) The power to declare that any regulation made under section 4 of this Act shall cease to be in force in Tokelau:

 “(f) The power to declare any day to be a public holiday.

30 “(3) Without limiting the generality of subsection (1) of this section, any rule made under this section may apply generally to Tokelau, or may apply within any specified part or parts of Tokelau.

 “(4) The General Fono may from time to time amend or revoke any rule made under this section.

35 “4D. **Rules subject to other enactments and international obligations**—(1) Any rule made under section 4c of this Act that is inconsistent with—

 “(a) Any Act of the Parliament of New Zealand that is in force in Tokelau; or

40 “(b) Any regulation made under section 4 of this Act after the commencement of this section; or

 “(c) Any international obligation of Tokelau— shall, to the extent of the inconsistency, be of no effect.

“(2) No rule and no provision of any rule made under **section 4c** of this Act—

“(a) Shall be deemed to be inconsistent with any law referred to in **subsection (1)** of this section solely on the ground that it deals with a matter already dealt with by any such law; or 5

“(b) Shall be invalid solely on the ground that it is repugnant to the law in force in Tokelau by virtue of **section 4b (1)** of this Act.

“**4E. Procedure for making rules**—Subject to this Act, the General Fono may determine its own procedures for making rules under **section 4c** of this Act, and for amending or revoking such rules. 10

“**4F. Publication and availability of rules**—(1) A copy of every rule made under **section 4c** of this Act shall be printed in Tokelauan and in English in the first available issue of *Te Vakai* published after the making of the rule. 15

“(2) A copy of every rule made under **section 4c** of this Act shall be available at all reasonable times—

“(a) For public inspection, without fee; and 20

“(b) For purchase, on payment of such amount (if any) as the Taupulega of the relevant village determines,— at the Administration Office of each village of Tokelau.

“(3) Failure to comply with **subsection (1)** or **subsection (2)** of this section shall in no way affect the validity of any rule made under **section 4c** of this Act. 25

“**4G. Proof of rules**—(1) In any proceedings, the production of any document purporting to be a copy of any rule made under **section 4c** of this Act, and which is endorsed with a certificate signed by the Administrator or by a person authorised for that purpose by the Administrator certifying— 30

“(a) That the document is a true copy of the rule; and

“(b) The date on which the rule came into force,— shall, until the contrary is proved, be sufficient evidence that the rule was duly made and is then in force. 35

“(2) Until the contrary is proved, it shall be presumed that every certificate purporting to have been given under this section has been given by the Administrator or by a person authorised by the Administrator to give certificates under this section. 40

“**4H. Disallowance of rules**—(1) A copy of every rule made under **section 4c** of this Act shall, as soon as practicable after it is made, be sent to the Administrator.

“(2) Within 30 days after the Administrator receives a copy of any rule in accordance with **subsection (1)** of this section, the Administrator may, by notice published in the *Gazette*, disallow the rule or any provision of the rule.

5 “(3) Where the Administrator, by notice, disallows any rule or any provision of a rule, the rule or provision so disallowed shall cease to have effect on the later of—

“(a) The date of the publication of the notice in the *Gazette*;
or

10 “(b) Any date specified in the notice as the date on which the rule or provision ceases to have effect.

“(4) Where any rule or any provision of any rule is disallowed under this section, the disallowance of the rule or provision shall have the same effect as a revocation of that rule or provision, but the disallowance shall not affect the validity of anything already done under the rule or provision so disallowed.

15 “(5) As soon as practicable after disallowing any rule or any provision of a rule under this section, the Administrator shall—

20 “(a) Notify that disallowance to the Chairperson of the General Fono; and

“(b) By written notice, inform the General Fono of the reasons for the disallowance.

Cf. 1989, No. 143, ss. 5 (2), 7

25 “**5. Restoration of Acts, Ordinances, or regulations**—(1) Where any rule or any provision of any rule, being a rule or provision that—

30 “(a) Declares that any Act of the Parliament of England or of Great Britain or of the United Kingdom shall cease to be in force in Tokelau; or

“(b) Declares that any Ordinance of the Gilbert and Ellice Islands Colony shall cease to be in force in Tokelau;
or

35 “(c) Declares that any regulation made under section 4 of this Act shall cease to be in force in Tokelau,—

40 is disallowed under **section 4H** of this Act, the disallowance of the rule or provision has the effect of restoring the Act, Ordinance, or regulation in force in Tokelau, as the Act, Ordinance, or regulation was immediately before it was declared to cease to be in force in Tokelau, as if the rule disallowed or provision disallowed had not been made.

“(2) The restoration of an Act, Ordinance, or regulation pursuant to **subsection (1)** of this section takes effect on the day

on which the rule disallowed or provision disallowed ceases to have effect.”

Cf. 1989, No. 143, s. 8

PART II

AMENDMENTS TO TOKELAU AMENDMENT ACT 1986 5

4. High Court of New Zealand to be a court of law for Tokelau—Section 3 (2) of the Tokelau Amendment Act 1986 is hereby amended by inserting, after the word “Act”, the words “and to the provisions of any rules made by the General Fono”. 10

5. Appointment of Commissioners—(1) Section 5 of the Tokelau Amendment Act 1986 is hereby amended by repealing subsections (2) and (3), and substituting the following subsections:

“(2) Subject to subsections (4) and (5) of this section, every Commissioner shall hold office for a term of 3 years. 15

“(2A) Every Commissioner shall be eligible for reappointment from time to time.

“(3) Notwithstanding anything in **subsection (2)** of this section, but subject to subsections (4) and (5) of this section, where a Faipule holds concurrently the office of Commissioner, that person shall remain in office as Commissioner until the completion of that person’s term of office as a Faipule, even though that person’s term of office as Commissioner expires before the completion of that person’s term of office as a Faipule.” 20 25

(2) Every person who, immediately before the commencement of this section, holds office as a Commissioner under section 5 of the Tokelau Amendment Act 1986—

(a) Shall continue to hold office; and 30

(b) Unless soon vacating office under subsection (4) or subsection (5) of that section, shall vacate office at the expiry of the period of 3 years beginning on the date of his or her appointment as a Commissioner, but shall be eligible for reappointment. 35

6. Jurisdiction of Commissioners—Section 7 of the Tokelau Amendment Act 1986 is hereby amended by repealing subsection (3), and substituting the following subsections:

“(3) Subject to **subsection (3A)** of this section, to any regulations made under the principal Act, and to any rules made by the 40

General Fono under **section 4c** of the principal Act, a Commissioner shall have jurisdiction only in respect of—

“(a) The island for which that Commissioner is appointed; and

5 “(b) The territorial sea of Tokelau that surrounds that island.

“(3A) Notwithstanding anything in **subsection (3)** of this section, but subject to subsection (1) of this section, any Commissioner may exercise jurisdiction in respect of the following offences:

10 “(a) Any offence to which section 9 of the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 applies:

“(b) Any offence that, under the law of Tokelau, may be committed beyond Tokelau (whether or not that offence may also be committed in Tokelau), in any case where that offence is committed beyond
15 Tokelau.”

7. Correcting drafting error—(1) Section 18 (1) of the Tokelau Amendment Act 1986 is hereby amended by repealing paragraph (c), and substituting the following
20 paragraph:

“(c) Section 2 (2) (d), section 3 (5), and section 3 (6) of the Tokelau Amendment Act 1976:”.

(2) This section shall be deemed to have come into force on the 1st day of August 1986.

25 PART III

CONSEQUENTIAL AMENDMENTS

8. Consequential repeals and revocation—(1) The following enactments are hereby consequentially repealed:

(a) The Tokelau Amendment Act 1982;

30 (b) Section 19 of the Tokelau Amendment Act 1986.

(2) The Tokelau Amendment Act (Community Services Levy) Order 1994 (S.R. 1994/187) is hereby consequentially revoked.

9. Community services levy to continue until rules made by General Fono—Until such time as the General Fono makes rules under **section 4c** of the principal Act (as substituted by **section 3** of this Act) imposing any levy or tax on income, then, notwithstanding—

40 (a) The repeal, by **section 8 (1) (a)** of this Act, of the Tokelau Amendment Act 1982; and

(b) The revocation, by **section 8 (2)** of this Act, of the Tokelau Amendment Act (Community Services Levy) Order 1994,—

the provisions of that Act, as they existed immediately before the commencement of this section, and that order, shall 5
continue in force as if that Act had not been so repealed, and as if that order had not been so revoked, and the community services levy imposed by that Act shall be payable accordingly.

10. Public Holidays Ordinance 1917 to cease to apply to Tokelau—(1) After the commencement of this section, the 10
Public Holidays Ordinance 1917 of the Gilbert and Ellice Islands Colony shall cease to have effect as part of the law of Tokelau.

(2) The provisions of sections 20, 20A, and 21 of the Acts Interpretation Act 1924 shall apply with respect to the 15
Ordinance specified in **subsection (1)** of this section as if that Ordinance were an Act of the Parliament of New Zealand that has been repealed by that subsection.