

ELECTORAL AMENDMENT BILL (No. 2) 2020

SAMOA

Explanatory Memorandum

1.0 Summary:

The Bill seeks to amend the Electoral Act 2019 (“principal Act”). The overall objective of the Bill is to meet the mandate of the Electoral Commission established as such under the Electoral Commission Act 2019. Such mandate is intended to be achieved through amendments to the principal Act: that provide for more fair application of the law to a person intending to contest for elections from constituencies affected in the re-defining of the electoral boundaries under the Electoral Constituencies Act 2019; and that provide for fair application of the law to a person intending to contest in the general elections but has been impacted by the Corona Virus Disease 2019 (COVID-19) travel restrictions; and address administrative gaps to improve the law that the Electoral Commission were faced with during by-elections since the principal Act was passed; and ensure the integrity of monotaga is intact for purpose of elections.

Clauses:

- Clause 1:** - provides for the short title and commencement.
- Clause 2:** - amends section 8 of the principal Act:
- a) by re-arranging the current subsections (1)(e) to (1)(d) to follow that a person required to render monotaga under a matai title within a village in a

constituency, has done so for a consecutive three (3) years, and such person has resided in Samoa for a consecutive three (3) years. This re-arrangement provides clarity in the process to be followed by persons intending to run as candidates in determining whether eligibility requirements under section 8(1) are met. The intention of section 8, is to ensure that a candidate's three (3) years' monotaga requirement is assessed on the matai title used for nomination. Thus section 8 of the principal Act is to be read in totality and to further clarify this, section 8 is to be applied together with the proposed amendment to section 58 as provided under clause 7 of the Bill;

- b) by substituting the words in the beginning of subsection (2) "The Commissioner may disqualify a person" with "A person is disqualified". This amendment will effectively revert this section to its original form when it was passed in 2019. Section 8(2) was initially amended by the *Electoral Amendment Act 2020, No. 13*, which provided that the Commissioner may disqualify a person from contesting as a candidate if the requirements of section 8 are not met. The proposed amendment, which reverts section 8(2) to its original form when it was passed in 2019 provides that a person is disqualified from contesting in the general elections,

if the requirements of section 8 are not met. The disqualification is determined by the Supreme Court. Consequently, as a result of this proposed amendment, section 9 of the principal Act which provides for a Judicial Review process on the decision of the Commissioner must be repealed;

- c) by amending subsection (3) -
- (i) to substitute the number "125" with "60" days in paragraph (d). The internal process in calculating the period of residence of an intending candidate requires a formula which equates to a total of 365 days a year. The current law provides under section 8(5) in the definition of "*minimum of three (3) years*" that a candidate is required to reside in Samoa for 305 days a year. This prescribed number was amended by the *Electoral Amendment Act 2020, No. 13* changing 240 days to 305 days. It follows that due to this increase in the days for the residential requirement, section 8(3) must also be amended to decrease 125 days to 60 days. This is the required period by which a person must produce proof of medical treatment overseas or other permitted absences to the Electoral Commissioner, in order to be exempted from the residential requirement under section 8(1);

- (ii) to insert a new paragraph (e) to also exempt a person from the residential requirement under section 8(1) who satisfies the Commissioner to be affected by travelling restrictions as a result of a declared pandemic or a natural disaster;
- d) by amending subsection (4) for consistency as a consequence of the proposed amendments to subsection (3)(e). The requirements of section 8(4) is to satisfy the Commissioner through a statutory declaration that a person meets the exemption under the proposed subsection (3)(e).

Clause 3: - section 9 is repealed.

Clause 4: - inserts a new section 46A to provide a nomination process available to a person who resides in Samoa and intends to contest in the General Elections 2021 but travelled abroad and could not travel back due to Corona Virus Disease 2019 (“COVID-19”) travelling restrictions. The process requires this person to nominate a person in writing to execute and submit the nomination papers to the Commissioner on his or her behalf if at the time nomination commences, this person is outside of Samoa. This new feature of the electoral process is available to ensure that people are not unfairly excluded from the election process. This section applies only for the purposes of the general elections 2021 and will expire on the day after the official declaration of results of the general elections made pursuant to section 84.

- Clause 5:** - amends section 47 by inserting a new subsections (3) and (4) to provide a right to a person to challenge the Commissioner's decision made under sections 47(1) and (2) with regard to the acceptance or the rejection of an application for nomination as a candidate. This proposed amendment is to provide an avenue for candidates to challenge the decision made by the Electoral Commissioner under section 47. Under the Electoral Act 1963 ('Repealed Act') this avenue was provided to allow candidates to challenge the eligibility of other candidates prior to the general elections in an amendment introduced in 2015. Under the principal Act, such avenue no longer exists. The process pertaining to the challenging of the Commissioner's decision on eligibility was formerly through an election petition filed to the Court after elections. This proposed amendment provides for a person to challenge the decision of the Commissioner and should be dealt with by the Court prior to cut-off date for withdrawal of nomination - which is before elections. Thus the intention is to allow for challenges to be filed and determined before polling day. The proposed amendment provides a time limit on when challenges are to be filed, and when the Court is to issue an order. Thus not only does the proposed amendment provide an avenue not currently provided for any challenges to a candidate's eligibility, but it also allows the Electoral Commission ample time to administratively prepare for the general elections.
- Clause 6:** - amends section 53 by inserting a new subsection (4) to provide that a candidate who is overseas during the nomination period is still required to be present in Samoa

on polling day. If the person is not in Samoa at 12noon of the 14th day before polling, that candidate's nomination is deemed withdrawn. This withdrawal rule is required to coincide with clause 4 of the Bill, which inserts a provision allowing nominations of a person not in Samoa (due to COVID-19 travel restrictions).

Clause 7: - amends section 58(4) by inserting two new paragraphs "(f)" and "(g)" and renumbering current paragraph "(f)" as paragraph "(h)" to provide the requirement for the use of matai titles of a candidate in a ballot paper, particularly, the order in which multiple matai titles are to appear. The proposed amendment provides that the registered matai title that a candidate uses for the elections, which meets the three (3) years monotaga must be noted first on the ballot paper. This is then followed by other registered matai titles regardless of whether the three (3) year monotaga requirement is met or not. This addresses issues faced by the Electoral Commission in previous elections requiring clarification on the process to be observed in order to meet the monotaga requirement prescribed under section 8 of the principal Act.

Clause 8: - amends section 141(2) by substituting paragraphs (a) and (b) with new paragraphs to clarify the legal consequences for a Member that does not comply with section 140 of the principal Act, after a Member undertakes an oath of allegiance in accordance with the various Membership status provided under section 140. The substituted paragraphs provide that a Member's seat is vacant if:

- (a) a Member of a political party resigns, withdraws from or changes his or her political party during a Parliamentary term; or
- (b) an independent Member joins a political party during a Parliamentary term.

The proposed amendment will bring this clause in line with Article 46(3)(a)(i) and (ii) of the Constitution.

Clause 9: - amends section 152 by substituting the reference to section "48" with section "46" to ensure that the required sections that apply to general elections also apply to by-elections.

Clause 10: - amends section 156 by:

- (a) renumbering the current provision as subsection (1) as a consequence of required amendments to insert new subsections into this section in the principal Act; and
- (b) substituting the current paragraph (c) with a new paragraph to clarify the rules to be applied for the purpose of section 8(1)(d) of the principal Act which is the monotaga requirement of consecutive three (3) years as follows -
 - (i) for Members representing the Urban Constituencies, such Members must meet the consecutive three (3) years of monotaga required, which is rendered through any registered matai title in any village, including villages outside of the Electoral Constituencies, that will replace the Urban Constituencies in the general elections 2021;

- (ii) for a person intending to contest for general elections 2021 from an Electoral Constituency listed in the Schedule, he or she may use the consecutive three (3) years monotaga rendered under a registered matai title in the corresponding territorial constituency listed in the Schedule. As an example, a person intending to contest from Sagaga 3 Electoral Constituency, may use his or her registered matai title in Gagaemauga No. 1 or Sagaga le Falefa territorial constituencies, to meet the consecutive three (3) years monotaga required, despite that the registered matai title used for elections (different from the registered matai title in the territorial constituency) does not meet the consecutive three (3) years monotaga. This proposed rule also applies to persons currently in Urban Constituencies, who intend to contest for elections from the Electoral Constituencies that replaces the Urban Constituencies; and
- (c) by inserting new -
 - (i) subsection (2) to provide the definition of monotaga for the purpose of the proposed amendment to the transitional provision 156(c) of the principal Act, and to clarify that this proposed amendment to section 156(c) only applies to the general elections 2021. The change to the definition of monotaga is to make specific reference to the Schedule; and

- (ii) subsection (3) to exempt a person from the residential requirement due to the impacts of the travel restrictions resulting from the COVID-19 pandemic; and
- (iii) subsection (4) to clarify that the proposed requirements inserted under clause 7 of the Bill (which amends section 58) does not apply to a person that the proposed section 156(c) applies to. This effectively ensures, those covered by section 156(c), are also exempted from the requirements of the proposed amendments to section 58 of the principal Act.

Clause 11: - amends the principal Act to insert a Schedule referenced in the proposed section 156(c) into the principal Act. The Schedule provides for a list of territorial constituencies and corresponding Electoral Constituencies used in the proposed amendment to section 156(c) of the principal Act.

Clause 12: - provides for consequential amendments to the Electoral Constituencies Act 2019. These amendments are:

- a) by amending section 1(2) by substituting “section 4” with “sections 4 and 5”;
- b) for section 2(2), it provides for the insertion of sub-villages that are not included under the Electoral Constituencies to be prescribed by Regulations;
- c) for section 5, to incorporate the recognition of the Electoral Constituencies for the nomination process of candidates together with the compilation of rolls for the general elections 2021.

Clause 13: - provides for a transitional provision to this Amendment Act to recognize a pandemic already declared as such under an enactment before the commencement of this Bill once passed. This is to ensure the COVID-19 declared as a pandemic in Samoa is recognized for the purpose of the proposed amendments.

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(Hon FAAOLESA Katopau AINU'U)

**MINISTER OF JUSTICE AND COURTS ADMINISTRATION AND
MINISTER RESPONSIBLE FOR THE ELECTORAL COMMISSION**