

## EXPLANATORY STATEMENT

Minute No. 23 of 2017 – Minister for Infrastructure and Transport

Subject - *Cocos (Keeling) Islands Act 1955*

*Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017*

The purpose of the *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017* is to ensure the clarity of the legal framework for emergency management in the Territory of Cocos (Keeling) Islands (the Territory) and the Government's capacity to respond to emergency events in the Territory.

The *Cocos (Keeling) Islands Act 1955* (the Act) provides the legal framework for the governance of the Territory. The Territory is administered by the Australian Government and has no state legislature. Subsection 8A(1) of the Act provides that the laws of Western Australia (WA) are in force in the Territory from time to time as applied laws. Applied laws may be amended or repealed by Ordinance, under subsection 8(2) of the Act. Ordinances are generally made to account for the Territory's unique legal and administrative arrangements, to address matters not dealt with by WA laws applied in the Territory, or to implement Australian Government processes and procedures. Subsection 12(1) of the Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory.

It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making powers commonly found in Commonwealth legislation, which permit the making of regulations as 'required or permitted' or 'necessary or convenient'. They are used by Parliament to indicate that, within the relevant subject matter, there is to be very little limitation on what can be provided for. They are generally only used for the external territories and the Jervis Bay Territory, where the relevant Ordinances deal with state-level matters not normally dealt with in other types of Commonwealth legislation. The Commonwealth Parliament recently enacted a provision similar to subsection 12(1) of the Act for the governance of Norfolk Island: section 19A of the *Norfolk Island Act 1979* (which was enacted in 2015).

The *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017* amends the *Emergency Management Ordinance 2012* (CKI). The existing Ordinance provides the legislative basis for emergency management activities in the Territory. Prior to the introduction of the *Emergency Management Ordinance 2012* (CKI), the *Emergency Management Act 2005* (WA)(CKI) provided the legislative basis for emergency management arrangements.

This Ordinance changes the name of the existing Ordinance to the *Cocos (Keeling) Islands Emergency Management Ordinance 2012* (CKI), reflecting current drafting standards and practices. This Ordinance will not change the substance of the legal framework for emergency management in the Territory. The Ordinance will clarify the existing framework by distinguishing between an 'emergency', which triggers certain powers, and a 'state of emergency', which provides for more extensive powers.

The existing Ordinance defines an ‘emergency’ as the occurrence or imminent occurrence of a hazard of such a nature or magnitude that it requires a significant and coordinated response. The Ordinance will introduce a more detailed definition of a ‘hazard’ to include examples of the types of accidents, incidents, events, situations or conditions that could endanger people, animals, property or the environment (examples include a cyclone, earthquake, flood, storm, tsunami, swell, fire, plague, epidemic, or vehicle, vessel or aircraft accident).

The existing Ordinance provides for the Administrator of the Territory to make a declaration that a ‘state of emergency’ exists if they are satisfied that an emergency has occurred, is occurring or is an imminent ‘state of emergency’ and that extraordinary measures are required to prevent or minimise loss of life, illness or injury to humans or animals, property loss or damage to property or the environment.

The existing Ordinance creates the Office of the Cocos (Keeling) Islands Territory Controller, which is to be held by the senior officer of the Australian Federal Police assigned to community policing duties in the Territory. This Ordinance will provide for the Territory Controller to make a declaration that an emergency situation exists if they are satisfied that an emergency has occurred, is occurring or is imminent and that extraordinary measures are required to prevent or minimise loss of life, illness or injury to humans or animals, property loss or damage to property or the environment. This Ordinance will also provide for the Territory Controller to extend and revoke an emergency situation declaration. It will detail the format and manner in which declarations must be published.

The existing Ordinance empowers the Administrator of the Territory or the Territory Controller to authorise any person as an ‘authorised officer’ during a state of emergency, where a state of emergency declaration is in force. This Ordinance will empower the Administrator of the Territory or the Territory Controller to also authorise any person as an ‘authorised officer’, where an emergency situation declaration is in force.

The existing Ordinance lists the powers that may be exercised by authorised officers during a declared state of emergency. The powers available to authorised officers under the existing Ordinance are identical to those that were provided to hazard management officers or authorised officers under the repealed *Emergency Management Act 2005* (WA)(CKI). This Ordinance will not amend the list of powers that may be exercised by authorised officers during a declared state of emergency in the existing Ordinance, but it will permit authorised officers to exercise a limited number of these powers during a declared emergency situation, if reasonably required for the purposes of emergency management. The proposed changes will improve clarity about which powers may be exercised in emergency situations. For example, officials will have the power to close a road during an ‘emergency’ or a ‘state of emergency’, but only to disconnect electricity during a ‘state of emergency’. This will ensure emergency management officials have the appropriate range of powers to act lawfully in an emergency situation and in a state of emergency situation.

The powers of an authorised officer do not limit the powers the person may have under another law. This recognises that authorised officers, as appointed by the Administrator of the Territory or the Territory Controller, will likely be drawn from those with existing knowledge of and training in emergency management, predominantly members of the police

force. Consistent with the existing Ordinance, when exercising powers during an emergency situation or state of emergency situation, an authorised officer is required to comply with any direction given by the Territory Controller.

#### Conditions to be Satisfied

The Act does not specify conditions that need to be satisfied before the power to make the Ordinance may be exercised.

#### Legislative Instrument

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

#### Commencement

The Ordinance commences on the date after registration on the Federal Register of Legislative Instruments.

#### Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required.

#### Consultation

In preparing this Ordinance, the Department of Infrastructure and Regional Development advised the Federal Executive Council Secretariat that it would consult on matters contained in the *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017*.

At the time of consultation the Cocos (Keeling) Islands Emergency Management Committee consisted of the Administrator of the Territory, Government agencies and voluntary organisations.

Before this Ordinance was made, the Minister for Infrastructure and Transport considered the general obligation to consult imposed by section 17 of the *Legislation Act 2003*. The Minister was satisfied that consultation was appropriate and reasonably practicable to be undertaken. Government departments and agencies likely to be affected by the proposed Ordinance were given an adequate opportunity to comment on its proposed content. The following stakeholders were consulted with: the Attorney-General's Department, and agencies and volunteer organisations represented in the Emergency Management Committee.

Details of the Ordinance are set out in the Attachment.

Authority: Section 12(1) of the *Cocos (Keeling) Islands Act 1955*

**Details of the *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017***

This Attachment sets out further details of the *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017*.

*Section 1 – Name*

This section provides that the title of the instrument is the *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017*.

*Section 2 – Commencement*

This section provides that the Ordinance is to commence on the day after it is registered on the Federal Register of Legislative Instruments.

*Section 3 – Authority*

This section provides that the Ordinance is made under the *Cocos (Keeling) Islands Act 1955*.

*Section 4 – Schedules*

This section provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Ordinance has effect according to its terms.

**Schedule 1 – Amendments**

***Emergency Management Ordinance 2012 (CKI)***

**Item 1** amends section 1 (Name of Ordinance) by adding ‘Cocos (Keeling) Islands’ to the name of the Ordinance. This amendment results in the name of the Ordinance being the ‘*Cocos (Keeling) Islands Emergency Management Ordinance 2012*’.

**Item 2** amends section 4 (Definitions) to add to the definition of ‘emergency area’ an area to which ‘an emergency situation declaration’ applies.

**Item 3** amends section 4 (Definitions) to include two new definitions. Firstly, it defines an ‘emergency situation’ as ‘any period during which an emergency situation declaration is in force’. Secondly, it defines an ‘emergency situation declaration’ as ‘a declaration made by the Territory Controller under section 16A’.

**Item 4** amends section 4 (Definitions) to repeal the definition of ‘hazard’ and substitute it with a more detailed definition of what may constitute a hazard.

**Item 5** repeals the heading of section 13 of the Ordinance, ‘Powers of Territory Controller during state of emergency’, and substitutes a new heading, ‘Powers of Territory Controller during emergencies’. This reflects that section 13 covers ‘an emergency situation’, as well as ‘a state of emergency situation’.

**Item 6** inserts ‘an emergency situation or’ into section 13 of the Ordinance given this section covers powers of the Territory Controller during ‘an emergency situation’, as well as a ‘state of emergency situation’.

**Item 7** amends subsection 13(a) of the Ordinance to substitute ‘mentioned in’ with ‘in accordance with’ to clarify the meaning of this section.

**Item 8** amends section 15 (Commencement, activation and inspection of plans) subsection (3) of the Ordinance to insert ‘an emergency situation declaration or’ to reflect that a plan may be in relation to ‘an emergency situation’ or a ‘state of emergency situation’.

**Item 9** repeals the heading of Part 3 of the Ordinance, ‘State of Emergency’, and substitutes a new heading, ‘Emergency situations and states of emergency’, to reflect that this Part covers both types of emergency situations.

**Item 10** inserts a new Division 1A (Emergency situation declaration) in Part 3 of the Ordinance. The new Division 1A will allow for local decision making in an emergency response, whilst recognising that emergency situation declarations are used only during events that require extraordinary measures in the response.

The new section 16A will provide for the Territory Controller to make an emergency situation declaration, either in writing or orally. The new section 16A will specify the details that must be included in the declaration, such as the period for which the extension has effect (being no more than three days). It will require a declaration made orally to be recorded in writing, and signed by the Administrator, as soon as practicable after commencement.

The new section 16A will specify that, before making the declaration, the Territory Controller must be satisfied that:

- (a) An emergency has occurred, is occurring or is imminent; and
- (b) Extraordinary measures are required to prevent or minimise any of the following:
  - (i) Loss of life of humans or animals;
  - (ii) Illness of, or injury to, humans or animals;
  - (iii) Property loss or damage;
  - (iv) Damage to the environment.

The new section 16A will require the Territory Controller to take reasonable steps to consult the Emergency Management Committee prior to making a declaration, although a failure to consult will not affect the validity of a declaration.

In conjunction with this amendment, the Australian Government Attorney-General’s *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under the new section 16A will not be a legislative instrument.

The new section 16B will provide for the extension of an emergency situation declaration by the Territory Controller, either in writing or orally. The new section 16B specifies the details

that the declaration must include and requires that a declaration made orally must be recorded in writing and signed by the Territory Controller as soon as practicable after commencement. It requires the Territory Controller to give written reasons for an extension to the Emergency Management Committee.

The new section 16B provides that an extension remains in force for the period of extension unless revoked earlier, but that the combined period of a declaration and any extensions must not be more than 7 days, unless Ministerial approval is given for further extensions beyond this period.

In conjunction to this amendment, the Australian Government Attorney-General's *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under the new section 16B will not be a legislative instrument.

The new section 16C will provide for the Territory Controller to revoke an emergency situation declaration or extension at any time, either in writing or orally. The new section 16C will require the revocation to record the time and date of commencement. If initially made orally, it will require the revocation to be put in writing and signed by the Territory Controller as soon as practicable after commencement.

The new section 16C will provide that, regardless of any other written law, the revocation of an emergency situation declaration will not affect:

- Penalties or punishments relevant to the period that the declaration was in force; or
- Any investigation or legal proceedings in respect of such a penalty or punishment.

In conjunction to this amendment, the Australian Government Attorney-General's *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under the new section 16C will not be a legislative instrument.

The new section 16D will require that emergency situation declarations, extensions and revocations are:

- Published in a community bulletin and distributed electronically and in hard copy (there are established distribution lists); and
- Broadcast over community radio; and
- Published on the community blackboard (this is a specific location well known to the Cocos (Keeling) Islands community); and
- Published on the website administered by the responsible Department; and
- Broadcast via SMS to the Emergency Management Committee, if SMS is available.

However, according to the new section 16D, a failure to publish the emergency situation declaration, extension or revocation by any of these methods does not affect the validity of the declaration.

**Item 11** repeals subsection 17(6) of the Ordinance, which details that a state of emergency declaration is not a legislative instrument. The existing subsection is not required as, in conjunction to this amendment, the Australian Government Attorney-General's *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under section 17 will not be a legislative instrument.

**Item 12** repeals subsection 18(5) of the Ordinance and substitutes a new subsection 18(5). The existing subsection is not required as, in conjunction to this amendment, the Australian Government Attorney-General's *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under section 18 will not be a legislative instrument.

The new subsection 18(5) will require the Territory Controller to give written reasons for the extension of a state of emergency declaration to the Emergency Management Committee to ensure there will be a clear and transparent justification for any extension.

**Item 13** repeals subsection 19(5) of the Ordinance. The existing subsection is not required as, in conjunction to this amendment, the Australian Government Attorney-General's *Legislation (Exemptions and Other Matters) Amendment (Emergency Management Instruments) Regulations 2017* will clarify that a declaration made under section 19 will not be a legislative instrument.

**Item 14** amends section 20 (Publication of state of emergency declaration, extension and revocation) subsection (1)(d) to omit 'the Administrator's website' and substitute 'a website administered by the Department'. The Administrator does not have a dedicated website and that relevant notices are published on the website of the responsible Department.

**Item 15** amends section 21 (Authorised officers) subsection (1) to insert 'an emergency situation or' to reflect that this subsection will cover both types of emergency situations.

**Item 16** amends section 22 (Powers of authorised officers) subsection (1) to insert 'an emergency situation or' after 'management during' to reflect that this subsection will cover both types of emergency situations.

**Item 17** amends subsection 22(1) to insert 'emergency situation or' after 'during the' to reflect that this subsection will cover both types of emergency situations.

**Item 18** amends subsection 22(1)(e) to omit 'thing;' and substitute 'thing.' This is a consequential amendment of item 19, which makes subsection 22(1)(e) the final item of subsection 22(1).

**Item 19** repeals subsections 22(1)(f) to (n) of the Ordinance to limit the powers of authorised officers during emergency situations to those included in subsections 22(1)(a) to (e). In conjunction with item 20, this distinguishes between the powers of authorised officers in an

emergency situation and during a state of emergency situation, aligns the scope of powers with each emergency situation, and improves clarity.

**Item 20** repeals the existing subsection 22(2) of the Ordinance and substitutes a new subsection 22(2). The new subsection 22(2) captures powers from existing subsections 22(1)(f) to (n), which can then only be used for the purpose of emergency management during a state of emergency.

In conjunction with item 19, the new subsection 22(2) will create a clear distinction between the powers of authorised officers in an emergency situation and during a state of emergency situation. This will align the scope of powers with each emergency situation and improve clarity.



## **Statement of Compatibility with Human Rights**

Prepared in accordance with *Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017***

The *Cocos (Keeling) Islands Emergency Management Amendment Ordinance 2017* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The following paragraphs provide a detailed assessment of the compatibility of this Ordinance with human rights and freedoms.

#### **Emergency situation**

This Ordinance will empower the Territory Controller to make an emergency situation declaration for a limited period in relation to particular emergency events. The Territory Controller may make a declaration only if satisfied that an emergency has occurred, is occurring or is imminent and that extraordinary measures are required to prevent or minimise loss of life, illness or injury to humans or animals, property loss or damage to property or the environment.

The maximum period for an emergency situation declaration will be seven days. Article 4.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that during officially-declared states of emergency, States ‘may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. This Ordinance does not differentiate on the grounds listed in the Covenant and is, therefore, compatible with the objectives, aims and provisions, included in Article 4 of the ICCPR.

#### **Freedom of movement**

The existing *Emergency Management Ordinance 2012* (CKI) engages the right to freedom of movement. This Ordinance will not create any new powers that affect this right.

The Ordinance will clarify that the existing powers of authorised officers to direct or prohibit the movement of persons within, into, out of, or around an emergency area, to direct the evacuation and removal of persons from an emergency area, and to close any road, access route or area of water in an emergency area, if reasonably required for the purposes of emergency management, are applicable during a declared emergency situation or state of emergency situation.

The Ordinance will clarify that the existing power of authorised officers to remove any person who obstructs or threatens to obstruct emergency management activities will only be available if reasonably required for the purposes of emergency management during a declared state of emergency.

The provisions in the existing Ordinance are consistent with the objectives, aims and provisions of the ICCPR, and in particular Article 12.3, which allows the right to liberty of movement to be restricted where, in accordance with domestic law, and when necessary to

protect public health and public order, and with Article 4 of the ICCPR which allows some rights to be abridged during emergency situations.

### **Arbitrary or unlawful interference with a person's home**

The existing *Emergency Management Ordinance 2012* (CKI) engages the right to freedom from arbitrary or unlawful interference with a person's home. This Ordinance will not create any new powers that affect this right.

This Ordinance will clarify that the existing powers of authorised officers to take control of or make use of any place, vehicle or other thing, if reasonably required for the purposes of emergency management, are applicable during a declared emergency situation or state of emergency.

This Ordinance will also clarify that the existing power of authorised officers to enter or, if necessary, break into and enter, a place or vehicle in an emergency area and the power to remove, dismantle, demolish or destroy a vehicle or any place in an emergency area, will only be available if reasonably required for the purposes of emergency management during a declared state of emergency.

The provisions in the existing Ordinance are limited to certain individuals under defined circumstances and are consistent with the objectives, aims and provisions of the ICCPR, including Article 4, which allows the prohibition on interference with a person's home to be restricted when in accordance with domestic law and in times of public emergency.

Although the powers to enter premises and seize property in the Ordinance are broad, their inclusion in this Ordinance is justified on the basis that their use during an emergency situations or state of emergency may be necessary to protect life and property. In addition, there are safeguards within the legislation to ensure that these powers can only be used in emergency circumstances. Finally, these powers, as well as being exercised only in very limited circumstances, are exercised for the safety of the individuals concerned and their communities.

### **Peaceful assembly**

The existing *Emergency Management Ordinance 2012* (CKI) may engage the right to peaceful assembly. This Ordinance will not create any new powers that affect this right.

This Ordinance will clarify that existing powers of authorised officers, which may engage the right to peaceful assembly, are applicable during a declared emergency situation or state of emergency situation. These powers include the power to direct or prohibit the movement of persons within, into, out of, or around an emergency area, to direct the evacuation and removal of persons from an emergency area, and to close any road, access route or area of water in an emergency area, if reasonably required for the purposes of emergency management.

This Ordinance will clarify that the power of authorised officers to remove to any place that the authorised officer thinks proper any person who obstructs or threatens to obstruct emergency management activities will only be available if reasonably required for the

purposes of emergency management during a declared state of emergency. This power may also engage the right to peaceful assembly.

Article 21 of the ICCPR provides exceptions to this right, provided they are imposed in conformity with the law and are necessary in a democratic society in the interests of public safety, public order, or public health. This Ordinance, therefore, is consistent with this human right.

### **Conclusion**

The Ordinance is compatible with human rights because to the extent that it may limit human rights those limitations are reasonable, necessary and proportionate.

**DARREN CHESTER**  
**Minister for Infrastructure and Transport**