**EXPLANATORY STATEMENT**

Issued by the Minister for Indigenous Australians

*Aboriginal and Torres Strait Islander Act 2005*

**Torres Strait Regional Authority (Postponement of Election) Instrument 2020**

**Overview**

1. The *Torres Strait Regional Authority (Postponement of Election) Instrument 2020* (Instrument) is made under section 142S of the *Aboriginal and Torres Strait Islander Act 2005* (Act). Subsection 142S(1) provides that the Minister may, by legislative instrument, make provision for and in relation to how the Torres Strait Regional Authority (TSRA) is to be constituted.
2. According to section 142Y of the Act, TSRA elections must be held every four years having regard to the day or days fixed for the polling by the Minister. Under subsection 143(1), the Minister must cause a copy of the section 142Y notice to be published in the *Gazette* at least 90 days before the day, or the first of the days, so fixed.
3. The TSRA and the Australian Electoral Commission (AEC) had decided to recommend the date of 25 July 2020 to the Minister for Indigenous Australians for polling. That date is no longer appropriate given the emergence of the COVID-19 pandemic globally and in Australia.
4. COVID-19 is an infectious disease that currently has no vaccine or antiviral treatment. It represents a severe and immediate threat to human health, and especially to the health of Aboriginal and Torres Strait Islander persons. It has the ability to cause high levels of morbidity and mortality and the disruption of the Australian community socially and economically.
5. The preference of both the TSRA and the AEC is to defer the election to a later date in the 2020 calendar year. The purpose of this disallowable Instrument is to defer the election of the TSRA Board for up to nine months. A detailed explanation of the Instrument is at Attachment A.

**Background**

1. This Instrument is necessary to provide certainty to key stakeholders in the Torres Strait regional community as well as in government. Given the uncertainty around how COVID-19 will develop domestically and internationally as well as the current restrictions on travel to the Torres Strait region, the prudent course of action is to defer the election to a later date so that the TSRA and AEC are able to conduct a safe and robust process that maximises the participation of the local community.
2. On 21 January 2020, ‘Human coronavirus with pandemic potential’ became a ‘listed human disease’ by legislative instrument made by the Director of Human Biosecurity under the *Biosecurity Act 2015*. On 18 March 2020, the Governor-General declared in the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* that a human biosecurity emergency exists. The human biosecurity emergency period is in force for three months. It ceases on 18 June 2020 unless extended by the Governor-General.
3. During a human biosecurity emergency period, the Health Minister may make emergency requirements and directions under the *Biosecurity Act 2015*. On 26 March 2020, the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Determination) imposed requirements to prevent or control the entry or spread of COVID-19 in designated areas of Australian territory.
4. All three local government areas in the Torres Straight region are designated under the Determination. From 11:59pm on Thursday 26 March 2020 entry into a designated area is very tightly regulated. Conducting an election is not prescribed as an “essential activity” under the Determination. These restrictions, together with the COVID-19 restrictions introduced by the Queensland government, make it impracticable for the AEC to conduct the election in an ordinary fashion. In this context it should be noted that the ATSI Act states that it is desirable for “TSRA elections to be conducted in a manner similar to the manner in which elections for the Parliament are conducted, with the aim of increasing the understanding of, and participation in, elections for the Parliament by Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area” (subsection 143G(6)).
5. The success of the TSRA election is dependent on face-to-face engagement, which increases the risk of contracting COVID-19. The prevalence of chronic health problems, the lack of health services and remoteness of the Torres Strait region means that there is a high risk to community members should the TSRA election proceed in July 2020.
6. Approximately 8,694 Aboriginal and Torres Strait Islander persons live in the Torres Strait region. An estimated 5,200 persons from 20 wards across the Torres Strait region are eligible to vote in the TSRA election. Voting in the TSRA election is non-compulsory. Effective delivery of the event relies heavily on face-to-face culturally appropriate information sessions to educate potential candidates and the community about the TSRA and the TSRA election.
7. Chronic health problems, such as diabetes and hypertension, increase the risks associated with COVID-19. The 2018-19 National Aboriginal and Torres Strait Islander Health Survey found that for Aboriginal and Torres Strait Islander persons:

* more than four in 10 (46%) have a chronic health problem;
* the rate of diabetes is higher for people living in remote areas (12%) than in non-remote areas (7%) and diabetes was the second leading cause of death in 2018; and
* 8% of people reported hypertension and it was higher for people living in remote areas (10%) than non-remote areas (8%).

1. The Instrument displaces the operation of subsection 142Y(1) of the Act, which states that TSRA elections must be held every four years. The Instrument is able to postpone the TSRA election and extend the term of the Board because, in accordance with section 142R, section 142Y is subject to any instrument in force under section 142S. The Instrument only affects the next TSRA election, after which TSRA elections will return to the usual four year election cycle. The day or days fixed for polling in the TSRA election that is held after the next election may be earlier than the four year anniversary.
2. The term of office of existing members of the TSRA continues for the terms specified in sections 142W, 143W(3), 144(3) and 144D(3) of the Act. That is, until a new member/Chairperson/Deputy Chairperson is elected or, in relation to the alternate of the Deputy Chairperson, for such period as is determined by the TSRA. The next TSRA election must be held in accordance with the relevant rules and regulations that are in force at that time.
3. The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The Instrument is subject to subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Under subsection 33(3) of the AIA, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including, rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

**Commencement**

1. The Instrument commences the day after it is registered on the Federal Register of Legislation.

**Consultation**

1. The National Indigenous Australians Agency (Agency) has worked closely with the TSRA and the AEC on the creation of this Instrument. In particular, on 30 March 2020, the Australian Electoral Commissioner signed a Minute citing the risks and impacts to the successful delivery of the TSRA election due to COVID-19, which was provided to the Agency. On 3 April 2020, the TSRA Chairperson wrote to the Minister seeking a postponement of the election. Given travel restrictions that were imposed from 26 March 2020, it was not reasonably practicable to undertake further consultation with persons affected by the Instrument.

ATTACHMENT A

**Explanation of the Instrument**

**Torres Strait Regional Authority (Postponement of Election) Instrument 2020**

**Section 1 – Name**

1. The name of the Instrument is the *Torres Strait Regional Authority (Postponement of Election) Instrument 2020* (Instrument).

**Section 2 – Commencement**

1. The Instrument commences on the day after registration on the Federal Register of Legislation.

**Section 3 – Authority**

1. The Instrument is made under section 142S of the *Aboriginal and Torres Strait Islander Act 2005* (Act).

**Section 4 – Definitions**

1. Section 4 contains definitions of words used throughout the Instrument.

**Section 5 – Postponement of TSRA election**

1. The Instrument displaces the operation of subsection 142Y(1) of the Act by postponing the Torres Strait Regional Authority (TSRA) election, which is due to be held before the end of July 2020, until a polling date for the next TSRA election is fixed by the Minister.

**Section 6 – Timing of next TSRA election**

1. The date fixed for polling of the next TSRA election shall be no later than 31 March 2021.

**Section 7 – Subsequent TSRA elections**

1. Subsection 142Y(1) of the Act applies to subsequent TSRA elections to ensure that the TSRA elections return to the usual four year election cycle. The effect is that the election after the postponed election must be held within the four years of the polling day or days.

**Statement of Compatibility with Human Rights**

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

**Torres Strait Regional Authority (Postponement of Election) Instrument 2020**

1. The *Torres Strait Regional Authority (Postponement of Election) Instrument 2020* (Instrument) 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*.

**Overview of the Instrument**

1. The Instrument is made under section 142S of the *Aboriginal and Torres Strait Islander Act 2005* (Act). Subsection 142S(1) provides that the Minister may, by legislative instrument, make provision for and in relation to how the Torres Strait Regional Authority (TSRA) is to be constituted.
2. According to section 142Y of the Act, TSRA elections must be held every four years having regard to the day or days fixed for the polling by the Minister. Under subsection 143(1), the Minister must cause a copy of the section 142Y notice to be published in the *Gazette* at least 90 days before the day, or the first of the days, so fixed.
3. The TSRA and the Australian Electoral Commission (AEC) had decided to recommend the date of 25 July 2020 to the Minister for Indigenous Australians for polling. That date is no longer appropriate given the emergence of the COVID-19 pandemic globally and in Australia.
4. COVID-19 is an infectious disease that currently has no vaccine or antiviral treatment. It represents a severe and immediate threat to human health, and especially to the health of Aboriginal and Torres Strait Islander persons. It has the ability to cause high levels of morbidity and mortality and the disruption of the Australian community socially and economically.
5. The preference of both the TSRA and the AEC is to defer the election to a later date in the 2020 calendar year. The purpose of this disallowable Instrument is to defer the election of the TSRA Board for up to nine months. A detailed explanation of the Instrument is at Attachment A.

**Background**

1. This Instrument is necessary to provide certainty to key stakeholders in the Torres Strait regional community as well as in government. Given the uncertainty around how COVID-19 will develop domestically and internationally as well as the current restrictions on travel to the Torres Strait region, the prudent course of action is to defer the election to a later date so that the TSRA and AEC are able to conduct a safe and robust process that maximises the participation of the local community.
2. On 21 January 2020, ‘Human coronavirus with pandemic potential’ became a ‘listed human disease’ by legislative instrument made by the Director of Human Biosecurity under the *Biosecurity Act 2015*. On 18 March 2020, the Governor-General declared in the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* that a human biosecurity emergency exists. The human biosecurity emergency period is in force for three months. It ceases on 18 June 2020 unless extended by the Governor-General.
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5. The success of the TSRA election is dependent on face-to-face engagement, which increases the risk of contracting COVID-19. The prevalence of chronic health problems, the lack of health services and remoteness of the Torres Strait region means that there is a high risk to community members should the TSRA election proceed in July 2020.
6. Approximately 8,694 Aboriginal and Torres Strait Islander persons live in the Torres Strait region. An estimated 5,200 persons from 20 wards across the Torres Strait region are eligible to vote in the TSRA election. Voting in the TSRA election is non-compulsory. Effective delivery of the event relies heavily on face-to-face culturally appropriate information sessions to educate potential candidates and the community about the TSRA and the TSRA election.
7. Chronic health problems, such as diabetes and hypertension, increase the risks associated with COVID-19. The 2018-19 National Aboriginal and Torres Strait Islander Health Survey found that for Aboriginal and Torres Strait Islander persons:

* more than four in 10 (46%) have a chronic health problem;
* the rate of diabetes is higher for people living in remote areas (12%) than in non-remote areas (7%) and diabetes was the second leading cause of death in 2018; and
* 8% of people reported hypertension and it was higher for people living in remote areas (10%) than non-remote areas (8%).

1. The Instrument displaces the operation of subsection 142Y(1) of the Act, which states that TSRA elections must be held every four years. The Instrument is able to postpone the TSRA election and extend the term of the Board because, in accordance with section 142R, section 142Y is subject to any instrument in force under section 142S. The Instrument only affects the next TSRA election, after which TSRA elections will return to the usual four year election cycle. The day or days fixed for polling in the TSRA election that is held after the next election may be earlier than the four year anniversary.
2. The term of office of existing members of the TSRA continues for the terms specified in sections 142W, 143W(3), 144(3) and 144D(3) of the Act. That is, until a new member/Chairperson/Deputy Chairperson is elected or, in relation to the alternate of the Deputy Chairperson, for such period as is determined by the TSRA. The next TSRA election must be held in accordance with the relevant rules and regulations that are in force at that time.
3. The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The Instrument is subject to subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Under subsection 33(3) of the AIA, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including, rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

**Consultation**

1. The National Indigenous Australians Agency (Agency) has worked closely with the TSRA and the AEC on the creation of this Instrument. In particular, on 30 March 2020, the Australian Electoral Commissioner signed a Minute citing the risks and impacts to the successful delivery of the TSRA election due to COVID-19, which was provided to the Agency. On 3 April 2020, the TSRA Chairperson wrote to the Minister seeking a postponement of the election. Given travel restrictions that were imposed from 26 March 2020, it was not reasonably practicable to undertake further consultation with persons affected by the Instrument.

**Human rights implications**

1. This Instrument engages the following rights:

* the *right to enjoy and benefit from culture* in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of International Covenant on Economic, Social and Cultural Rights (ICESCR);
* the *right to self-determination* in Article 1 of ICCPR and Article 1 of the ICESCR;
* the *rights of equality and non-discrimination* in Articles 2, 16 and 26 of the ICCPR and Article 2 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD);
* the *right to take part in public affairs and elections* in Article 25 of the ICCPR; and
* the *right to health* in Article 12 of the ICESCR.

1. The effect of the Instrument is to postpone the forthcoming TSRA election for up to nine months. The current TSRA Board will continue to operate during this period of time. As a result, the right to enjoy and benefit from culture, the right to self-determination, and the rights of equality and non-discrimination continue to be advanced. If these rights are limited, the limitation is reasonable, necessary and proportionate given the risks posed to the health of Aboriginal and Torres Strait Islander persons by COVID-19 as discussed below.
2. In contrast, the right to take part in public affairs and elections is limited temporarily as a result of the right to health being prioritised. When balancing the priority of the right to health against the right to take part in public affairs and elections, the conflicting interests of the community must be considered. In some circumstances, the public health risk to a community is such that some rights may be restricted by the implementation of appropriate public health measures which are necessary to promote the right to health.
3. The provisions in this Instrument operate to restrict the right to take part in public affairs and elections but are reasonable, necessary and proportionate to achieve the objective of protecting the health of residents of the Torres Strait region. The limitations are authorised by law and are not arbitrary. Postponing the election for a limited period of time is considered necessary to ensure the election is conducted as safely as possible in the interests of the public health of electors and election officials. COVID-19 poses an ongoing threat to the health and wellbeing of Australians, and in particular to Aboriginal and Torres Strait Islander persons who have a higher incidence of chronic health conditions. Subsequent elections will be conducted every four years, thus ensuring a return to periodic four year elections after the COVID-19 pandemic is expected to end.

*Right to enjoy and benefit from culture*

1. The right to enjoy and benefit from culture is contained in Article 27 of the ICCPR and Article 15 of the ICESCR. Article 27 of the ICCPR protects the rights of individuals belonging to minorities within a country to enjoy their own culture. Article 15 of the ICESCR protects the right of all persons to take part in cultural life.
2. The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) specifically refers to Indigenous peoples’ cultural values and rights associated with their ancestral lands and states that their relationship with nature should be regarded with respect and protected. The UNCESCR has also provided guidance on the communal and individual aspects of the right to culture, in particular that the reference to ‘everyone’ in Article 15 of the ICESCR may denote either individual or collective rights to culture. The UNCESCR has noted, in particular, that Indigenous peoples have the right to act collectively to protect their cultural heritage, traditional knowledge and cultural expressions.
3. The TSRA Board is elected by eligible voters from the Torres Strait region. Protecting and maintaining the special and unique Ailan Kastom is the first function listed for the TSRA under section 142A of the Act. Ailan Kastom means a body of customs, traditions, observances and beliefs of some or all of the Torres Strait Islander persons living in the Torres Strait region, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships. The TSRA Board are enabled to make decisions on behalf of the TSRA and the Torres Strait region in relation to Ailan Kastom.
4. One of the TSRA Board’s primary functions is to approve program mandates. These program mandates guide the work of the TSRA in: economic development; fisheries; culture, art and heritage; native title; environmental management; governance and leadership; healthy communities; and safe communities. It is through these programs, Ailan Kastom is maintained.
5. The Act promotes the right to enjoy and benefit from culture by providing that the term of the current TSRA Board will continue until the election, so ensuring that the important functions listed under the Act continue to be performed. However, if the deferral of the election is considered to be a limitation of the right to enjoy and benefit from culture, the limitation is reasonable, necessary and proportionate given the risks posed to the health of Aboriginal and Torres Strait Islander persons by COVID-19 as explained at paragraphs 8-13 and 21 above.

*Right to self-determination*

1. The right to self-determination is a collective right, in that it pertains to groups of people, as opposed to individuals within a group. The right to self-determination, as set out in Article 1 of the ICCPR and Article 1 of the ICESCR, provides for the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to collectively pursue their economic, social and cultural development without outside interference.
2. The Act as a whole promotes the right to self-determination by establishing the TSRA and providing governance structures that promote the independence of Aboriginal and Torres Strait Islander persons.
3. The Act promotes the right to enjoy and benefit from culture by providing that the term of the current TSRA Board will continue until the election, so ensuring that the important functions listed under the Act continue to be performed. However, if the deferral of the election is considered to be a limitation of the right to self-determination, the limitation is reasonable, necessary and proportionate given the risks posed to the health of Aboriginal and Torres Strait Islander persons by COVID-19 as explained at paragraphs 8-13 and 21 above.

*Rights of equality and non-discrimination*

1. Articles 2, 16 and 26 of the ICCPR affirm the rights of all people to be treated equally. Article 2 of the ICESCR and Article 5 of the CERD also prohibit discrimination on the basis of race. All human beings have the right to be treated equally and not to be discriminated against. The right to equality and non-discrimination encompasses both positive and negative obligations – the obligation to refrain from discriminating or eroding equality, which is implemented in Australian domestic law by the *Racial Discrimination Act 1975* and the obligation to protect and advance the fulfilment and enjoyment of the rights of equality and non-discrimination for all people.
2. Non-discrimination is an integral part of the principle of equality. It ensures that no one is denied their rights because of race. However, sometimes it may be necessary to treat people differently to achieve equality. This is because differences between people may make it difficult for them to enjoy their rights without support. Different treatment may not amount to prohibited discrimination if the criteria for the differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.
3. The Act is characterised as a ‘special measure’ within the meaning of Article 1(4) of the CERD and subsection 8(1) of the *Racial Discrimination Act 1975*. Article 1(4) provides that special measures are deemed not to be discrimination. Special measures are designed to secure to disadvantaged groups ‘the full and equal enjoyment of human rights and fundamental freedoms’ (Article 2(2)). The Act enables a limited form of self-governance by the TSRA Board and thus self-determination by Aboriginal and Torres Strait Islander persons in the Torres Strait region. Only eligible persons are entitled to vote for the TSRA Board. As a result, the interests of Aboriginal and Torres Strait Islander persons are being specifically advanced in the Torres Strait region.
4. The Act promotes the rights of equality and non-discrimination by ensuring that the TSRA Board continues to function for the extended period prior to an election. Accordingly, the Instrument can be characterised as being part of the broader special measures of the Act. The Instrument meets the criteria of being a special measure because it:

* applies directly to Aboriginal and Torres Strait Islander persons in the Torres Strait region;
* has as its sole purpose the effective participation of Aboriginal and Torres Strait Islander persons in the next TSRA election and therefore their involvement in the formulation of policies and programs affecting them;
* is necessary to empower Aboriginal and Torres Strait Islander persons to participate in public affairs, and is a reasonable and proportionate response given the health risks posed by COVID-19; and
* has a purpose which has yet to be achieved, as the next election of the TSRA Board is yet to occur.

1. The Act promotes the rights of equality and non-discrimination by extending the term of the current TSRA Board to ensure that the important functions listed under the Act continue to be performed. However, if the deferral of the election is considered to be a limitation of the rights to equality and non-discrimination the limitation is reasonable, necessary and proportionate given the risks posed to the health of Aboriginal and Torres Strait Islander persons by COVID-19 as explained at paragraphs 8-13 and 21 above.

*Right to take part in public affairs and elections*

1. Article 25 of the ICCPR guarantees the rights of citizens to stand for public office, to vote in elections and to have access to the public service. The rights in Article 25 only apply to Australian citizens.
2. The United Nations Human Rights Council has stated that the conduct of public affairs relates to the exercise of legislative, executive and administrative powers, and covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. Citizens participate directly in the conduct of public affairs when they are elected to public office. They also do so when they vote and decide public issues through a referendum or other electoral processes. Indirect participation takes place when people elect bodies such as a parliament to represent them.
3. The Instrument limits the right to take part in public affairs and elections by deferring the TSRA election for up to nine months. The number of Aboriginal and Torres Strait Islander persons who are eligible to vote in the next TSRA election is estimated to be around 5,200 out of a population of 8,694 persons. The aim of deferring the election is to reduce the exposure of this community to COVID-19. In addition, this Instrument is necessary to allow the AEC and the TSRA to prepare for and conduct a robust election process given the travel restrictions related to COVID-19 currently in place.
4. The nine month deferral is reasonable, necessary and proportionate in the circumstances. The aim of the AEC and the TSRA is to conduct the election in 2020 if feasible. However, given the risks posed by cyclone season it is prudent to permit the election to be conducted in early 2021. Subsequent elections will be conducted every four years, thus ensuring a return to periodic four-year elections after the COVID-19 pandemic is expected to end.

*The right to health*

1. The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UNCESCR has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.
2. The UNCESCR reports that the ‘highest attainable standard of health’ takes into account the country’s available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs and conditions necessary for the realisation of the highest attainable standard of health.
3. This Instrument advances the right to health by reducing the risk of residents of the Torres Strait region being exposed to COVID-19, which would have a detrimental impact on their health and the health of their community, by deferring the TSRA election. This Instrument will assist to prevent and control the spread of COVID-19 in the Torres Strait region.

**Conclusion**

1. The Instrument is compatible with human rights because it promotes the human rights of Aboriginal and Torres Strait Islander persons and to the extent that it may limit human rights those limitations are reasonable, necessary and proportionate.