

# EXPLANATORY MEMORANDUM

## ***Emergency Management Amendment (COVID-19 Response) Bill 2020***

### **Overview of the Bill**

The Emergency Management Amendment (COVID-19 Response) Bill 2020 (the Bill) amends the *Emergency Management Act 2005* (EM Act) to:

- introduce new provisions into the Western Australian emergency management framework to strengthen the State's capacity to respond to the COVID-19 pandemic and similar events in the future,
- clarify and amend existing provisions to remove barriers in the existing laws that are impeding the COVID-19 response.

The provisions of the EM Act are playing a key role in the State's emergency management response to the COVID-19 pandemic. It is the first time in Western Australia that a state of emergency of such significant scope and magnitude has been declared utilising the provisions of the EM Act. The COVID-19 pandemic has presented issues and challenges not contemplated by the EM Act. This has brought to light inadequacies in the EM Act that need to be rectified to strengthen the State's capacity to respond to both the current emergency and emergencies more generally.

In particular, this emergency has demonstrated that the provisions in the EM Act to compel compliance with directions given by emergency management authorities under the EM Act need to be improved.

The current pandemic is an unprecedented situation. The amendments introduce what might otherwise be considered to be extraordinary provisions. However, mindful that some provisions may be only necessary or applicable to the COVID-19 pandemic response, a sunset clause of 12 months has been included in the Bill where necessary.

### **Amendment Bill**

The Bill provides as follows:

#### **CLAUSE 1. SHORT TITLE**

Sets out the name of the proposed Act as the *Emergency Management Amendment (COVID-19 Response) Act 2020* (the Amendment Act).

#### **CLAUSE 2. COMMENCEMENT**

Clause 2 provides for the Amendment Act to come into operation as follows:

- (a) sections 1 and 2 on the day which the Amendment Act receives Royal assent,

- (b) sections 5, 7, 11, 12(1) and 12 (2) are deemed to have come into operation at 12 am on 16 March 2020. The retrospective application is intended to ensure that any doubt associated with directions given under the EM Act during the COVID-19 state of emergency is removed,
- (c) section 10 comes into operation on the day after the period of 12 months beginning the day after the assent day. This is a sunset clause which deletes the new section 72A and any cross references to this section, a year (12 months) after it comes into effect,
- (d) the commencement of all other provisions occurs on the day after the date of Royal assent.

### **CLAUSE 3. ACT AMENDED**

Sets out the Amendment Act amends the *Emergency Management Act 2005*.

### **CLAUSE 4. SECTION 67 AMENDED**

Clause 4 inserts paragraph (d) which allows hazard management officers and authorised officers ('relevant officers') to direct that any road, access route or area of water in or leading to the emergency area be closed. Giving relevant officers the ability to direct others to carry out this function overcomes the current restriction in the provisions that these relevant officers need to carry out this function themselves, which is not always practical. Section 67 currently enables directions to be made to a class of persons as well as individuals. Clause 12 makes new provision for how these directions are to be made.

### **CLAUSE 5. SECTION 70 AMENDED**

Subclause (1) amends section 70(1) to provide that relevant officers are able to direct a class of persons and not just 'any person'. This amendment is considered necessary to respond to an emergency such as a human epidemic. The Bill also refers to "any class of person who may have been exposed" because this is necessary to give the provision efficacy. It would not be possible for relevant officer to be satisfied that all members of the class had been exposed for the purposes of issuing the direction.

Subclause (3) clarifies the period for which directions under section 70, which relate to restriction of movement of people to an area and quarantine, will take effect. Under the EM Act, the State Emergency Coordinator is an 'authorised officer' and can give directions under section 70 of the EM Act. Section 70(3) currently provides that the State Emergency Coordinator can authorise a period of restriction of movement from an area/quarantine for longer than 24 hours. The current provision does not adequately provide for the State Emergency Coordinator to extend his or her own direction. The new provision clarifies that, where such directions are given by the State Emergency Coordinator, a period longer than 24 hours can apply.

### **CLAUSE 6. SECTION 70A INSERTED**

Subclause (1) inserts an ability for the State Emergency Coordinator to direct a person to be subjected to electronic monitoring (as defined) while the person is in quarantine under a direction given under section 70 of the EM Act. This includes the ability of an authorised officer to direct a person to wear an approved electronic monitoring device or direct an

electronic device be installed at the person's residence or, where the person does not have a place of residence, any other place specified by the officer.

A penalty of 12 months imprisonment or a fine of \$12,000 will apply where a person:

- fails to comply with a direction,
- hinders an authorised officer in the exercise of the powers under this section,
- without reasonable excuse, removes or interferes with the operation of the electronic device in such a way that it impedes the monitoring of the location of the person.

This provision has been modelled on existing provisions in other legislation. It is recognised that this is an extraordinary measure and the following safeguards are in place to ensure that this provision will not unreasonably impose on freedoms:

- the type of electronic device needs to be approved by the Minister for Emergency Services on the advice of the State Emergency Coordinator,
- a direction from the State Emergency Coordinator is necessary to subject a person to this provision,
- this provision can only be used during a state of emergency (as only authorised officers can give directions under this provision).

#### **CLAUSE 7. SECTION 71 AMENDED**

Clause 7 inserts a provision to ensure that a direction under subsection 71(1) can be given to a class of place and to ensure that it is not necessary to give directions to each individual place of business, worship or entertainment within an area.

#### **CLAUSE 8. SECTION 72 AMENDED**

Clause 8 amends the definition of 'relevant information' for the purposes of the information exchange provisions to include:

- information about the recent travel of a person;
- information about persons with whom a person has been in close contact.

#### **CLAUSE 9. SECTION 72A INSERTED**

Clause 9 inserts provisions that:

- 1. allow relevant officers to take or direct a person or a class of persons to take, any action that the relevant officers consider is reasonably necessary to prevent, control or abate risks associated with the emergency.**

The EM Act currently does not have a broad power that can be used by relevant officers to manage an emergency. This means that matters that are not contemplated by the current provisions cannot be dealt with appropriately during an emergency response. For instance, this provision will enable directions for social distancing to be made for the COVID-19 pandemic. Emergencies create dynamic environments and are, at times, the result of novel and unprecedented events or occurrences. The current provisions in the emergency management framework do not equip emergency management personnel with all the necessary tools to respond to events previously not contemplated. The need for a broad power to deal with emergencies is recognised in other legislation, for example section 157 of the *Public Health Act 2016*.

The new provision allows relevant officers, during emergency situation or state of emergency, to take, or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency.

## **2. allow a relevant officer to direct a person to provide certain types of information.**

These provisions supplement the information provisions in section 72 of the EM Act, which only currently allow relevant authorities to obtain information for the purposes of emergency management from emergency management agencies and not from a person generally. This restriction could hinder an emergency management response. For instance, there is currently no ability under the EM Act provisions for emergency management personnel to direct the provision of information from individuals about their travel or who they have been in contact with. A person is not excused from providing the information requested because providing that information might tend to incriminate the person or expose that person to a criminal penalty. However, the information provided cannot be used as evidence in criminal proceedings against that person other than proceedings for an offence under section 89 of the EM Act – false or misleading information.

This provision may allow for sensitive information to be obtained by relevant officers. However, it is not unconstrained and can only be exercised for the purposes of emergency management in an emergency situation or state of emergency. It is also subject to section 95 of the EM Act which makes it an offence to breach confidentiality.

Section 72A is intended to apply only in the circumstances of an appropriate response to the COVID-19 pandemic response. For that reason, provision is made for a 12 months 'sunset clause' at Clause 10.

### **CLAUSE 10. SECTION 72A DELETED AND CONSEQUENTIAL AMENDMENTS**

Clause 10 provides for the new section 72A and references this section in other sections of the Act to be deleted. Pursuant to clause 2, this section will only come into operation 12 months after section 72A comes into effect.

### **CLAUSE 11. SECTION 75 AMENDED**

Clause 11 provides clarity that relevant directions under subsection 75(1) can be given to a class of place and it is not necessary to give the direction in relation to each individual place.

### **CLAUSE 12. SECTION 77 AMENDED**

Subclause (1) inserts subsection 77(2A) and amends subsection 77(3) to provide certainty that a direction given under specified sections of the EM Act to a class of persons or to a class of thing:

- does not need to be given directly to a person to whom it applies,
- does not have to be published in the Gazette,
- must be published in a manner the Minister for Emergency Services considers suitable but failure to publish does not invalidate the direction.

This bill amends a number of provisions in the EM Act to clarify or expand their application to a class of persons or class of place, where the existing language may not or does not accommodate that. It is not always practical for individual directions to be given directly to those affected. Further, directions have to be given during emergencies which are, at times,

very time constrained environments and do not lend themselves to immediate publication of these directions. In addition, certain directions may be for specific purposes which may not be appropriate to publish (e.g. directions made to public authorities relating to security measures). The proposed amendments aim to ensure that these considerations are catered for and do not impede the ability of relevant officers to give directions nor cast doubt on the validity of directions given.

The effect of subclauses (1) and (2), together with clause 2(b), is that section 77(2A) is taken to have been in effect on and from 16 March 2020. This provision has retrospective effect to ensure that directions that were issued by the State Emergency Coordinator and relevant officers in response to the COVID-19 pandemic state of emergency in relation to a class of person or place are valid and effective.

New section 72A commences on the day after the day on which this Act receives the Royal Assent. Accordingly, section 77(2A), as it has effect before that commencement, does not include a reference to new section 72A. However, subclause (3) will insert a reference to new section 72A(2) into section 77(2A) at the same time as the new section 72A comes into operation.

### **CLAUSE 13. SECTION 86 AMENDED**

Section 86 is the offence provision for failure to comply with a direction. Clause 13 amends section 86 to include section 72A (which is a new provision) in the list of provisions to which this section applies.

The penalty for the failure to comply with a relevant direction is also amended to include imprisonment for 12 months in addition to the existing fine of \$50,000. The strengthening of the penalty provision aims to improve compliance with directions given by emergency management authorities during an emergency and to provide more options to pursue where people breach directions issued under the emergency management provisions.

### **CLAUSE 14. SECTION 102 AMENDED**

Clause 14 amends the regulation making power under the EM Act (section 102) to facilitate the issuing of infringement notices for the offence of failure to comply with a direction (section 86 of the EM Act).

Section 5 of the *Criminal Procedure Act 2004* (WA) provides that regulations under a 'prescribed Act' may prescribe offences for which an infringement notice may be issued with a modified penalty. Schedule 1A of the *Criminal Procedure Regulations 2005* (WA) provides a list of 'prescribed Acts', which currently does not include the EM Act.

Section 5(2) of the *Criminal Procedure Act 2004* provides that an offence must not be prescribed under section 5(1) if the penalty for the offence is or includes imprisonment. As the penalty for the proposed offence under the EM Act would include a term of imprisonment, an amendment to the principal legislation (i.e. the EM Act) is required to override the operation of section 5(2) of the *Criminal Procedure Act 2004*.

Consequential amendments to the *Criminal Procedure Regulations 2005* and *Emergency Management Regulations 2006* will introduce modified penalties for breaching directions under the EM Act.

