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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PUBLIC HEALTH AMENDMENT BILL 2020

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Rachel Stephen-Smith
Minister for Health**

PUBLIC HEALTH AMENDMENT BILL 2020

The Bill is a Significant Bill. Significant Bills are bills that have been assessed by reference to a range of criteria which warrant a more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

BACKGROUND

In December 2019, China reported cases of a viral pneumonia caused by a previously unknown pathogen in Wuhan City, in the Hubei Province of China. The pathogen was identified as a novel coronavirus genetically related to the virus that caused the outbreak of Severe Acute Respiratory Syndrome in 2003. The new strain of coronavirus is called SARS-CoV-2 and the disease it causes is called COVID-19. COVID-19 is presently understood to most likely spread from person-to-person contact. The current estimates of the time it takes for symptoms to develop after being exposed to the virus that causes COVID-19 is a range of 2 to 14 days. At this stage, there is no known vaccine or antiviral against COVID-19.

On 30 January 2020, the Director-General of the World Health Organisation (WHO) declared the outbreak of COVID-19 a Public Health Emergency of International Concern. On 11 March 2020, the Director-General of the WHO declared COVID-19 a global pandemic. The WHO requested that every country urgently take necessary measures to ready emergency response systems.

On 16 March 2020, the Minister for Health declared a public health emergency under section 119 of the *Public Health Act 1997* (the Act) due to the public health risk to the ACT community posed by COVID-19.

As at 1 June 2020, the WHO has reported that there are 6,057,853 confirmed cases of COVID-19 worldwide, and the Australian Government has reported 7,204 confirmed cases in Australia and 103 deaths as a result of COVID-19. As of 1 June 2020, the ACT had 107 confirmed cases and 3 people had died from COVID-19.

OVERVIEW OF THE BILL

Part 7 of the Act relates to public health emergencies. Section 119 of the Act provides that the Minister for Health may declare a public health emergency if satisfied that it is justified in the circumstances.

An emergency declaration activates a range of emergency actions and powers. While an emergency declaration is in force, section 120 of the Act empowers the chief health officer to take any action, or give any direction, he or she considers necessary or desirable to alleviate the emergency specified in the direction.

Under section 122 of the Act, an eligible person may apply to the Minister for Health for compensation in relation to any loss or damage suffered by a person as a result of anything done in the exercise of a function under part 7, being a function exercised while an emergency declaration was in force.

The Bill amends the Act to provide that compensation will not be payable to an otherwise eligible person in relation to any loss or damage suffered as a result of anything done in the exercise of a function under part 7 in relation to a COVID-19 declaration while the declaration was in force. An exception is provided for anything done in relation to a direction given under section 120(1)(f) which relates to the power of the chief health officer to direct the occupier of property to place the property at the disposal or control of the chief health officer. The amendment is taken to have commenced on 16 March 2020 when the Minister for Health declared the public health emergency in relation to COVID-19.

JUSTIFICATION FOR THE BILL

It could never have been contemplated when section 122 was drafted that the Territory might face the current emergency circumstances. The range and scope of possible claims that might be made by persons and organisations affected by the directions made by the Chief Health Officer are potentially of a scope beyond the financial means of the Territory to meet. Even were attempts to be made to impose modest limits on the range and scope of claims that might be made, the all-pervading effect of the directions would still involve amounts that would neuter the capacity of the Territory to continue the broad range of measures intended for the benefit of the community as a whole and indeed to plan for and conduct the ordinary business of government.

The amendment will ensure that the ACT Government can effectively target resources aimed at achieving goals including supporting the medium to longer term health of the Territory economy. It will protect the ongoing financial viability and sustainability of the Territory and allow the ACT Government to deliver essential services, address needs in the Canberra community and respond effectively to the ongoing COVID-19 emergency.

In the context of the COVID-19 pandemic, the chief health officer has made a range of directions with respect to the public health emergency and these may continue in some form for some months in order to protect the Canberra community from COVID-19. COVID-19 presents a significant risk to the health and livelihoods of everyone in the ACT community. The scale of the COVID-19 pandemic, and the response required to protect the community, is unprecedented. Section 122 of the Act is not well targeted to the current environment and opens the Territory to significant potential liability for unpredictable claims. It has the potential to significantly divert assistance from the broader ACT community. The retrospective

application of the amendment is necessary noting the context of the public health directions having been made.

The amendment is a law which allows the Territory to respond to the COVID-19 emergency including providing targeted financial support to areas of need in a way that represents the best use of limited public monies. It is a law within the power of the Legislative Assembly and is not a law for the acquisition of property other than on just terms. Since the start of the COVID-19 emergency, the ACT Government has provided significant support to the community to deal with the impacts of COVID-19 on the community. The stimulus packages have totalled over \$350 million. In particular, the ACT Government has implemented measures to provide significant support to small and medium businesses who are facing a downturn in the local economy as a result of the public health directions.

These initiatives include:

- Waiver of food business registration, liquor licensing and outdoor dining fees for 12 months;
- Waiver of rideshare vehicle licence, hire care licence and taxi plate fees for 12 months;
- Waiver of infection control licence fees (for businesses such as beauty therapists, nail salons and tattoo parlours) for 12 months;
- Waiver of payroll tax for all businesses whose operations are directly affected by the public health directions (such as gyms, indoor sporting venues and cinemas);
- Interest-free deferral of payroll tax for businesses with wages of up to \$10 million until 1 July 2022;
- Interest-free deferral of payroll tax for businesses in the construction industry until 1 September 2020;
- Extension of time to pay commercial general rates and an automatic credit of the annual fixed charge;
- Interest-free deferral of commercial general rates for property owners who have been affected by COVID-19 until 1 October 2020;
- Rental relief to tenants of ACT Government owned properties;
- Electricity rebates for small businesses; and
- A tiered category system to provide relief to commercial property landlords and owner-occupiers.

The ACT Government has also implemented employment-related measures to assist to reduce the financial effects of the COVID-19 emergency and keep the local economy moving. For example, the Government is fast tracking additional infrastructure projects that will support local jobs and businesses and provide the community with better infrastructure and services into the future. The Government has also created additional roles within the ACT Public Service to provide work

opportunities for people in the casual or semi-skilled workforce who have lost their jobs or been significantly impacted due to COVID-19.

In addition, the ACT Government has extended \$9 million in financial support to the non-government sector through the COVID-19 Community Support Package. The funding will provide direct relief to members of the community, support the not-for-profit sector to deliver further mental health and community support, and boost the capacity of critical community services to meet demand. These measures have required significant, immediate financial investment from the Government to ensure that help is getting to the parts of our community that need it the most. This investment has been aimed at supporting our community to deal with and survive the immediate impacts of COVID-19, but also the medium and longer term effects that the pandemic will have on the health of our economy.

The ACT Government has also implemented a range of other initiatives to assist the community in relation to the impact of COVID-19 and the necessary steps taken to protect the community as a result. This includes temporary amendments to residential tenancy laws and laws dealing with commercial leases to assist landlords and tenants.¹ Other measures include a moratorium on evictions for failure to pay rent and a restriction on rental increases for households impacted by COVID-19.² The ACT government has also introduced land tax/rate relief for landlords who agree to rent reductions and provided mediation services to assist landlords and tenants to resolve disputes. This reflects that all governments in Australia have adopted a holistic approach to support the entire community through a suite of measures designed to assist the community and those parts of it particularly affected, of which financial assistance forms a part.

Without this amendment the Territory's capacity to undertake these measures to assist all Canberrans will be in jeopardy. The amendment enables the Government to assist those affected by the COVID-19 emergency and who have been impacted by the directions. Those directions have been a critical element in preventing the spread of the COVID-19 virus in the ACT and preserving the lives of those who might otherwise been affected, as is tragically on display in other jurisdictions and parts of the world.

A person who suffers loss or damage as a result of anything done in relation to a direction given under section 120(1)(f) (which relates to placing property under the control or at the disposal of the chief health officer) will not be excluded from making an application for compensation under section 122. In addition, the ACT Government will also still retain the discretionary 'act of grace' framework under the *Financial*

¹ See, for example, Residential Tenancies (COVID-19 Emergency Response) Declaration 2020; Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020.

² Residential Tenancies (COVID-19 Emergency Response) Declaration 2020.

Management Act 1996 to provide direct financial support in appropriate and exceptional circumstances.

CONSULTATION ON THE PROPOSED APPROACH

Due to the urgent nature of the Bill, consultation with the community and stakeholders was not possible. The Security and Emergency Management Committee of Cabinet, the Justice and Community Safety Directorate and the Chief Minister, Treasury and Economic Development Directorate were consulted in relation to the amendment.

The amendment is consistent with recent amendments made in Queensland and Tasmania to their respective public health legislation. Section 366 of the *Public Health Act 2005* (QLD) was amended to provide that a person is not entitled to be paid any compensation for loss or damage if a power was exercised, or purportedly exercised, in relation to the COVID-19 emergency. The explanatory notes to the [*Public Health and Other Legislation \(Public Health Emergency\) Amendment Act 2020*](#) (QLD) acknowledge that it was considered imprudent for the Queensland Government to be potentially liable to uncapped and unpredictable compensation claims arising from the pandemic.³ Similarly, section 26 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (TAS) provides that the compensation provision in the Tasmanian public health legislation does not apply in relation to any loss or damage suffered as a result of certain public health actions taken as a result of COVID-19. In South Australia, section 103A was recently inserted into the *South Australian Public Health Act 2011* (SA) to expressly provide that no liability attaches to the Crown in relation to any acts or omissions in connection with the exercise of functions under the Act, or any failure to exercise or discharged a function under the Act in relation to COVID-19.

CONSISTENCY WITH HUMAN RIGHTS

The Bill is compatible with the rights set out in the *Human Rights Act 2004* (HRA) and for completeness the analysis below is provided.

Rights which may be engaged

The Bill may engage a number of rights under the HRA, directly or indirectly, including:

- Section 21 – right to a fair hearing;
- Section 13 – right to freedom of movement;

³ Explanatory Notes, *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* (QLD), 4.

- Section 15 – the right to freedom of association;
- Section 18 – the right to liberty;
- Section 9 – the right to life.

Compatibility of the measure with the right to a fair hearing

Section 21 of the HRA provides that everyone has the right to have rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 21 of the HRA is drawn from Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and is required under the HRA to be interpreted with reference to international law.⁴ Article 14 of the ICCPR and relevant international jurisprudence indicate that in civil and administrative matters, the right to a fair hearing will generally apply to determining rights and obligations in a ‘suit at law.’ The concept of a ‘suit at law’ encompasses judicial procedures aimed at determining rights and obligations pertaining to the areas of contract property and torts in the areas of private law, equivalent notions in the area of administrative law including the use of public land or the taking of private property and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.⁵ Jurisprudence in relation to whether a ‘suit of law’ exists in a particular case is complex. However, on a proper construction of section 122 it does not give rise to a ‘suit of law’ because of the nature of that section – it creates a right to apply for compensation. Its amendment does not affect any ‘suit of law’ and thus there will be no engagement of the right to a fair hearing through the amendment.

For completeness and in the alternative, even if the right to a fair trial is engaged and limited by the amendment, this limit is permissible under section 28 of the HRA. The key elements of this test are addressed below.

Nature of the right effected (section 28 (a) and (c))

The nature of the right is that it may be subject to limitations. That which a statute creates a statute can modify.

Legitimate purpose (s28(b))

The amendment addresses a substantial and pressing concern to protect the ongoing financial viability and sustainability of the Territory and to allow the ACT Government ensure that the ACT Government is able to continue to effectively respond to the public health emergency and protect the right to life while providing

⁴ See HRA s 31.

⁵ See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

targeted economic assistance to mitigate the effects of COVID-19 on the community. Delivering resources in this way is essential to the protection of other human rights.

COVID-19 presents a significant risk to the health and livelihoods of everyone in the ACT community. The scale of the COVID-19 pandemic, and the response required to protect the community, is of a scale that has not been seen for a century. In this respect, the amendment is of importance to support the ACT's Government's use of the Act including to promote and protect the right to life in the context of the COVID-19 pandemic.

Further, at international law it is recognised that during a state of public emergency which threatens the life of the nation, that governments may take measures which significantly limit or derogate from certain human rights, 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.⁶

Rational connection between the limitation and the purpose (s28(d))

In the context of the COVID-19 emergency, the amendment is rationally connected to (that is, is effective to achieve) the legitimate purpose of the amendment. This is because it will ensure that the ACT Government can continue to make strategic financial decisions which prioritise assisting the most vulnerable in the community and financing medium and long term goals that will benefit the whole ACT community into the future. It will also allow the ACT Government to use the Act as required to respond to the pandemic to protect the right to life.

Proportionality (s28(e))

The amendment in the Bill is the least restrictive means reasonably available to achieve the objective. Section 122 in the Act is not well targeted to the current environment and opens the Territory to potential liability for unpredictable claims. The retrospective application of the amendment is necessary to ensure that this objective can be achieved as a number of public health directions have already been made in relation to the COVID-19 emergency and compliance with these directions has already occurred.

The proposed amendment is proportionate to the legitimate purpose of enabling the ACT Government to continue to make strategic decisions which represent the best use of public monies and respond effectively to the ongoing COVID-19 emergency. Since the start of the COVID-19 emergency, the ACT Government has provided significant support to deal with the impacts of COVID-19 on the community as

⁶ Article 4 of the International Covenant on Civil and Political Rights; UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 72nd sess, UN Doc CPR/C/21/Rev.1/Add.11 (31 August 2001) ('General Comment No. 29').

outlined above. These alternative supports are relevant to an overall assessment of the proportionality of the amendment. In formulating this proposed amendment, the approaches adopted in other jurisdictions were given due consideration and the amendment is considered to be the least rights restrictive approach, reasonably available, to address its legitimate purpose noting the scope of the implications for the ACT and the current COVID-19 emergency.

In recognition of the particular nature of the measures required to address this emergency, the amendments are drafted to apply specifically to the COVID-19 emergency. The compensation provision will continue to apply for loss or damage suffered in the context of a different public health emergency. This acts as a further safeguard that assists to ensure that there is rational connection between the purpose of the amendment and any limitation on human rights. It also assists to ensure that the measure is not overbroad and represents the least rights restrictive approach reasonably available. In the context of the COVID-19 pandemic, any potential limitation on rights as a result of the Bill is a proportionate response to ensure the ongoing financial viability of the Territory and the ongoing ability for the ACT Government to make strategic budget decisions to support the community and to protect the right to life.

Compatibility of the measure with other human rights

There is no free-standing right to an effective remedy or compensation under the HRA.⁷ Section 122 is a provision that deals with loss that may result from the implementation of public health directions. Accordingly, section 122 does not itself have a direct connection to the protection of particular human rights under the HRA.

It is acknowledged that the amendment in the Bill may indirectly engage other human rights (such as the right to freedom of movement, the right to freedom of association or the right to liberty). This is because in the context of a public health emergency declaration the Act allows directions to be issued which may include limitations on such rights. By providing that compensation will not be payable under section 122, the amendment may be said to operate to remove a potential safeguard which may have relevance to the proportionality of any limitations imposed by a direction.

However, noting the scope of section 122 and the context of the current COVID-19 emergency the amendment does not adversely affect the proportionality of limitations imposed by public health directions. This is because section 122 only provides for a process to apply for compensation in relation to loss or damage as a result, *inter alia*, of the making of the public health directions. It says nothing directly about particular human rights that may be engaged and limited by public health

⁷ Part VA of the HRA permits a person to seek a remedy (other than damages) for breach of a right.

directions themselves. The proportionality of the public health directions that have been made, including restrictions on, for example, the rights to freedom of movement or association, stands on them being a necessary and proportionate response to the COVID-19 pandemic informed by relevant medical opinion in the context of a broadly consistent national response. In the current context, the existence or otherwise of a right to apply for compensation under section 122 is not directly relevant to that analysis and is not determinative.

It is also noted that the chief health officer already has public authority obligations under the HRA which operate as a substantive and effective safeguard in ensuring that directions are compatible with human rights within the legislative framework under the Act.

Even if the removal of the ability to claim compensation under section 122 in relation to the COVID-19 pandemic engages and limits rights under the HRA, the explanation for the amendment to section 122 and the assessment of the potential financial consequences of it makes it the least restrictive option, reasonably available, for the ACT.

Overall, in the context of the COVID-19 pandemic, providing that compensation will not be payable, will not adversely affect the proportionality of any limitation on these other rights imposed through the directions for the same reasons as outlined above. This includes the importance of the amendment from the perspective of appropriately targeting budgetary decisions and also protecting the right to life.

Public Health Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Public Health Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

Clause 1 provides that the title of the Act will be the *Public Health Amendment Act 2020*.

Clause 2 Commencement

Clause 2 provides that the Act is taken to have commenced on 16 March 2020.

Clause 3 Legislation amended

Clause 3 provides that the Act amends the *Public Health Act 1997*.

Clause 4 Compensation, New Section 122(3)(c)

Clause 4 inserts subsection 122(3)(c) to provide that compensation is not payable to an eligible person in relation to a loss or damage arising in relation to a COVID-19 declaration, except for anything done in relation to a direction given under section 120(1)(f).

Clause 5 Section 122(4), New definition of *COVID-19 declaration*

Clause 5 inserts subsection 122(4) to provide a definition of the term COVID-19 declaration.