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

**PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)**

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

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# PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)

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## PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

### Background – COVID-19 Public Health Response

In December 2019, China reported cases of a viral pneumonia caused by a previously unknown pathogen in Wuhan City in 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 spreads from person-to-person contact.

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. This declaration has been extended numerous times, most recently until 12 February 2021.

Pursuant to section 120 (1) of the Act, while an emergency declaration is in force, the Chief Health Officer may take any action, or give any direction, they consider to be necessary or desirable to alleviate the emergency specified in the declaration. It is an offence pursuant to section 120 (4) of the Act to fail to comply with a direction without reasonable excuse. Since March 2020, the Chief Health Officer has made a broad range of directions under section 120 (1) of the Act to introduce necessary measures to alleviate the COVID-19 emergency.

Throughout most of the pandemic, the ACT has adopted a strategy of suppression with a goal of no community transmission, guided by the advice of the Australian Health Protection Principal Committee (AHPPC) and decisions of National Cabinet. The ACT's public health response to COVID-19 has evolved since March 2020 and has most recently been guided by the National Plan to Transition Australia's National Response to COVID-19 towards the path of living with COVID-19 and reducing the burden of restrictions. This combines measures to suppress COVID-19 with an acceptance that there will continue to be some level of local transmission.

In early 2021, the Therapeutic Goods Administration (TGA) approved the first of several COVID-19 vaccines which enabled the ACT to commence the roll out of the ACT's COVID-19 vaccination program to people eligible for vaccination.

Noting that by November 2021, the ACT had achieved vaccination of a high proportion of the ACT population, public health restrictions have been progressively eased. The impetus to further extend the public health emergency due to COVID-19 remains uncertain, however it is recognised that certain critical ‘baseline’ public health measures will be required in the medium term to prevent a resurgence of COVID-19, in particular to alleviate pressure on health systems and reduce risk to vulnerable community members. These measures include, for example, a requirement for positive cases of COVID-19 and close contacts to isolate for a specified period of time and be tested for COVID-19 before leaving isolation, and for face masks to be worn in certain high-risk settings to prevent transmission.

As of 30 November 2021, the WHO has reported that there have been 260,867,011 confirmed cases of COVID-19 worldwide and 5,200,267 deaths as a result of COVID-19. The Australian Government has reported 209,142 confirmed cases of COVID-19 in Australia and 1,997 deaths. The ACT has had 1,872 confirmed cases of COVID-19 and 14 deaths.

While these statistics point to the magnitude of the pandemic and continue to be of concern, it is acknowledged that there may not be sufficient justification for a public health emergency declaration within a few months, particularly in the context of the ACT’s very high rates of vaccination and the high rates of vaccination in surrounding areas. This legislation will enable the Government to continue managing the risk of COVID-19 by stepping down from a public health emergency declaration, when appropriate, while maintaining baseline public health measures.

### **Consultation on the Proposed Approach**

The amendments in the Bill were developed in consultation with the Justice and Community Safety Directorate. The ACT Human Rights Commission was also consulted on the amendments in the Bill.

### **Overview of the Bill**

The Bill amends the Act primarily by inserting Part 6C and Part 7A.

The introduction of Part 6C and Part 7A establishes a regulatory framework for protecting the public from the public health risks of COVID-19 in circumstances where those risks may not give rise to a public health emergency.

This Bill proposes the inclusion of new temporary powers to implement public health and social measures, including COVID-19 vaccination requirements for certain workers, and test, trace, isolate and quarantine measures to suppress or prevent the spread of COVID-19 within the community.

The powers are intended to serve as a step up from powers available to the Chief Health Officer to respond to notifiable conditions under Part 6 of the Act and a step

down from emergency powers available to the Minister and the Chief Health Officer to respond to the public health risk of COVID-19 under section 120.

The Bill has been developed having regard to the continuing need to manage risks associated with COVID-19 after the conclusion of the public health emergency declaration.

The proposed amendments are temporary and end 18 months after they commence.

### **COVID-19 management declaration**

Division 6C.2 of the Bill allows the Executive to make a COVID-19 management declaration where the Executive has reasonable grounds for believing that COVID-19 presents a serious risk to public health, and with consideration of whether a material risk of substantial injury or prejudice to the health of people exists or may come to exist.

The Executive is required to request and consider any advice from the Chief Health Officer about the risk to public health posed by COVID-19 before making or extending a COVID-19 management declaration. Any advice from the Chief Health Officer must be published within 7 days after the Executive receives the advice.

A COVID-19 management declaration or extension is a disallowable instrument that must be presented to the Legislative Assembly. This declaration can be made for up to six months and can be extended one or more times, subject to disallowance by the Assembly.

### **Executive, Ministerial and Chief Health Officer Directions**

The making of a COVID-19 management declaration by the Executive empowers the making of Executive, Minister or Chief Health Officer directions (Divisions 6C.3, 6C.4 and 6C.5).

These directions capture the following:

A Ministerial direction (Division 6C.3) may be made in relation to:

- preventing or limiting entry to an area or into the ACT;
- regulating gatherings, whether public or private;
- requiring the use of personal protective equipment;
- regulating the carrying on of activities, businesses or undertakings; and
- requiring the provision of information, including information about the identity of a person, or the production or keeping of documents.

An example of a Ministerial direction may include a requirement to ‘check in’ at a venue or wear a face mask in a certain setting. A Ministerial direction can be made to regulate the operation of a business or gathering such as the density or capacity of an area, but not to the extent of prohibiting a business from operating or imposing a lockdown or curfew.

The intent of a Ministerial direction is to enable targeted restrictions to reduce the risk of COVID-19 transmission in the community, particularly in higher risk settings, and may include an aim of reducing the risk of super spreading events at larger gatherings.

A Chief Health Officer direction (Division 6C.4) may be made in relation to:

- a requirement for the provision of information, including information about the identity of a person, or the production or keeping of documents;
- a requirement for the medical examination or testing of a person; and
- the segregation or isolation of people.

A Vaccination direction (Division 6C.5) in relation to a requirement to be vaccinated against COVID-19 may be made by the Executive to do any of the following:

- engage in particular work;
- work at a particular workplace;
- engage in a particular activity; and
- access a particular place.

The purpose of any direction made under a COVID-19 management declaration is to protect the ACT community from the risk of COVID-19 through the introduction of a regulatory scheme which can operate in the absence of a public health emergency. The scheme provides appropriate powers accompanied by a range of checks and balances which recognise and uphold human rights, accountability and proportionality imperatives. Measures must take the least restrictive approach to achieve the objects stated in the objects clause in the Bill.

If a COVID-19 management declaration is in force, the Chief Health Officer, Minister or Executive may make a direction in the areas listed above in order to reduce the public health risk of COVID-19, based on the Chief Health Officer’s advice, for a period of up to 90 days. A direction may be extended on one or more occasions, for a period of no longer than 90 days on each occasion.

The decision to extend direction-making powers to the Executive and Minister, in addition to the Chief Health Officer, recognises that the impact of public health and social measures or introduction of a requirement for COVID-19 vaccination in certain

settings may have broad impacts and may significantly engage and limit human rights across society, and equally such measures may promote human rights. The Bill enshrines that the Chief Health Officer's advice must be sought and considered in the making of any direction under Part 6C.

Ministerial and Chief Health Officer directions are notifiable instruments to provide a high degree of transparency of these measures. These directions are not considered suitable to be disallowable instruments as this may undermine the effectiveness of public health measures while a COVID-19 management declaration is in place.

A Vaccination Direction that may be made by the Executive is a disallowable instrument noting the significant way in which such a direction engages human rights. This provides a higher degree of scrutiny over such a measure.

The Bill includes a range of safeguards and other measures to ensure all directions are proportionate to address the risk of COVID-19. This includes the requirement that Ministerial and Chief Health Officer directions are referred to the relevant Assembly Committee responsible for the consideration of legal issues to provide further scrutiny in relation to human rights compatibility.

The Bill requires publication of the advice of the Chief Health Officer in relation to any direction made or extended under Part 6C, and at 30-day intervals in relation to the justification for maintaining the direction, and how the direction or extension is consistent with human rights. The requirement for regular review of directions provides an oversight and accountability mechanism to ensure that directions are revoked if they are no longer justified.

The Bill requires the Minister to notify the public of advice from the Chief Health Officer:

- within 7 days after notification of a COVID-19 management declaration or extension; and
- within 7 days after receiving advice from the Chief Health Officer about the status of the risk presented by COVID-19 while the declaration is in force.

### **Exemptions (Division 6C.6) (including guidelines)**

Division 6C.6 sets out requirements relating to exemption applications relating to Ministerial, Chief Health Officer and Vaccination Directions. Requirements include processes for exemption applications and, in the event of an unfavourable decision, mechanisms for applications for internal or review by an External Reviewer. The Division also includes requirements for the making of guidelines for exemptions where a Ministerial, Chief Health Officer or Vaccination Direction is in force.



Subdivision 6C.6.2 allows an affected person to apply to the relevant decision maker to exempt the person from complying with a requirement of a Ministerial or Chief Health Officer Direction.

Subdivision 6C.6.3 allows an affected person to apply to the relevant decision-maker for review of an unfavourable decision relating to an application for an exemption to a Ministerial or Chief Health Officer Direction.

While a Ministerial or Chief Health Officer Direction is in force, subdivision 6C.6.4 (section 118ZH) requires the Minister to appoint at least one External Reviewer. An External Reviewer must consent to the appointment and must be either a sitting or retired Judge or Magistrate or a person who has been a legal practitioner for at least five years.

An affected person may apply to an External Reviewer in relation to certain internal review decisions. The circumstances where an affected person may apply for external review include:

- A Ministerial direction to prevent or limit entry into the ACT where the decision related to an application to exempt the person on medical or compassionate grounds; or
- A segregation or isolation direction.

Applications for external review have been limited as the specified circumstances are considered to involve a significant impact on a person's rights, including the freedom of movement, right to family, right to life and right to liberty. Providing formal mechanisms for internal and external review serves as an important safeguard for the powers available under Ministerial and Chief Health Officer Directions.

Subdivision 6C.6.5 (Exemption guidelines) sets out requirements for the making of guidelines about applying for an exemption, and exempting a person, from a requirement to comply with a Ministerial, Chief Health Officer and Vaccination Direction. Relevant guidelines must be in force while a relevant direction is in force.

### **Consequential amendments**

The Bill also makes consequential amendments to the *COVID-19 Emergency Response Act 2020* and the Magistrates Court (Public Health COVID-19) Infringement Notices) Regulation 2020.

The purpose of the Bill's consequential amendments to the *COVID-19 Emergency Response Act 2020* is to insert necessary provisions in this Act into Part 7A of the *Public Health Act 1997* to retain the Check In Information provisions in conjunction with Part 6C, as the *COVID-19 Emergency Response Act 2020* will expire when the public health emergency ends.

The purpose of the Bill's consequential amendments to the Magistrates Court (Public Health COVID-19) Infringement Notices) Regulation 2020 is to insert a reference to the new offence at new section 118ZN (Offence—failure to comply with direction) and to extend the operation of the Regulation until 12 months after the end of a COVID-19 Emergency Declaration or COVID-19 Management Declaration being in force.

### **Miscellaneous provisions**

The Bill creates a new temporary offence in section 118ZH. It is an offence to fail to comply with a direction that has been given under section Part 6C while a COVID-19 management declaration is in force. Similar to the existing offence in section 120 (4), a maximum penalty of 50 penalty units applies.

The Bill states that strict liability applies in relation to the first element – that a COVID-19 direction is in force. Applying strict liability means that the prosecution will not be required to establish a fault element in relation to the existence of the direction. As a safeguard to the application of strict liability, the amendments include a requirement that a COVID-19 direction that is not given to a particular person is a notifiable instrument. This formalises the current practice of notifying directions on the ACT Legislation Register. The Bill also introduces a requirement that, before requiring a person to comply with a COVID-19 direction, an authorised officer must, if reasonably practicable, warn a person that failure to comply with a direction without reasonable excuse is an offence. A failure to comply with this requirement does not affect the liability of the person and it is not a condition precedent for an authorised officer taking enforcement action.

For the second element, the prosecution will be required to prove that the person engaged in the conduct amounting to a failure to comply with a direction. The offence impliedly provides that the offence is committed by an omission to do an act and as a result, intention is the fault element that must be proved under the Criminal Code 2002.

Section 120B (3) provides that it is a defence if a person has a reasonable excuse for failing to comply with the direction, replicating the defence available under section 120 (4). The Bill clarifies that the defendant has the evidential burden in relation to the defence. The defendant must present or point to evidence that suggests a reasonable possibility that the defence can be established. The prosecution must then refute the defence beyond reasonable doubt. Whether an explanation for failing to comply with a direction is a reasonable excuse will depend on the individual circumstances of each case assessed against an objective test of reasonableness. For example, failing to comply with a quarantine direction due to mere forgetfulness may not be a reasonable excuse but failing to comply with the direction due to a cognitive impairment or disability is considered to be a reasonable excuse.

The Bill also creates an exception to section 187 (1) of the *Crimes Act 1900* (ACT) which applies the provisions in Part 1C of the *Crimes Act 1914* (Cwlth) to ACT offences not punishable by imprisonment or punishable by imprisonment for 12 months or less. Part 1C sets out powers of detention and obligations of police officers during investigations. The exception applies only where:

- a police officer believes a person who is 18 or older has committed an offence against section 120B (1);
- the officer intends to serve an infringement notice or take no further action;
- the officer is questioning the person if they have a reasonable excuse for failing to comply with the direction; and
- before questioning, the officer warns the person that they do not have to answer the question or do anything but that anything they say or do may be used in evidence.

The Bill amends the Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020 (the Regulation) to insert a reference to the new offence at new section 118ZN (Offence—failure to comply with direction). As a result, authorised officers will be able to issue infringement notices to persons over the age of 18 years (and over the age of 16 years in relation to a face mask direction) for the new offence of failing to comply with direction. The Bill also amends the expiry provision to provide that the Regulation ends after a 12-month period during which no COVID-19 emergency declaration or management declaration is in force.

## **CONSISTENCY WITH HUMAN RIGHTS**

### **Human Rights Overview**

As at 1 December 2021, COVID-19 continues to present a significant risk to public health in the ACT, Australia and internationally.

Providing for the making of necessary directions with appropriate safeguards and protections is critical for the continued effective management of the COVID-19 pandemic.

The Bill proposes a new Part 6C – Public health measures – COVID-19, which is designed to serve as a step up from existing powers available to the Chief Health Officer to prevent or alleviate a significant public health hazard and a step down from the powers available to the Minister and the Chief Health Officer to necessary to deal with a public health emergency.

The assessment of rights under the *Human Rights Act 2004* (HR Act) below describes the rights engaged, promoted and limited. The proportionality assessment addresses the factors under section 28 of the HR Act.

The powers under the Bill both promote rights by protecting a number of rights, in particular the right to life by providing a scheme to prevent or alleviate the risk to public health from COVID-19.

The Bill also imposes limitations on a number of rights. It does this by creating a scheme which allows the Executive to make a COVID-19 Management Declaration to enliven powers to adopt measures aimed at preventing or alleviating risks to public health from COVID-19 including:

- Ministerial Directions in relation to public health and social measures;
- Chief Health Officer Directions in relation to testing, tracing, isolation and quarantine; and
- Vaccination Directions to impose requirements in certain circumstances.

The Bill includes a number of protections and safeguards to ensure the limits on rights are the least restrictive necessary and proportionate to the risks to public health posed by COVID-19. These safeguards are described in the proportionality assessment below and include:

- Objects of the proposed new Part to ensure that directions and guidelines made:
  - recognise and respect the rights of people affected; and
  - are consistent with human rights while still achieving the purpose of protecting the public from risks presented by COVID-19.
- Requirements to ensure orders are made in consultation with the Chief Health Officer and to ensure the advice is published in a timely way.
- Requirements to consult with the Human Rights Commissioner about whether directions are consistent with human rights.
- Requirements to prepare and publish a statement on how directions are necessary to prevent or alleviate the risk of COVID-19 and how they are consistent with human rights.
- To ensure the effective scrutiny by the ACT Legislative Assembly:
  - COVID-19 Management Declarations and Vaccination Directions made by the Executive are disallowable instruments; and
  - The relevant standing committee must report to the Assembly about human rights issues raised by Ministerial and Chief Health Officer Directions.
- Where a Direction is in force, requirements for decision makers to make guidelines for the management of exemption applications.

- At least every 30 days a direction is in force, the Chief Health Officer must provide advice on whether they believe the direction is still justified.
- A limitation on the period the Chief Health Officer may direct a person to segregate or isolate to 14 days unless the person is confirmed positive, had not been tested for COVID-19 as required or has not received a negative test result.
- A requirement for segregation or isolation directions to specify that they do not apply in an emergency including to seek urgent medical care or where the person is escaping family violence.
- Vaccination directions must not prevent or limit a person from being able to obtain an essential good or service such as groceries and medical treatment.
- The ability for a person to apply for:
  - an exemption in relation to Ministerial and Chief Health Officer Directions,
  - internal review of unfavourable exemption applications; and
  - review by an independent External Reviewer in relation to certain Ministerial and Chief Health Officer Direction exemption applications.
- In relation to the criminal offence for failing to comply with a Direction:
  - a requirement for an authorised officer, where reasonably practicable, to warn a person that failure to comply with a direction without a reasonable excuse is an offence; and
  - including the defence of reasonable excuse.
- A sunset provision that ends the proposed new Part 18 months after it commences.

## Rights Engaged

The Bill engages and ***promotes*** the following rights under the ACT's *Human Rights Act 2004* (HR Act), and will be discussed under Rights Promoted in detail:

- Section 9 – Right to life
- Section 11(2) – Protection of children
- Section 13 – Right to freedom of movement
- Section 15 – Right to freedom of assembly and association

The Bill engages and may ***limit*** the following rights under the HR Act, and will be discussed under Rights Limited in detail:

- Section 8 – Right to equality

- Section 10(2) – Protection from medical treatment without free consent
- Section 12(a) – Right not to have privacy, family or home interfered with
- Section 13 – Right to freedom of movement
- Section 14(1) – Right to freedom to demonstrate religious beliefs
- Section 15 – Right to freedom of assembly and association
- Section 18 – Right to liberty
- Section 19 – Right to humane treatment when deprived of liberty
- Section 22 – Rights in criminal proceedings
- Section 27B – Right to work

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. This is further reflected in section 28 of the HR Act, with the first subsection of that provision stipulating that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Subsection (2) provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purposes; and
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

However, the reasonable limits test may not require the adoption of the least restrictive means identified, but rather that when determining the reasonableness of the relevant limitation, it is sufficient that the means adopted falls within a range of reasonable responses to the problem confronted.

The limits that are placed on human rights by the Bill are reasonable and justifiable in a free and democratic society. An assessment of the Bill's impact on relevant provisions of the HR Act, against all factors in section 28 (2), is provided below.

### **Rights Promoted**

It is generally accepted that the right to life set out in section 9 of the HR Act not only enjoins a government from the intentional and unlawful taking of a life but also to take appropriate steps to safeguard the lives of those within its jurisdiction (*Osman v United Kingdom* (1999) 29 EHRR 45). A duty to take reasonable action to avoid real

and immediate risk to life which a government can control and of which it has or ought to have knowledge has been said to be a positive aspect of this right (Osman at [116]).

In its entirety, the Bill promotes the right to life under section 9 of the HR Act as the measures in the Bill aim to uphold the public health and safety of the community by enabling the ACT Government to take reasonable action to prevent and/or limit the potential spread of COVID-19, and by extension mitigate the serious risk to health and life posed by the disease.

The measures proposed in this Bill recognise that the ACT and the rest of Australia, is expected to eventually reach a point where COVID-19 may no longer need to be treated as a public health emergency. At the time during which this Bill was prepared, the ACT has surpassed COVID-19 vaccination targets and is implementing the ACT's Pathway Forward to progress to a state of 'COVID normal'. Nevertheless, whilst COVID-19 remains a global pandemic it is likely to continue to constitute a serious risk to public health, as evidenced by a new COVID-19 variant of concern, designated 'Omicron', having been identified shortly before the preparation of this explanatory statement.

Furthermore, the Bill recognises that whilst vaccination rates within Australia at the present time have reduced the overall public health risk to the Australian community posed by COVID-19 there are nevertheless many countries and communities throughout the world which are largely unvaccinated. This maintains a likelihood of further COVID-19 variants of concern emerging, again, as evidenced by the recent identification of the 'Omicron' COVID-19 variant of concern. Accordingly, there also remains a possibility that the degree of protection afforded by current vaccines may prove to be less effective against COVID-19 variants of concern.

Furthermore, regard must also be given to the fact that there are persons within the ACT community who remain unvaccinated; many not by choice but due to the vaccine not being available to them due to age or a health or medical condition (such as allergies or having previously experienced a serious adverse event following vaccination). For such persons, the imposition of vaccination directions to prevent or alleviate risk presented by COVID-19 serves to promote and secure their right to life, as well as their capacity to enjoy other rights, such as the freedom of movement (s 13 HR Act) and freedom of assembly and association (s 15 HR Act).

For these reasons, the measures included in the Bill have the overarching intent of preventing or limiting the spread of COVID-19, thereby protecting members of the ACT community from the risk of serious illness or death that could result from a COVID-19 infection, or equally from other diseases or injury due to a hospital and health system overwhelmed by COVID-19 cases. Therefore, every limitation on a human right that is or may be imposed to varying degrees by the provisions of this Bill arises through the ACT Government seeking to robustly meet its positive

obligation to protect the health and lives of members of the ACT community from the significant public health risks posed by COVID-19.

Section 11 (2) of the HR Act provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. This right recognises the particular protection children deserve due to their unique vulnerability of being a child.

To date the evidence reflects, compared with cases in adults, there are far fewer cases of COVID-19 reported in children. Cases in children are typically milder and they are less likely to develop severe illness. At the time of this Bill's preparation, there was no approved COVID-19 vaccine available to children under the age of 12 years in Australia.

It is also recognised that young children are less able to independently take certain health measures (e.g., effective handwashing, social distancing, wearing facemasks) to protect themselves from communicable diseases. As such, children face a combination of unique vulnerabilities to COVID-19 transmission from which the Bill seeks to protect them.

### **Rights Limited**

1. *The nature of the right affected and the limitation (s 28 (2) (a) and (c))*

#### *Directions that prevent or limit entry to an area or to the ACT*

Section 118R(1)(a) as inserted by this Bill gives the Minister the ability while a COVID-19 management declaration is in force to issue a direction which prevents or limits a person or category of persons from entering a particular area, or into the ACT.

It is a condition on the exercise of the power of the Minister in section 118R that the Minister must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19 and the direction must be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Minister may exempt a person from the application of the Direction.

A Ministerial Direction under section 118R is a Notifiable Instrument.

Directions under section 118R are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will be a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.



The Minister’s power under section 118R(1)(a) principally engages the right to freedom of movement (s 13 HR Act) and the right to freedom of assembly and association (s 15 HR Act), but depending on the area or place restricted, the power could potentially also engage the right to freedom to demonstrate religious beliefs (s 14(1) HR Act).

It is recognised that a restriction on access to public spaces will limit the right to freedom of movement in section 13 of the HR Act, but it is accepted that the right to freedom of movement may be subject to restrictions which serve permissible purposes, such as protecting the rights and freedoms of others, and the protection of such things as national security, public order, and – centrally in relation to COVID-19 – public health.

It is important to distinguish between restrictions that may limit the freedom of movement and restrictions, which may amount to a limitation on the right to liberty. A deprivation of liberty, which would constitute detention, may occur for human rights purposes in the absence of mere physical confinement, at least where the degree of control over the individual overrides their autonomy. A mere restriction on movement, without further restriction, will not have the character of detention.

Similarly, it is accepted that the right to freedom of assembly will cover meetings in private spaces or public spaces and it will cover all meetings, whether static or active. Furthermore, it was determined in *Saska v Hungary* [2012] ECHR 1981 at [21] that the right to freedom of assembly or association will include the right to choose the time, place, and manner of conduct of the assembly. However, again it has also been confirmed that the right, and these aspects of it, may be subject to reasonable limits which are prescribed by law and necessary to protect public safety, and the same time is true for limits on the right to freedom of movement.

It is recognised that the concept of “worship” extends to direct expression of belief, such as ritual or ceremonial acts, as well as practices integral to such acts. Nevertheless, case law has confirmed that the right to practice religion may be subject to reasonable limits, of which limits to protect public safety is well accepted (see cases such as *R (Williamson) v Secretary of State for Education and Employment and Others* [2005] 2 AC 246 at 257[16]; *Eweida & Ors v United Kingdom* (2013) 57 EHRR 8; and *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 at [537]).

### *Directions that regulate gatherings*

Section 118R(1)(b) gives the Minister the ability while a COVID-19 management declaration is in force to issue a direction which can regulate gatherings, which extends to gatherings in both public and private locations. This could be done in a wide variety of ways. It could be the imposition of a fixed number of attendees, such as for a wedding or a funeral. It could also be based on a density limitation, such as

‘one person per four square metres’. There may also be circumstances where permitted gatherings are limited to persons with a familiar connection (i.e. a man and his family visiting the home of his sister and her family, or a mother visiting her adult children).

It is a condition on the exercise of the power of the Minister in section 118R that the Minister must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19, and be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Minister may exempt a person from the application of the Direction. A Direction under section 118R is a Notifiable Instrument.

Directions under section 118R are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will be a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.

The power provided by the section 118R(1)(b) engages the right to freedom of movement (s 11 HR Act), the right to freedom of assembly and association (s 15 HR Act). Depending on the area or place restricted, the power could potentially also engage the right to freedom to demonstrate religious beliefs (s 14(1) HR Act). Should a Direction impose restrictions on gatherings in private residences, the right not to have a person’s privacy, family or home interfered with is also likely to be engaged (s 12(a) HR Act).

As previously discussed, it is recognised that a restriction on access to public spaces will limit the right to freedom of movement in section 13 of the HR Act, but it is accepted that the right to freedom of movement may be subject to restrictions which serve permissible purposes, such as protecting the rights and freedoms of others, and the protection of such things as national security, public order, and—centrally in relation to COVID-19—public health.

It is important to distinguish between restrictions which may limit the freedom of movement and restrictions which may amount to a limitation on the right to liberty. A deprivation of liberty, which would constitute an imprisonment at common law, may occur for human rights purposes in the absence of mere physical confinement, at least where the degree of control over the individual overrides their autonomy. A mere restriction on movement, without more, will not have that character.

Similarly, it is accepted that the right to freedom of assembly will cover meetings in private spaces or public spaces and it will cover all meetings, whether static or active. Furthermore, it was determined in *Saska v Hungary* [2012] ECHR 1981 at [21] that the right to freedom of assembly or association will include the right to choose the time, place, and manner of conduct of the assembly. However, again it

has also been confirmed that the right, and these aspects of it, may be subject to reasonable limits which are prescribed by law and necessary to protect public safety, and the same is true for limits on the right to freedom of movement.

It is recognised that the concept of “worship” extends to direct expression of belief, such as ritual or ceremonial acts, as well as practices integral to such acts. Nevertheless, in cases such as *R (Williamson) v Secretary of State for Education and Employment and Others* [2005] 2 AC 246 at 257[16]; *Eweida & Ors v United Kingdom* (2013) 57 EHRR 8; and *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 at [537] it has also been confirmed that the right to practice religion may be subject to reasonable limits, of which limits to protect public safety is well accepted.

The Direction will engage the right to privacy of individuals in their private capacity if it applies to a private residence. However, it can also engage the right to privacy in their professional capacity as owners of businesses, as employers or employees and as contractors because any restriction on the ability of a person to engage in activity within their personal lives or their profession, trade or calling is capable of engaging the right to privacy. The right in section 13 of the HR Act protects the freedom to, amongst other things, move freely within the Territory. As such, a restriction on access to public spaces will limit this right.

#### *Directions that require the use of Personal Protective Equipment*

Section 118R(1)(c) as inserted by this Bill gives the Minister the ability to issue a direction which requires the use of Personal Protective Equipment, commonly referred to as PPE. In most instances this is likely to be in relation to the carrying and wearing of face masks and/or the use of hand sanitiser. However, for workers in certain fields or persons attending certain locations deemed to be ‘high risk settings’ such as hospitals and residential aged care facilities (RACFs) this requirement may extend to the use of both face shields and masks, gloves, gowns, or a combination of those PPE items.

It is a condition on the exercise of the power of the Minister in section 118R that the Minister must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19 and be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon the Minister may exempt a person from the application of the Direction. A Direction under section 118R is a Notifiable Instrument.

Directions under section 118R are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.

A requirement to wear PPE, and in particular face masks, imposed by a Direction from the Minister pursuant to section 118R(1)(c) can in limited circumstances, and subject to any exceptions included, engage the right to equality in section 8 of the HR Act. Any use of this power will need to have regard to likelihood of there being a limited number of persons within the community that due to disability or illness will be unable to comfortably, or even safely, wear a face mask or some other forms of PPE. Unless such a Direction includes fair and appropriate exclusions or the ability to obtain an exemption the Direction risks impacting certain individuals unequally in comparison to the majority of the community.

*Directions that regulate or restrict the carrying on of a business, undertaking or activity*

Section 118R(1)(d) as inserted by this Bill gives the Minister to issue a direction which can regulate, but not prohibit, the carrying of activities, businesses, or undertakings. The application of such restrictions can, and is likely to, extend to activities, businesses, or undertakings irrespective of whether they are conducted on a for-profit or not-for-profit basis, and can extend to volunteer and community run organisations and groups, such as sporting associations and clubs.

This could be done in a wide variety of ways, ranging from the imposition of significant restrictions and controls on a particular activity (e.g. large events or festivals) or a category of business (e.g. bars and nightclubs), to a minimum set of conditions in order to operate (e.g. use of the Check In CBR app to record a person's attendance at the place).

It is a condition on the exercise of the power of the Minister in section 118R that the Minister must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19 and be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Minister may exempt a person from the application of the Direction. A Direction under section 118R is a Notifiable Instrument.

Directions under section 118R are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.

The Minister's power under section 118R(1)(d) can potentially engage the right to privacy (s 12(a) HR Act), the right to freedom of movement (s 13 HR Act), the right to freedom to demonstrate religious beliefs, (s 14(1) HR Act), the right to freedom of assembly (s 15 HR Act), and the right to work (s 27B HR Act).

The Direction will engage the right to privacy of individuals in their professional capacity as owners of businesses, as employers or employees and as contractors because any restriction on the ability of a person to engage in activity within their personal lives or their profession, trade or calling is capable of engaging the right to privacy. The right in section 13 of the HR Act protects the freedom to, amongst other things, move freely within the Territory. As such, a restriction on access to public spaces will limit this right.

It is recognised that the concept of “worship” extends to direct expression of belief, such as ritual or ceremonial acts, as well as practices integral to such acts. Nevertheless, in cases such as *R (Williamson) v Secretary of State for Education and Employment and Others* [2005] 2 AC 246 at 257[16]; *Eweida & Ors v United Kingdom* (2013) 57 EHRR 8; and *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 at [537] it has also been confirmed that the right to practice religion may be subject to reasonable limits, of which limits to protect public safety is well accepted.

It is also accepted that the right to freedom of assembly will cover meetings in private spaces or public spaces and it will cover all meetings, whether static or active. Furthermore, it was determined in *Saska v Hungary* [2012] ECHR 1981 at [21] that the right to freedom of assembly or association will include the right to choose the time, place, and manner of conduct of the assembly. However, again it has also been confirmed that the right, and these aspects of it, may be subject to reasonable limits which are prescribed by law and necessary to protect public safety, and the same is true for limits on the right to freedom of movement.

Whilst the HR Act contains a right to work in section 27B, there are clear and well-established limitations to this right within Australian law governing matters such as requisite professional qualifications and competency, licensing and registration, insurance and work health and safety obligations. Furthermore, it is well accepted that on public health and/or public safety grounds persons suffering from some medical conditions (in particular those associated with vision or cardiac health) can be prevented performing some categories of work, in particular those which involve the operation of machinery. Furthermore, it is also already accepted that vaccination against other transmissible diseases is a pre-requisite for working in certain health care settings.

### *Directions that require the provision of information*

There are several sections proposed to be inserted by the Bill which enable directions to be issued that require the provision of information, which is to include information about the identity of a person, or which require the keeping or production of documents. The Executive has this power under Part 6C.5, as does the Minister under Part 6C.3, and the Chief Health Officer is also vested with this power by Part 6C.4. In practice however, the requirement for production of information is likely to be associated with another requirement. For example, a Direction imposed by the Executive that limits entry to a place to persons vaccinated against COVID-19 would reasonably be expected to be accompanied by a requirement to produce evidence of that vaccination. Similarly, a direction issued by the Minister requiring all persons that attend a restaurant or café to check in using the Check In CBR app will amount to both a direction regulating the business and also a direction requiring provision of information.

In order to ensure compliance with a direction issued, irrespective under which section, it is also likely that any direction issued will include a requirement to answer questions and/or provide evidence to an authorised person when required so that adherence to the full extent of any requirement can be determined.

As previously noted, it is a condition on the exercise of the power of the Minister in section 118R that the Minister must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19, and be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Minister may exempt a person from the application of the Direction. A Direction under section 118R is a Notifiable Instrument.

The exercise of the power of the Executive in Part 6C.5 is also conditional upon the Executive being satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19, and be accompanied by a statement about such things as the grounds on which that belief is formed and the grounds upon which the Executive may exempt a person from the application of the Direction. A Direction under that Part is a Disallowable Instrument.

As Disallowable Instruments are to be accompanied by an explanatory statement the required statement from the Executive is likely to be incorporated into the supporting explanatory statement.

Directions which require the provision of information, whether issued by the Executive, the Minister, or the Chief Health Officer, are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. There is a requirement that every 30 days the Chief Health Officer will provide advice as to whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.

Compelling the provision of information and/or documents is recognised as engaging the right to privacy (s 12(a) HR Act). The exact extent to which a requirement to provide information will engage the right to privacy will vary based on the nature of the information and the circumstances in which it is compelled. The infringement of the right to privacy by contact tracing is a legitimate purpose, in that it is a valuable and effective method of identifying and thereby limiting the potential spread of COVID-19.

Similarly, provisions which require a person to check-in when attending a venue or location also infringe on that right but in a proportionate and necessary manner. In other instances, persons may be required to provide information to verify their identity because they are believed to be subject to the requirements of another type of Direction (such as quarantine) or in order to apply for, or evidence entitlement to an exemption (such as providing proof of identity). In such instances, whilst the right to privacy is limited, the limitation is appropriate and necessary for the effective operation of the public health protections imposed and the regulatory system that supports it.

*Directions that require persons to undergo a medical examination or testing*

Section 118U(1)(b) as inserted by this Bill gives the Chief Health Officer the power to issue a direction requiring a person, or persons to which certain circumstances apply (such as undergoing isolation having tested positive to COVID-19) to undergo a medical examination or testing. Testing for COVID-19 is predominately done using a polymerase chain reaction (PCR) test of saliva samples or nasal swab.

It is a condition on the exercise of the power of the Chief Health Officer in section 118U that they be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19. Much like a direction issued by the Minister, a direction made by the Chief Health Officer must be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Chief Health Officer may exempt a person from the application of the Direction. A Direction under section 118U is a Notifiable Instrument unless the Direction made is specific to a particular person.

Directions under section 118U are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified. In practice however, as such Directions are issued by the Chief Health Officer if the Chief Health Officer no longer considers a Direction necessary or justified the Chief Health Officer will act to have the Direction revoked.

Section 10(2) of the HR Act entrenches in ACT law a right against medical treatment without a person's complete and free consent. However, a legal interpretation question that immediately arises is in what circumstances does a medical examination or testing constitute 'medical treatment'. It would be fair and reasonable to conclude that any medical examination or test involving a degree of intrusion on a person's physical integrity such as the puncturing of the skin (e.g., the taking of a blood sample), the administration of a substance or device (e.g., endoscopy), or which involves a radiological exposure (e.g., through medical imaging such as an x-ray) would be regarded as a medical treatment.

A greater degree of uncertainty exists in relation to tests that are non-invasive and which carry no risks of side effects, such as nasal swabs and saliva samples utilised for COVID-19 testing. The human rights concerns generally cited in relation to roadside drug testing laws, including within the ACT, have focused on engagement of the right to privacy and the rights to presumption of innocence and in criminal proceedings rather than upon consent to the testing methodology at the roadside.

So, whilst there is a reasonable body of case law on consenting to medical treatment that can be found internationally, nationally, and locally -such as *Australian Capital Territory v JT* [2009] ACTSC 105 (28 August 2008) – there has clearly been far less need for judicial bodies to consider what is to be technically regarded as 'medical treatment', most likely as in most circumstances the ordinary common meaning has been adequate. Nevertheless, in *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [557] it was determined that 'treatment' is to be given a wide meaning, and should include 'behaving or dealing with someone in a certain way, giving medical care or attention or applying a process or substance to someone'. As such, if the reasoning from this VCAT decision is applied, a requirement that a person submit to a COVID-19 testing process should still be considered from the perspective of the right contained in section 10(2) of the HR Act.

#### *Directions that require the segregation or isolation of persons*

The Chief Health Officer will also have the power to require the segregation (essentially quarantine) or isolation of people under section 118U(1)(b) during any period in which a COVID-19 management declaration is in effect. The ability to place persons exposed to a disease into quarantine, and the isolation of persons infected, is a fundamental and essential component of established methodology to an identified risk to public health.

It is a condition on the exercise of the power of the Chief Health Officer in section 118U that they be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19. Much like a direction issued by the Minister, a direction made by the Chief Health Officer must be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Chief Health Officer may exempt a person from the application of the Direction. A Direction



under section 118U is a Notifiable Instrument unless the Direction made is specific to a particular person.

As previously discussed, Directions under section 118U are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will be a requirement upon the Chief Health Officer to advise the Minister every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified. In practice however, as such Directions are issued by the Chief Health Officer if the Chief Health Officer no longer considers a Direction necessary or justified the Chief Health Officer will act to have the Direction revoked.

The Chief Health Officer's power under section 118U(1)(c) engages the right to privacy (s 12(a) HR Act), the right to freedom of movement (s 13 HR Act), the right to freedom to demonstrate religious beliefs, (s 14(1) HR Act), the right to work (s 27B HR Act), and most significantly the right to liberty (s 18 HR Act) and the right to humane treatment when deprived of liberty (s 19 HR Act). It is however, long established and globally recognised that test, trace, isolate and quarantine (TTIQ) measures are not only fundamental public health interventions proven to stop or curb the spread of transmissible diseases, but also essential in the context of a pandemic.

Accordingly, the infringement on the right to privacy (s 12(a) HR Act), the right to freedom of movement (s 13 HR Act), the right to freedom to demonstrate religious beliefs, (s 14(1) HR Act), the right to liberty (s 18 HR Act) and the right to work (s 27B HR Act) are legitimate purposes, as segregation – through isolation of infected persons and quarantine of persons exposed – is a proven and critical method to prevent the spread of an infectious disease, and therefore an essential tool in responding to the significant public health risks still posed by the COVID-19 pandemic.

#### *Directions that require persons to be vaccinated*

Under Part 6C.5 of the Bill the Executive has the ability to issue a direction which imposes a requirement for a person to be vaccinated against COVID-19 to engage in particular work or work at a particular workplace, to access a particular place; or engage in a particular activity. Either additionally or alternatively to a Direction requiring vaccination, the relevant section also enables the Executive to direct that a person who is not vaccinated against COVID-19 be prevented or restricted from engaging in particular work or working at a particular workplace, accessing a particular place; or engaging in a particular activity.

It is a condition on the exercise of this power by the Executive that the Executive must first be satisfied that it is necessary to prevent or alleviate the risk posed by COVID-19, and be accompanied by a statement about such things as the grounds on which that belief is formed and grounds upon which the Executive may exempt a person

from the application of the Direction. As previously noted, because a Direction under Part 6C.5 is a disallowable instrument, such a statement is likely to form part of an explanatory statement supporting the disallowable instrument.

Directions of this nature by the Executive are to remain in force for not longer than 90 days but can be extended by up to 90 days as many times as is necessary. During such time it will be a requirement upon the Chief Health Officer to advise the Executive every 30 days whether the Chief Health Officer considers in their expert opinion that the Direction issued is still necessary and justified.

Clearly any requirement that mandates vaccination engages the right to protection from medical treatment without free consent contained in section 10(2) of the HR ACT, just as an exclusion from a place, activity, or form of employment on the basis of being unvaccinated engages the right to equality (s 8 HR ACT).

It is also recognised that requiring vaccination in order to access a place will engage the right to freedom of movement, just as being unable to engage in particular types of work or work in certain locations unless vaccinated engages the right to work in section 27B of the HR ACT. There is also the potential for the right of freedom to demonstrate religious belief (s 14 HR ACT) to be engaged if the person's reason for being unvaccinated is based on a religious belief, or if the place to which access is being denied is connected to the demonstration of a person's religious beliefs, which could be a place in which prayer or religious fellowship normally takes place, or where certain religious rites might reasonably be expected to occur, such as a funeral home, crematoria, or a wedding function hall.

## *2. Legitimate purpose (s 28 (2) (b))*

The United Nation's 'Siracusa Principles' serve as a foundation consideration for every human right limited through the provisions of this Bill. Paragraphs 24, 25 and 26 of the 'Siracusa Principles' specifically deal with public health, recognising that public health protection is a legitimate basis for limiting certain rights when dealing with a serious public health threat such as COVID-19.

In accordance with the Siracusa Principles, the ACT Government has – together with the Commonwealth and other State and Territory governments – given due regard to the advice and instruction on COVID-19 provided by expert groups such as the AHPPC and the Australian Technical Advisory Group on Immunisation (ATAGI). In turn, these entities have given due consideration to advice and medical research issued by the World Health Organization (the WHO).

A clear example of such advice provided by the WHO concerns face masks, stating that "masks should be used as part of a comprehensive strategy of measures to suppress transmission and save lives" but also confirms that "the use of a mask alone is not sufficient to provide an adequate level of protection against COVID-19".

Similarly, there is extensive guidance issued by the WHO, and well established within health care settings, concerning both infection prevention and control and workplace health and safety measures, a core component of which is the use of PPE such as masks, gowns, and gloves.

The provisions within this Bill that enable directions which can require testing, tracing through information collection, and segregation under isolation or quarantine therefore gain legitimacy through their endorsement and adoption by the AHPPC which has, in the context of the 2021 outbreaks of the Delta variant of COVID-19, advised that vaccination alone is unlikely to be sufficient to prevent a resurgence of the virus. AHPPC advised that some level of public health and social measures (PHSM) and TTIQ will be required in the post-vaccination phase of the National Plan to Transition Australia's National Response to COVID-19 (the National Plan).

In keeping with the 'Siracusa Principles', the National Cabinet endorsed on 5 November 2021 guiding principles for TTIQ and PHSM to be applied nationally as part of the National Plan.

Other key measures to limit the spread of COVID-19 recommended by expert advisory groups are measures which limit entry to places, and which restrict movement across national and international borders, as well as restrictions on gatherings.

Accordingly, the infringement of the rights identified by this Bill are all for a recognised legitimate purpose, as evidenced by the fact these valuable and effective methods of responding to and alleviating the significant public health risks posed by COVID-19 have also been deployed in similar forms throughout Australia, and internationally.

### *3. Rational connection between the limitation and the purpose (s 28 (2) (d))*

The ACT has surpassed COVID-19 vaccination targets and implemented the ACT's Pathway Forward to progress to a state of 'COVID normal', with low level PHSM in place, in addition to ongoing TTIQ measures which remain an important component of the public health response.

COVID-19 vaccines have proven to be effective in preventing serious disease and slowing transmission. Further to the ACT's excellent vaccination coverage, the epidemiological situation is currently stable and there has not been a surge in cases despite eased restrictions.

However, in the context of the 2021 outbreaks of the COVID-19 'Delta' variant of concern, the AHPPC advised that vaccination alone is unlikely to be sufficient to prevent a resurgence of the virus. AHPPC therefore advised that some level of PHSM in addition to TTIQ will be required in the post-vaccination phase of the National Plan to Transition Australia's National Response to COVID-19 (National

Plan). The importance of those measures is further heightened by the emergence of yet another COVID-19 variant of concern; 'Omicron'.

In this context there is a clear, rational, and essential purpose associated with the limitations to be imposed by this Bill. The measures implemented under public health emergency directions since the beginning of the pandemic have proven to be largely successful, and together with economic supports provided by the ACT Government also manageable. This Bill would enable a 'step down' from a declared public health emergency towards an eventual 'COVID-19 normal' but whilst enabling similar measures to continue to be imposed subject to an increased level of oversight and restriction, together with a clear mandate for the disclosure of the rationale behind each unique measure to enhance transparency and accountability.

The public health crisis resulting from the COVID-19 pandemic has sufficiently abated such that the immediacy of action enabled by public health emergency directions is hoped to soon no longer be necessary, but a significant public health risk is still presented by COVID-19 such as to warrant strong and decisive public health measures.

#### 4. Proportionality (s 28(2)(e))

The exercise of the powers to be inserted into the *Public Health Act 1997* by this Bill that enable the issuing of Directions that may, to varying degrees, limit some human rights are subject to numerous safeguards. These include the objects clause for Part 6C expressing that an objective of the Part is to ensure that Directions or guidelines made under provisions within the Part are to be consistent with human rights, as well the fact that Part 6C itself is to expire after 18 months of operation.

Central to the included safeguards is the limitation that the Directions in Part 6C are only exercisable if a COVID-19 management declaration has been made. The authority to issue a COVID-19 management declaration is vested in the Executive which reflects the seriousness of both that decision and the implications and actions that will arise because of that declaration. Furthermore, a COVID-19 management declaration will be a disallowable instrument, which means that if the decision is not supported by the majority of members of the Legislative Assembly it can be disallowed; effectively cancelled. Disallowable instruments are also required to be supported by an explanatory statement through which the justification for the declaration will need to be explained, ensuring information about the declaration and rationale for the action is transparently communicated and accessible to all.

Any COVID-19 management declaration is also limited to a maximum duration of 6 months, and whilst multiple 6-month extensions are also possible, those extensions are also disallowable instruments. Again, this ensures accountability and transparency as information about the decision and a justification for the extension is documented and accessible.

However, the safeguards effectively begin with section 118Q which requires both that advice of the Chief Health Officer be obtained before any declaration (or extension) and the Executive give public notice of that advice. Again, this contributes to and promotes public awareness and discussion on the proposed action.

In the event that a COVID-19 management declaration is made, there are further safeguards tied to the exercise of each form of Direction. The Direction that arguably has the greatest impact on human rights –enabling requirements for vaccination or the imposition of restrictions on persons who are unvaccinated – has also been vested in the Executive and is also a Disallowable Instrument. Again, this reflects the gravity of such an action, and ensures that such a Direction will have the full oversight of the Legislative Assembly and can be disallowed if not supported by a majority of the elected members.

When making a relevant direction, the Executive, Minister and Chief Health Officer are required to consult with the Human Rights Commission about whether the direction or extension is consistent with human rights. In the case of Ministerial and Chief Health Officer Directions, this requirement will not apply where the Direction is made in urgent circumstances.

Ministerial and Chief Health Officer directions issued under Part 6C will be subject to consideration by the relevant standing committee which must report to the Legislative Assembly about human rights issues that arise.

Consultation, reporting and parliamentary scrutiny mechanisms will ensure that Directions made are effectively informed by public health advice and provide for community and parliamentary transparency and scrutiny of directions made.

All Directions that can be issued under Part 6C, whether issued by the Executive, the Minister or the Chief Health Officer, are to remain in force for not longer than 90 days but can be extended by a further 90 days multiple times. These timeframes seek to ensure that a Direction is not imposed for an unnecessarily long and inappropriate period, whilst enabling prolonged operation provided that the procedural steps to justify extensions can be made out. These safeguards are further bolstered by a requirement for advice to be provided by the Chief Health Officer every 30 days on whether a Direction (and through it the associated limitations on human rights) remains in the Chief Health Officer's expert opinion to be justified.

Directions issued by the Minister will be notifiable rather than disallowable to ensure that the detail of such a Direction is open and transparent. Whilst notifiable instruments do not ordinarily require an explanatory statement, an additional safeguard associated with a Direction by the Minister is a requirement for a statement to be published addressing the nature of the risk posed by COVID-19, the grounds on which the Minister believes the Direction will mitigate that risk or aspects of that risk, and the grounds on which exemptions will be available.

A further safeguard imposed in relation to Directions issued by the Minister are that in making or extending a Direction the Minister must ask for and take into consideration advice from the Chief Health Officer, consult the Chief Minister, and within 7 days of making or extending a Direction issue a public notice addressing the advice from the Chief Health Officer and explaining how the Direction or extension is consistent with human rights (unless the Direction is to remake an existing Direction to resolve minor or technical issues).

Similar safeguards are imposed for Directions issued by the Chief Health Officer, replicating the same 90 day period for Directions and extensions and the requirement that Directions are notifiable instruments, and also requiring that within 7 days of making or extending a Direction that a public notice addressing how the Direction or extension is consistent with human rights be published (unless the Direction is to remake an existing Direction to resolve minor or technical issues).

Provisions are included in the Bill which ensure allowance is made for exemptions to every Direction issued under Part 6C, and in the case of Directions issued by the Minister or the Chief Health Officer, a person that is refused an exemption or has conditions attached to an exemption to which they believe are unfair or unnecessary is to have the right to seek an internal review of that decision. These measures contribute to the proportionality of the use of these powers.

Furthermore, a decision of an internal reviewer in relation to a segregation or isolation Direction may then be further reviewed by an External Reviewer to allow for the independent review of such decisions. This right of external review also applies to a decision of an internal reviewer that was in connection to a Direction by the Minister that prevents or limits entry into the ACT, where the internal reviewer's decision relates to an exemption sought on medical or compassionate grounds.

A review of decisions by the Executive are reviewable under the *Administrative Decisions (Judicial Review) Act 1989*.

There are also two key inclusions within the Bill that apply in relation to any Direction made by the Chief Health Officer requiring segregation or isolation which contribute substantially to the proportionality of the human rights limitations imposed. The first is that the application of any Direction on an individual is to apply for no longer than 14 days at a time (noting that persons might be subject to a requirement more than once depending on their movements and/or exposures) unless specified factors apply. For example, a person may be required to quarantine or segregate for 14 days having been in close contact with a known case, but before the conclusion of that time period the individual may test positive to COVID-19 and then be required to isolate as a confirmed case until they test negative for the virus.

The Bill also provides that a segregation or isolation direction must specify the emergency circumstances where the Direction does not apply. Examples reflect that

thus would include the need to evacuate the place in which the segregation/isolation is occurring because of a fire (or an evacuation tone from a fire alarm), or if the person needs urgent medical treatment, and also extends to the person escaping family violence. These provisions recognise that the immediacy of the threat to the life or health of that individual takes precedence over measures which seek to protect public health from the potential spread of COVID-19.

The full extent to which any Direction issued will engage the various human rights identified within this explanatory statement, and the proportionality of the limitations imposed by the Direction, will depend on the restrictions imposed by an individual Direction, together with its conditions, limits, and exclusions. It is for this reason that the requirement for public notices addressing consistency with human rights to be issued for Directions is of particular importance.

Ultimately however, the Bill and the power to issue Directions that it will establish, are in response to continued significant public health risk posed by COVID-19. That significant risk is demonstrated by its continued high incidence globally, the continued identification of cases throughout Australia even with a high level of vaccination uptake, and the emergence of yet another variant of concern,

Both Australia and the ACT will reach a stage where COVID-19 is no longer regarded as a public health emergency, but so long as there remains a global COVID-19 pandemic the disease will remain a significant risk to public health and safety warranting a high level of PHSM and TTIQ controls.

This is because the scale of the risk remains substantial, the morbidity rate for those who develop serious illness is substantial, and the incident of cases despite high vaccination rates retains the potential to place a dramatic burden on the ACT's health system.

Given the scale of these risks, and the actual experience of the ACT, the nation and the world during 2020 and 2021, any limitation of a right arising by operation of a Direction issued under Part 6C is a reasonable limit and is justifiable in accordance with the principles in section 28 of the HR Act and that it is evident based on the experiences nationally over the past two years that there is no less restrictive means reasonably available to achieve the purpose of the limitation.

Accordingly, the Bill and the powers that proposes are considered to be either compatible with the relevant rights in the HR Act or satisfying the requirements of section 28 of the HR Act.

## *Offence – failing to comply with a direction – use of strict liability*

### *1. The nature of the right affected and the limitation (s 28 (2) (a) and (c))*

The application of strict liability in offences - whether applying to the entire offence or to just select elements of the offence as is the case with the offence in Part 6C.7 - engages the presumption of innocence under s22(1) of the HR Act by removing the fault elements from an offence or aspects of the offence. For the relevant offence this means that it will be sufficient for the prosecution to establish the factual element a direction under Part 6C was in force without needing to prove fault or a mental element in regard to that element of the offence. Accordingly, whilst a person will be able to raise the defence of reasonable and honest mistake in relation to compliance with a direction under Part 6C, it will not be a defence to claim ignorance of, or mistaken belief about the application of a direction.

### *2. Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))*

The Bill is being introduced to exclusively reserve personal information collected by the App for contact tracing and compliance with contact tracing purposes. This will displace, and even prohibit, several uses and disclosures of such information which would ordinarily be permitted under the Territory Privacy Principles (TPPs) set out in the ACT's Information Privacy Act 2014 (see Background – the Check In CBR app).

The offence in Part 6C.7 of the Bill applies if a person is subject to a Direction made under a COVID-19 management declaration and the person fails to comply with the direction without a reasonable excuse. The construction of the offence applies strict liability to one limb of the offence; being that a direction was in force.

The imposition of offences to prohibit conduct considered improper is a legitimate purpose. Furthermore, as the imposition of the offence addresses non-compliance with lawful directions imposed to prevent and/or limit the spread and impact of COVID-19 there is a rational connection between the offence and the objects of the COVID-19 public health measures as stated in section 118M.

The rationale for the application of strict liability to an element of the offence is to ensure that a sufficiently robust and consistent enforcement regime can operate efficiently as part of an enforcement framework supporting a COVID-19 management declaration.

### *3. Proportionality (s 28(2)(e))*

The offence supports the requirements imposed by directions issued under a COVID-19 management declaration, and with them the protections from the spread and impact of COVID-19 intended by those directions. Strict liability offences are widely accepted as being appropriate in regulatory contexts. Nevertheless, in this offence strict liability has been applied to just one element of the offence rather than



to the offence as a whole. This contributes to the proportionality of the offence because the need to prove a fault element for that aspect of the offence would make the enforcement regime less effective, whereas a fault element must still be established for the second limb of the offence – the failure to comply with the direction.

Additionally safeguards included in the Bill in relation to the offence for failing to comply with a Direction include a requirement for an authorised officer, where reasonably practicable, to warn a person that failure to comply with a direction without a reasonable excuse is an offence.

In addition, a number of defences remain open to a defendant including the defence of reasonable excuse. A note is also included explaining that the defendant has an evidential burden in relation to the defence of reasonable excuse and this formalises the common law position in relation to the offence. It is considered reasonable and proportionate to apply an evidential onus of proof as a potential excuse would be solely within the knowledge of the defendant. The prosecution retains the onus to refute the defence beyond reasonable doubt should such a defence arise.

Section 23 of the Criminal Code 2002 provides that other defences may also be available for use for strict liability offences.

The limitation on rights in criminal proceedings as a result of the exception to the application of section 187 (1) of the *Crimes Act 1900* (ACT) and Part 1C of the *Crimes Act 1914* (Cwlth) is considered to be reasonable and proportionate to the objective of promoting public health and life. Safeguards have been incorporated to minimise the impact on rights. The exception is narrowly limited to circumstances where the officer believes that the person is 18 years or older, the officer intends to issue an infringement notice or take no further action, the officer is only questioning the person about whether they have a reasonable excuse, and the officer warns the person against self-incrimination.

In recognition of the particular nature of the measures required to address the COVID-19 emergency, the amendments are drafted to apply specifically to directions made while a COVID-19 emergency declaration is in force. In addition, a sunset provision has been included to ensure that these amendments will expire at the end of a 12-month period.

*Permitted uses of check-in information, and check-in information not admissible in court*

1. *The nature of the right affected and the limitation (s 28 (2) (a) and (c))*

Contact tracing is, in relation to COVID-19, the process of identifying persons who have or may have COVID-19, or persons who have or may have been exposed to

COVID-19, and then communicating public health advice and requirements to such persons. Contact tracing is therefore an essential and highly effective means of responding to the public health risks posed by COVID-19 and ultimately alleviating the significant public health risks associated with the COVID-19 public health emergency. In this regard, contact tracing positively engages the right to life as the objective of contact tracing is to protect the lives of members of the ACT community.

The benefits of contact tracing are significantly enhanced if information about the movements of suspected cases and the identification of persons potentially exposed can be reliably and expeditiously obtained. The development and use of the App deliver precisely those benefits through the recording of information about the presence of persons at particular locations. This however impacts upon the privacy of those persons as information is recorded about them and their movements.

Accordingly, the provisions of Part 7A in this Bill regarding check-in information operate to limit the use of collected personal information to contact tracing and compliance with contact tracing obligations only, and in doing so positively engage the right to privacy through the introduction of additional controls and safeguards about the use of contact tracing information collected.

### *2. Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))*

As previously discussed, paragraphs 24, 25 and 26 of the United Nation's 'Siracusa Principles' specifically deal with public health and recognise that public health is a legitimate basis for limiting certain rights to deal with a serious public health threat.

Accordingly, the infringement on the right to privacy by contact tracing is a legitimate purpose, in that it is a valuable and effective method of responding to and alleviating the COVID-19 public health emergency. Nevertheless, the additional privacy protections granted by Part 7A of this Bill – relocated from the *COVID-19 Emergency Response Act 2020* – have a legitimate purpose in reducing the extent to which the right to privacy is impacted by the Check In CBR app contact tracing system.

### *3. Proportionality (s 28(2)(e))*

Additional protections on personal information include:

- a requirement that information is only collected through authorised means – that is, the Check In CBR app or another means permitted under the public health directions;
- limiting the permitted uses of information collected via the Check In CBR app to contact tracing and related compliance uses;
- excluding the use of Check In CBR information in court proceedings unless the person is subject to an investigation or prosecution for failing to comply

with a public health direction about contact tracing or giving false or misleading information about contact tracing; and

- requirements for the protection and destruction of Check In CBR app information.

In addition, the period during which the provisions for the collection and use of personal information operate is limited. The provisions in Part 7A will cease operation at the end of a 12-month period in which no COVID-19 emergency declaration has been in force, or if a COVID-19 management declaration is made before that time, at the end of a 12-month period in which no COVID-19 emergency declaration has been in force.

The Check In CBR app is an effective means to respond to the significant public health risks posed by COVID-19. Minimal personal information is collected in order to identify a person's presence at a location in the ACT. It is considered that the provisions for collection, use, protection, and destruction of personal information minimise the potential for infringement of a person's right to privacy and are therefore proportionate to achieving the legitimate aim.

#### *Offences related to check-in information – strict liability offences*

##### *1. The nature of the right affected and the limitation (s 28 (2) (a) and (c))*

Strict liability offences engage the presumption of innocence under s22(1) of the HR Act by removing the fault elements from an offence. This means that it will be sufficient for the prosecution to establish the factual elements of the offence in order to prove the offence, rather than needing to prove that the person acted intentionally or recklessly. However, it is still possible for a person to raise the defence of reasonable and honest mistake.

##### *2. Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))*

The Bill applies the strict liability offences relating to check-in information that were originally contained in the *COVID-19 Emergency Response Act 2020*. Those offences exclusively reserve personal information collected by the App for contact tracing and compliance with contact tracing purposes. The relocated offences displace, and even prohibit, several uses and disclosures of such information which would ordinarily be permitted under the Territory Privacy Principles (TPPs) set out in the ACT's *Information Privacy Act 2014*. More information on the operation of the Check In CBR app is detailed in the explanatory statement for the COVID-19 Emergency Response (Check In Information) Amendment Bill 2021.

Part 7A of this Bill contains strict liability offences previously contained in the *COVID-19 Emergency Response Act 2020* that apply in the case of:

- collection other than via the Check In CBR app or another method permitted under the public health direction; and
- use of check-in information for purposes other than permitted uses.

The imposition of offences to prohibit conduct considered improper is a legitimate purpose. Furthermore, as the imposition of the offences addresses the misuse or improper collection of privacy information collected through contact tracing, there is a rational connection between the creation of the offences and the objects of the COVID-19 public health measures set out in section 118M of this Bill.

The rationale for inclusion of strict liability offences is to ensure that a sufficiently robust and consistent enforcement regime can operate efficiently as part of an escalating enforcement framework, to meet the purpose of ensuring public health and community wellbeing and confidence in the imposed check-in systems and processes.

### *3. Proportionality (s 28(2)(e))*

The strict liability offences are intended as added safeguards for protecting personal information. The offences support the requirements for the collection of personal information for contact tracing and compliance with contact tracing purposes to be carried out only by those persons authorised to do so, through permitted means, and further for the data to only be used for contact tracing and compliance with contact tracing purposes following which that data is to be destroyed after a defined period.

Strict liability offences are appropriate in a regulatory context where a defendant can reasonably be expected to know what the requirements of the law are, and where the need to establish a fault element in each case would make the enforcement regime less effective.

In this case the strict liability offences will primarily apply to persons responsible for collecting or handling check-in information and those required to comply with a public health direction in relation to contact tracing who should be aware of the regulatory requirements in relation to the collection and use of this information.

The imposition of strict liability for these offences will ensure that the regulatory intent can be effectively achieved, and the offences enforced while allowing for a defence of reasonable mistake where a person was acting under a genuine misapprehension regarding factual issues.

PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)

***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 2021 (No 2)**. In my opinion, having regard to 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*.

.....

Shane Rattenbury MLA  
Attorney-General

## Public Health Amendment Bill 2021 (No 2)

### Detail

#### Clause 1 Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Public Health Amendment Act 2021 (No 2)*.

#### Clause 2 Commencement

This clause provides that, except for section 7 to 11, the Act will commence on the seventh day after its notification day.

Sections 7 to 11 commence on the later of—

- the day after this Act's notification day; and
- the day of commencement of section 3 of the *Public Health Amendment Act 2021*.

Sections 7 to 11 effectively omit the term “COVID-19 declaration” which was intended by the *Public Health Amendment Act 2021* to be used in throughout section 120 of the *Public Health Act 1997*. This Act will omit the term “COVID-19 declaration” and substitute it with a “COVID-19 emergency declaration”. This serves to further differentiate the term from that of a “COVID-19 management declaration”.

#### Clause 3 Legislation amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Public Health Act 1997*. The Bill will also amend the *COVID-19 Emergency Response Act 2020* and the *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020*.

#### Clause 4 Protection from liability

New section 17 (1) (ca) provides that an external reviewer appointed under this section 118ZH (1) of this Act will not incur civil or criminal liability for an act or omission done honestly and without negligence for the *Public Health Act 1997*.

#### Clause 5 New part 6C

This clause inserts a new part 6C entitled “Public health measures— COVID-19” in the *Public Health Act 1997*.

New part 6C establishes a regulatory framework for protecting the public from the public health risks of COVID-19 where those risks may not have escalated to the point

of a public health emergency under part 7 of the *Public Health Act 1997*. This is achieved through the introduction of divisions 6C.1 to 6C.7, under which the Executive may make a ‘COVID-19 management declaration’ empowering the making of Ministerial, Chief Health Officer, and vaccination directions.

The importance of intermittent public health and social measures, including vaccination requirements, together with a rapid and highly effective TTIQ response is critical for ongoing epidemic control. The ability to constrain the rate and extent of epidemic growth of COVID-19 to minimise serious illness, hospitalisation, and fatality to potentially prevent cases from exceeding health sector capacity remains of critical importance to public health in the Territory.

The implementation of temporary public health measures in responding to COVID-19 has the potential to mitigate a public health risk of COVID-19 escalating to the point of a public health emergency declaration and more restrictive measures.

### **New Division 6C.1 Preliminary**

New Division 6C.1 includes the objects and definitions for Part 6C of the *Public Health Act 1997*.

#### New section 118M Objects—pt 6C

New section 118M states that the intent is to establish a regulatory framework for protecting the public from the public health risks of COVID-19. It further reinforces the importance of ensuring that any directions or guidelines made in protection of the public under Part 6C are done so with recognition and respect for the human rights, inherent dignity and needs of the people affected, and are consistent with human rights and subject only to reasonable limits that are demonstrably justified in accordance with section 28 of the HR Act.

The COVID-19 public health response has demonstrated that restrictive measures may necessarily be imposed in order to protect public health and promote the right to life in section 9 of the HR Act, and that these measures may limit other human rights. New section 118M confirms the critical importance of human rights and that any limits on these rights should be justified in responding to COVID-19 under part 6C.

The objectives of the new part 6C and interpretive provisions operate in addition to the existing objective of the *Public Health Act 1997*, and the principles in part 6 of the *Public Health Act 1997*.

#### New section 118N Definitions—pt 6C

New section 118N operates to direct the reader to definitions which are used and defined throughout the new part 6C.

## **New Division 6C.2 COVID-19 management declaration**

New Division 6C.2 provides for the making of a COVID-19 management declaration and enables the use of certain powers under new part 6C to manage the risks to public health presented by COVID-19. A COVID-19 management declaration may be made or extended if the Executive believes on reasonable grounds that COVID-19 presents a serious risk to public health.

Division 6C.2 contains provisions concerning a COVID-19 management declaration, including in relation to:

- the making of a COVID-19 management declaration;
- the duration in which a COVID-19 management declaration is in force;
- extension and revocation of a COVID-19 management declaration;
- the reporting obligations of the Chief Health Officer on the status of the risk presented by COVID-19 while a declaration is in force; and
- the publication of advice from the Chief Health Officer.

### New section 118O COVID-19 management declaration—general

New section 118O sets out the power of the Executive to make a COVID-19 management declaration.

Subsection (1) provides that the Executive may make a COVID-19 management declaration if there are reasonable grounds for believing that COVID-19 presents a serious risk to public health.

Subsection (2) provides that, in forming a belief on reasonable grounds that COVID-19 presents a serious risk to public health, the Executive must consider whether there is a material risk of substantial injury or prejudice to the health of people taking into account the prescribed matters.

Subsection (3) makes it clear that the Executive has the power to make a COVID-19 management declaration in the absence of COVID-19 cases in the Territory and where transmission of COVID-19 is low. This subsection recognises that preventative public health measures may be required where there is a serious risk to public health from outside of the Territory.

Subsection (4) clarifies that the operation of part 6C does not prevent the Minister from declaring a public health emergency in relation to COVID-19 under part 7 or taking any other action the Minister may take under the *Public Health Act 1997*.

Subsection (5) states that a COVID-19 management declaration is a disallowable instrument. Disallowable instruments must be presented to the Legislative Assembly after which the instrument can be disallowed or amended by the



Legislative Assembly. This provides public accountability through scrutiny by the Legislative Assembly of the COVID-19 management declaration.

New section 118P COVID-19 management declaration—duration

New section 118P provides for the duration of a COVID-19 management declaration and requires the Chief Health Officer to regularly review the status of the risk presented by COVID-19 for the Executive to consider whether a COVID-19 management declaration remains justified.

Subsection (1) provides that a COVID-19 management declaration comes into force either immediately after it is made or at a later time stated in the declaration. This means that a declaration cannot be made retrospectively. The period for which a COVID-19 management declaration continues in force must not exceed 6 months beginning on the day stated in the declaration. This ensures a COVID-19 management declaration does not remain in force any longer than is necessary in respond to a serious risk to public health presented by COVID-19.

Subsection (2) empowers the Executive to extend a COVID-19 management declaration, as required, for no longer than 6 months at a time beginning on the date of the extension.

Subsection (3) requires the Chief Health Officer to advise the Executive no later than every 60 days during which a COVID-19 management declaration is in force about the status of the risk presented by COVID-19.

Subsection (4) provides that a failure to by the Chief Health Officer to comply with the requirement in subsection (3) in relation to advising on the status of the risk presented by COVID-19 throughout the declaration does not affect the validity of the declaration, which for the avoidance of doubt includes any extension of the declaration.

Subsection (5) provides that the Executive must revoke a COVID-19 management declaration if the Executive is satisfied that the declaration is no longer justified. This is an important measure to ensure that a COVID-19 management declaration does not continue in force if it is not open to the Executive to be satisfied that there are no longer reasonable grounds for believing that COVID-19 presents a serious risk to public health. The Executive is required to consider any advice which the Chief Health Officer may provide.

Subsection (6) states that an extension of a COVID-19 management declaration is a disallowable instrument.

## New section 118Q COVID-19 management declaration—consultation and public notice

Subsection (1) requires the Executive to ask for and consider any advice of the Chief Health Officer before making or extending a COVID-19 management declaration. This recognises that a decision to make or extend a declaration should be properly informed by public health considerations including any advice provided by the Chief Health Officer. The Executive is not obliged to adopt any advice provided by the Chief Health Officer but must consider any advice available when making a declaration.

Subsection (2) requires the Executive to ensure that, within 7 days after a COVID-19 management is made or extended, any advice provide by the Chief Health Officer on the proposed declaration or extension is publicly notified. The note explains that ‘public notice’ means publishing the advice on an ACT government website or in a daily newspaper circulating in the Territory.

Subsection (3) requires the Executive to ensure that that advice from the Chief Health Officer about the status of the risk presented by COVID-19 required to be provided under section 118P (3), be publicly notified within 7 days after receipt by the Executive.

Subsection (4) provides that a failure by the Executive to comply with a requirement to give public notice of advice from the Chief Health Officer does not affect the validity of the COVID-19 management declaration.

### **New Division 6C.3 Ministerial directions**

New Division 6C.3 provides for the making of a Ministerial direction in relation to public health social measures where the direction is necessary to prevent or alleviate the risk presented by COVID-19. The Minister must ask for advice of the Chief Health Officer prior to making or extending a direction and must consult with the Human Rights Commissioner.

Division 6C.3 contains provisions concerning a Ministerial direction, including in relation to:

- the power of the Minister to make a Ministerial direction;
- the form and content of a Ministerial direction;
- the duration in which a Ministerial direction is in force;
- variation, extension and revocation of a Ministerial direction;
- the consultation requirements for making a Ministerial direction;

- the reporting obligations of the Chief Health Officer about whether the Ministerial direction remains justified; and
- the provision of advice from the Chief Health Officer to the public.

#### New section 118R Ministerial directions—general

Subsection (1) allows the Minister to make a Ministerial direction while a COVID-19 management declaration is in force for the following matters:

- a direction which prevents or limits entry into the Territory or an area in the Territory. An example includes a preventing or limiting the ability of people to enter a residential aged care facility;
- a direction which regulates public or private gatherings. An example includes restrictions on the number of people that may participate in a social gathering at a residence, workplace or in a public space;
- a direction that requires the use of personal protective equipment, such as the wearing of facial masks;
- a direction that regulates the carrying on of activities, businesses, or undertakings. An example includes requiring businesses to implement and comply with a COVID-19 safety plan and density limits;
- a direction that requires the provision of information (including information about the identity of any person), or the production or keeping of documents. An example includes where a person might be required to provide information as a condition of participating in an activity, or entry to a place or area.

Subsection (2) limits the power of the Minister to make a Ministerial direction only where satisfied that the direction is necessary to prevent or alleviate the risk presented by COVID-19.

Subsection (3) requires that a Ministerial direction contain a statement about the nature of the risk presented by COVID-19 and the grounds on which the Minister believes the direction prevents or alleviates the risk. This is an important condition to ensure transparency and accountability, for the public to understand the reasons for requirements imposed by a Ministerial direction. A Ministerial direction may also provide grounds on which the Minister may exempt a person from complying with the direction.

Subsection (4) requires any grounds on which the Minister may exempt a person from complying with a Ministerial direction must adhere to any Ministerial exemption guideline which may be in force in relation to the ground for exemption. This is an important safeguard where the Minister in making a

Ministerial guideline must ask for advice and consider advice from the Chief Health Officer and consult with the Human Rights Commissioner on whether the guidelines are consistent with human rights providing public notice of the same.

Subsection (5) states that a Ministerial direction is notifiable instrument. A notifiable instrument does not need to be presented to the Legislative Assembly and is not subject to disallowance or amendment. This recognises the necessity that measures be adopted and amended quickly to prevent or alleviate the public health risk presented by COVID-19 in circumstances where a COVID-19 management declaration has been made as a disallowable instrument.

#### New section 118S Ministerial directions—duration

Subsection (1) provides that a Ministerial direction comes into force either immediately after it is made or at a later time stated in the declaration. This means that a direction cannot be made retrospectively. The period for which a Ministerial direction remains in force must not exceed 90 days beginning on the day stated in the direction. This ensures a Ministerial direction does not remain in force any longer than required and regular consideration is given to its necessity to prevent or alleviate the risk presented by COVID-19.

Subsection (2) empowers the Minister to extend a Ministerial direction for no longer than 90 days at a time beginning on the date of the extension.

Subsection (3) requires the Chief Health Officer to advise the Minister at least every 30 days during which a Ministerial direction remains in force about whether the Chief Health Officer believes the direction is still justified. This ensures the Minister is receiving the latest advice on the public health situation and necessity of measures implemented in response.

Subsection (4) provides that a failure by the Chief Health Officer to comply with the requirement in subsection (3) to advise the Minister does not affect the validity of the direction or any extension.

Subsection (5) provides that the Minister must revoke a Ministerial direction if satisfied that the direction is no longer justified. This is an important measure to ensure that a direction does not continue in force if it is no longer a necessity to prevent or alleviate the risk presented by COVID-19. The Minister is required to consider any advice which the Chief Health Officer may provide.

Subsection (6) states that an extension of a Ministerial direction is notifiable instrument.

#### New section 118T Ministerial directions—consultation and public notice

Subsection (1) requires the Minister to ask for and consider any advice of the Chief Health Officer prior to making or extending a Ministerial direction. This

recognises that a decision to make or extend a Ministerial direction should be properly informed by public health considerations including any advice provided by the Chief Health Officer. This is an important precondition to the exercise of the power to make a Ministerial direction.

The Minister is not required to adopt the advice of the Chief Health Officer but must give proper consideration to any advice which is provided.

The Minister is further required to consult with the Chief Minister, and separately the Human Rights Commissioner about whether the Ministerial direction is consistent with human rights. The matters which the Minister may consult with the Chief Minister have not been specified and are not intended to be limited.

Subsection (2) empowers the Minister to make or extend a direction in the absence of consultation with the Human Rights Commissioner under subsection (1) where it is considered necessary to alleviate an immediate or imminent risk to public health. The Minister is required to include a statement in the direction that the Human Rights Commissioner has not been consulted as the direction needed to be implemented urgently and consult the Human Rights Commissioner about the direction as soon as practicable after it is made. An example of when a direction may be required urgently is where a new variant of concern is discovered which may require a quick and effective public health response to control or limit transmission.

Subsection (3) requires the publication of any advice from the Chief Health Officer about the making or extending of a Ministerial direction and information on how the direction or extension is consistent with human rights within 7 days after the direction or extension is notified. This is an important requirement to ensure transparency and accountability for the public to understand the reasons for requirements implemented by the Chief Health Officer.

Subsection (4) requires the Minister to ensure that advice which is provided by the Chief Health Officer under section 118S (3) about whether a Ministerial direction is justified be publicly notified within 7 days after receipt.

Subsection (5) states that subsections (1), (2) (b) and (3) do not apply to a Ministerial direction that remakes a direction which is already in force where the changes are minor or technical, or the changes do not result in the direction being more restrictive. A direction may be remade for a number of reasons, including to ease restrictions, implement another requirement which is no less restrictive, or exempt a person from the requirements to comply with the direction, which will not ordinarily require the Minister to engage in consultation and seek advice. This reduces the administrative burden of unnecessary consultation.

Subsection (6) requires the Minister to include a statement in a Ministerial direction where the direction is remade under subsection (5), to the effect that the changes were made in accordance with subsection (5).

Subsection (7) states that a failure by the Minister to comply with subsections (2) (b), (3) or (6) does not affect the validity of the Ministerial direction. Those subsections deal with consultation, statements required to be included in directions, publication of Chief Health Officer advice and statements on consistency with human rights.

#### **New Division 6C.4 Chief health officer directions**

New Division 6C.4 provides for the making of a Chief Health Officer directions in relation to public health measures, including TTIQ where a direction is necessary to prevent or alleviate the risk presented by COVID-19. The Chief Health Officer is required to regularly provide advice on whether any directions made are necessary to prevent or alleviate the public health risk presented by COVID-19. Further the Chief Health Officer is required to consult with the Human Rights Commissioner in making or extending any direction.

Division 6C.4 contains provisions concerning a Chief Health Officer direction, including in relation to:

- the power of the Chief Health Officer to make a direction;
- the form and content of a direction;
- the duration in which a direction is in force;
- variation, extension and revocation of a direction;
- the human rights consultation requirements for making a direction;
- the reporting obligations of the Chief Health Officer to the Minister about whether a direction remains justified; and
- the provision of advice to the public on how the direction or extension is consistent with human rights.

#### **New section 118U Chief health officer directions—general**

Subsection (1) allows the Chief Health Officer to make a direction while a COVID-19 management declaration is in force in relation to the following matters:

- a requirement for the medical examination or testing of a person. An example is a direction may require all international arrivals to undergo a COVID-19 test and may make provision about the circumstances, type and manner in which a test is to be undertaken;

- the segregation or isolation of a person (a ***segregation or isolation direction***). An example is where a person is required to isolate or quarantine whether that be as a result of a person being diagnosed with COVID-19 or where the person is at risk of developing COVID-19 due to potential exposure;
- a direction that requires the provision of information (including information about the identity of any person), or the production or keeping of documents. An example may include the provision of vaccination information to assess the risk of infection and onward transmission.

Subsection (2) limits the power of the Chief Health Officer to make a direction to circumstances where the direction is necessary to prevent or alleviate the risk presented by COVID-19.

Subsection (3) requires that a Chief Health Officer direction contain a statement about the nature of the risk presented by COVID-19 and the grounds on which the Chief Health Officer believes the direction prevents or alleviates the risk. This is an important condition to ensure transparency and accountability, for the public to understand the reasons for requirements which may require medical examination or testing, restrict movement or compel information. The Chief Health Officer may include grounds in the direction on which a person is exempt from complying with the direction. This may include an exemption from part of a direction and need not be an exemption to the entire operation of the direction.

Subsection (4) requires any grounds, on which the Chief Health Officer exempts a person from complying with a direction, to adhere to any Chief Health Officer exemption guideline which may be in force. This is an important safeguard where a Chief Health Officer guideline requires consultation with the Human Rights Commissioner on whether the guidelines are consistent with human rights.

Subsection (5) requires that a Chief Health Officer direction to an individual be given to the individual in writing.

Subsection (6) states that a Chief Health Officer direction, other than in relation to an individual, is a notifiable instrument.

New section 118V Chief health officer directions—additional matters for segregation or isolation directions

Subsection (1) limits the power of the Chief Health Officer to make a segregation or isolation direction, whether or not on an individual, to fourteen days on each occasion the direction applies to the individual. An example where a direction may apply to a, individual on “each occasion” could be where the person is identified as a close contact of more than one person diagnosed with COVID-19.

Subsection (2) provides an exception to the time limit on a person being segregated or isolated for a period of no more than 14 days, where the person:

- tests positive for COVID-19; or
- has not been tested for COVID-19 as required under the direction; or
- has not otherwise returned a negative result for COVID-19 when tested as required under the direction.

Subsection (3) provides that a segregation or isolation direction does not apply in the event of an emergency. The examples included are not exhaustive and direct the reader to some of the circumstances where this would apply. Subsection (4) requires a segregation or isolation direction to include circumstances where subsection (3) applies.

#### New section 118W Chief health officer directions—duration

Subsection (1) states that a Chief Health Officer direction comes into force either immediately after it is made or at a later time stated in the direction, and a Chief Health Officer direction made to an individual comes into force immediately after it is given to the person or at a later time stated in the direction. This means that a direction cannot be made retrospectively.

Subsection (2) restricts a Chief Health Officer direction (other than in relation to an individual) from being in force for longer than 90 days beginning on the day stated in the direction. This ensures a Chief Health Officer direction does not remain in force any longer than required and regular consideration is given to its necessity to prevent or alleviate the risk presented by COVID-19.

Subsection (3) empowers the Chief Health Officer to extend a Chief Health Officer direction (other than in relation to an individual) for no longer than 90 days at a time beginning on the date of the extension. There is no limit to the number of times a Chief Health Officer direction may be extended but it must be necessary to prevent or alleviate the risk presented by COVID-19.

Subsection (4) requires that any extension of a Chief Health Officer direction is issued on an individual be in writing.

Subsection (5) states that an extension of a Chief Health Officer direction (other than in relation to an individual) is a notifiable instrument.

#### New section 118X Chief health officer directions—review

Subsection (1) states that section 118X applies to a Chief Health Officer direction made or extended but it does not apply to Chief Health Officer directions in relation to an individual.



Subsection (2) requires the Chief Health Officer to advise the Minister at least every 30 days during which a Chief Health Officer direction remains in force about whether the direction is still justified. This ensures oversight and public accountability where the Minister is able to consider the advice on the public health situation and necessity of measures implemented in response.

Subsection (3) provides that the Chief Health Officer must revoke a Chief Health Officer direction if satisfied that the direction is no longer justified. This is an important measure to ensure that a direction does not continue in force if it is no longer a necessity to prevent or alleviate the risk presented by COVID-19.

Subsection (4) provides that a failure by the Chief Health Officer to comply with the requirement in subsection (2) to advise the Minister on the whether the direction remains justified does not affect the validity of the direction.

#### New section 118Y Chief health officer directions—consultation and public notice

Subsection (1) states that section 118Y applies to a Chief Health Officer direction made or extended but it does not apply to Chief Health Officer directions in relation to an individual.

Subsection (2) requires the Chief Health Officer to consult with the Human Rights Commissioner about whether the Chief Health Officer direction or extension is consistent with human rights.

Subsection (3) empowers the Chief Health Officer to make or extend a direction in the absence of consultation with the Human Rights Commissioner under subsection (2) where it is considered necessary to alleviate an immediate or imminent risk to public health. The Chief Health Officer is required to include a statement in the direction that the Human Rights Commissioner has not been consulted and must consult the Human Rights Commissioner about the direction as soon as practicable after it is made. An example of when a direction may be required urgently is where a new variant of concern is discovered which may require a quick and effective public health response to control or limit transmission.

Subsection (4) requires Chief Health Officer to publish information on how the direction or extension is consistent with human rights within 7 days after the direction or extension is notified. This is an important requirement to ensure transparency and accountability for the public to understand the reasons for requirements implemented or extended by the Chief Health Officer.

Subsection (5) requires the Chief Health Officer to publish any advice given the Minister under section 118X (2) about the justification for a Chief Health Officer direction within 7 days after provision of the advice.

Subsection (6) states that subsections (2), (3) (b) and (4) do not apply to a Chief Health Officer direction that remakes a direction which is already in force where the changes are minor or technical, or the changes do not result in the direction being more restrictive. A direction may be remade for a number of reasons, including to ease restrictions, implement another requirement which is no less restrictive, or exempt a person from the requirements to comply with the direction, which will not ordinarily require the Minister to engage in consultation and seek advice. This reduces the administrative burden of unnecessary consultation.

Subsection (7) requires the Chief Health Officer to include a statement in a Chief Health Officer direction where the direction is remade under subsection (6), to the effect that the changes were made in accordance with subsection (6).

Subsection (8) states that a failure by the Chief Health Officer to comply with subsections (3) (b), (4), (5) or (7) does not affect the validity of the Chief Health Officer direction. Those subsections deal with consultation, statements required to be included in directions, publication of Chief Health Officer advice and statements on consistency with human rights.

### **New Division 6C.5 Vaccination directions**

New Division 6C.5 provides for the making of a vaccination where the direction is considered necessary to prevent or alleviate the risk presented by COVID-19. In making or extending a vaccination direction, the Executive must ask for the advice of the Chief Health Officer and must consult with the Human Rights Commissioner about the proposed vaccination direction.

Division 6C.5 contains provisions concerning a vaccination direction, including in relation to:

- the power of the Executive to make a vaccination direction;
- the form and content of a vaccination direction;
- the duration in which a vaccination direction is in force;
- variation, extension and revocation of a vaccination direction;
- the consultation requirements for making a vaccination direction;
- the reporting obligations of the Chief Health Officer about whether the vaccination direction remains justified; and
- the provision of advice from the Chief Health Officer to the public.

### New section 118Z—Vaccination directions—general

This section specifies that the Executive may make a vaccination direction while a COVID-19 management declaration is in force for a person to be vaccinated against COVID-19 to prevent or restrict a person to do any of the following:

- (i) engage in particular work;
- (ii) work at a particular workplace;
- (iii) access a particular place;
- (iv) engage in a particular activity.

Division 6C.5 is intended to ensure that only certain high-risk work, activity or places be targeted by a vaccination direction. A vaccination direction is a disallowable instrument.

This power may only be exercised where a COVID-19 management declaration is in force and there are stated grounds for the direction justifying the direction is needed to prevent or alleviate the risk of COVID-19. The new Division 6C.5 includes accountability mechanisms of time-limited duration and review (s118ZA), and requirement to seek Chief Health Officer advice, consult the Human Rights Commissioner and give public notice of the Chief Health Officer's advice and how the direction is consistent with human rights (s118ZB).

Section 118Z (1)(c) includes a requirement for the provision of information (including information about the identity of a person), or production or keeping of documents in relation to a vaccination direction with the intention of monitoring and ensuring compliance with this direction, for instance to maintain vaccination records at a workplace.

This section provides that the Executive may only make a vaccination direction if satisfied that it is necessary to prevent or alleviate the risk presented by COVID-19.

A vaccination direction must include a statement about the grounds on which the Executive believes it is necessary to prevent or alleviate the risk of COVID-19, and the medical grounds (if any) or other grounds on which the Executive may exempt a person from complying with a vaccination direction.

Section 118Z (5) provides that a vaccination direction must not prevent or limit a person from obtaining essential goods or services. Two stated examples are provided which are non-exhaustive: buying groceries or accessing medical treatment.

### New section 118ZA—Vaccination directions—duration

This section provides that a vaccination direction comes into force immediately after it is made or at a later time stated in the direction, and can remain in force for up to, but no longer than, 90 days.

A vaccination direction can be extended on one or more occasions but not longer than 90 days on each occasion.

The Chief Health Officer must, at least every 30 days during which a vaccination direction is in force, advise the Executive about whether the direction is still justified. A failure of the Chief Health Officer to do so does not affect the validity of the direction.

A vaccination direction must be revoked if the Executive decides, on the basis of the Chief Health Officer's advice, that it is no longer justified. The direction is revoked if the COVID-19 management declaration is revoked.

An extension of a vaccination direction is a disallowable instrument.

### New section 118ZB—Vaccination directions—consultation and public notice

In making or extending a vaccination declaration, the Executive must ask for, and take into account, advice from the Chief Health Officer about the proposed direction.

This advice must be made public through the issue of a public notice within 7 days after a vaccination direction is made or extended. Similarly, the Executive must also give public notice of the Chief Health Officer's advice given under 118ZA (3) to the Minister about the status of the risk of COVID-19 warranting the continuation of the direction.

The Executive must also advise, in a public notice, how a vaccination direction or extension of a direction is consistent with human rights.

Public reporting requirements and consideration of Chief Health Officer advice is not required if a direction is remade for minor or technical reasons, or the change does not result in the remade direction being more restrictive than the revoked direction. If satisfied with this, the Executive would also need to include a statement to the effect of the above in the remade direction.

If the Executive fails to comply with the above public reporting requirements, including how the direction is consistent with human rights, the validity of the direction is not affected.

## **New Division 6C.6 Exemptions**

### **New Subdivision 6C.6.1 Preliminary**

New Division 6C.6 establishes an exemption scheme in relation to Executive, Ministerial or Chief Health Officer directions which can be made under divisions 6C.3, 6C.4 and 6C.5. This Division includes:

- establishing how a person to whom a direction applies can apply for an exemption;
- how an exemption decision is made;
- how an internal review may be sought;
- circumstances under which an external review may be sought;
- how exemptions guidelines are made and notified.

#### New section 118ZC—Definitions—div 6C.6

This section specifies definitions used in this new division, specifically:

‘Affected person’, meaning:

- a person to whom a Ministerial or Chief Health Officer direction applies;  
or
- a person to whom an internally or externally reviewable decision has been made.

‘Externally reviewable decision’, meaning:

- A reviewable exemption decision in relation to an application to enter the ACT for medical or compassionate reasons, or for an exemption decision in relation to a segregation or isolation direction.

‘Internally reviewable decision’, meaning:

- A decision to give an exemption subject to conditions or a decision not to give an exemption.

‘Relevant decision maker’, meaning:

- The decision maker in relation to an application to exempt a person from a Ministerial or Chief Health Officer direction.

## **New subdivision 6C.6.2—Exemptions—Ministerial and Chief Health Officer directions**

This new subdivision provides for how a person to whom a Ministerial or Chief Health Officer direction applies may apply for an exemption and how a decision is made in relation to an exemption application.

### New section 118ZD—Exemptions—application

This section provides for how a person to whom a Ministerial or Chief Health Officer direction applies (an affected person) may apply for an exemption.

An exemption application must be made in writing, stating the grounds on which the exemption is sought. This can be made for one or more reasons including medical or compassionate grounds, or other grounds stated in the Ministerial or Chief Health Officer direction. These grounds are guided by and limited by grounds stated in Ministerial or Chief Health Officer exemption guidelines.

The relevant decision maker may, in writing, request that the affected person provide additional information so that the decision maker can make a reasonable decision on the application. The affected person must provide any additional information requested within 7 days or the relevant decision maker may refuse to give further consideration to the application.

### New section 118ZE—Exemptions—decision

This section provides for how a decision is made in relation to an affected person seeking an exemption to a Ministerial or Chief Health Officer direction.

On application, the Minister or Chief Health Officer, or a person delegated as the decision maker, may grant an exemption if satisfied on grounds stated in the direction, including for medical or compassionate grounds, or if satisfied on other grounds that an exemption is appropriate.

An exemption may be subject to conditions, which would be specified in the exemption given.

If an exemption is not given, the decision maker must notify the applicant in writing of the decision. For a segregation or isolation direction, the decision maker must notify the applicant within 3 days after the application is made, or 3 days after the affected person gives the decision maker additional information. In any other case, decision maker must notify the applicant within 5 days after the application is made, or 5 days after the affected person gives the decision maker additional information. If a response is not provided by the decision maker, it should be taken to mean a decision to provide an exemption has been refused.

In reaching a decision, the relevant decision maker must comply with any requirement set in a Ministerial or Chief Health Officer exemption guideline.

If a decision maker makes a decision which is internally reviewable, it must be stated in writing that the affected person may apply for an internal review of the decision.

### **New subdivision 6C.6.3—Exemptions—Ministerial and Chief Health Officer direction—internal review**

This new subdivision provides for how an internal review of a Chief Health Officer or Ministerial exemption decision may be sought and how an internal review decision is made.

A person who has applied for an exemption from complying with a Ministerial or Chief Health Officer direction may apply in writing for an internal review of an exemption decision or a condition placed on an exemption decision.

An internal review is an internal ACT Government review of an exemption decision.

The internal reviewer must review the exemption decision and either confirm the decision, vary the decision or revoke the decision and make a new decision. The internal reviewer must give written notice of their decision within 3 days after receiving the application for an internal review if the decision relates to a segregation or isolation direction, or 5 days in any other case. Failure to give notice is taken to be confirmation of the original exemption decision.

### **New section 118ZF—Internal review—application**

This new section provides for how an affected person in relation to an internally reviewable decision may apply for review of the decision.

An internal review of a Ministerial or Chief Health Officer direction must be sought in writing and must set out the grounds on which the review of the decision is sought.

### **New section 118ZG—Internal review—decision**

This new section provides that if an application for an internal review of a reviewable decision is made under section 118ZF, an internal reviewer must review the exemption decision made by the decision maker. The internal reviewer must be another person (a different person to the decision maker).

On application, the internal reviewer must either confirm the decision, vary the decision or revoke the decision and make a new decision. The internal reviewer must give written notice of their decision within 3 days after receiving the application for an internal review if the decision relates to a segregation or isolation direction, or 5 days in any other case. Failure to give notice is taken to be confirmation of the original exemption decision.

If an internal reviewer makes a decision which is externally reviewable, the internal reviewer must advise the affected person in writing that they may apply for an external review of the decision.

#### **New subdivision 6C.6.4 Exemptions—Ministerial and Chief Health Officer directions—external review**

This new subdivision provides for how an external review of a Ministerial or Chief Health Officer exemption decision may be sought and how an external review decision is made.

#### New section 118ZH – Ministerial and Chief Health Officer exemptions – from external reviewer

The Minister may appoint at least one person as an external reviewer. An external reviewer must be a Magistrate or a retired Magistrate, a Judge or a retired Judge, or a legal practitioner with no less than five years' experience and must consent in writing to be appointed as an external reviewer.

Division 19.3.3 of the Legislation Act (Appointments – Assembly consultation) does not apply to an appointment of an external reviewer.

#### New section 118ZI – External review – application

This section provides for how an affected person in relation to an externally reviewable decision may apply for an external review of the decision.

An external review of a Ministerial or Chief Health Officer direction must be sought in writing and must set out the grounds on which the review of the decision is sought.

#### New section 118ZJ – External review – decision

This new section provides that if an application for an internal review of a reviewable decision is made under section 118ZI, an external reviewer must review the externally reviewable decision against the relevant requirements under this Act and other requirements, if any, in relation to a Ministerial or Chief Health Officer guideline.

After completing the review, the external reviewer must either confirm the decision, vary the decision, revoke the decision and make a new decision, or refer the decision to the relevant decision maker for the decision to be remade.

If the decision is referred to the relevant decision maker decision to be remade, the external reviewer must tell the decision maker how the decision did not comply with the relevant requirements.



## **New Subdivision 6C.6.5 Exemption guidelines**

### New section 118ZK—Exemptions—Ministerial directions—guidelines

This section provides that the Minister may make guidelines setting out how a person can apply for and be granted with an exemption from complying with a Ministerial direction. The Minister must ensure guidelines are in force while a Ministerial direction is in force.

A Ministerial exemption guideline may be made about the following:

- Making and considering an application for an exemption;
- Making and considering an application for review of an internally reviewable decision;
- Making and considering an application for review of an externally reviewable decision;
- The grounds on which, or any limitations on the ground which, an exemption may be given.

In making a guideline specifying the above, the Minister must take into account advice from the Chief Health Officer and must consult with the Human Rights Commissioner about whether the guidelines are consistent with human rights. The Minister must also, within 7 days after a guideline is notified, give public notice of the advice of the Chief Health Officer and how the guideline is consistent with human rights.

A Ministerial direction exemption guideline is a notifiable instrument.

### New Section 118ZL—Exemptions—Chief Health Officer directions—guidelines

This section provides that the Chief Health Officer may make guidelines setting out how a person can apply for and be granted with an exemption from complying with a Chief Health Officer direction. The Chief Health Officer must ensure guidelines are in force while a Chief Health Officer direction is in force.

A Chief Health Officer exemption guideline may be made about the following:

- Making and considering an application for an exemption;
- Making and considering an application for review of an internally reviewable decision;
- Making and considering an application for review of an externally reviewable decision;

- The grounds on which, or any limitations on the ground which, an exemption may be given.

In making a guideline specifying the above, the Chief Health Officer must consult with the Human Rights Commissioner about whether the guidelines are consistent with human rights. The Chief Health Officer must also give public notice of how the guideline is consistent with human rights.

A Chief Health Officer direction exemption guideline is a notifiable instrument.

#### New Section 118ZM—Exemptions—vaccination directions—guidelines

This section provides that the Executive may make guidelines setting out how a person can apply for and be granted with an exemption from complying with a vaccination direction.

In making a vaccination exemption guideline, the Executive must take into account advice from the Chief Health Officer and must consult with the Human Rights Commissioner about whether the guidelines are consistent with human rights. The Executive must also, within 7 days after a guideline is notified, give public notice of the advice of the Chief Health Officer and how the guideline is consistent with human rights.

A person applying for an exemption to a vaccination requirement or otherwise taking action in relation to an exemption from a requirement to comply with a vaccination direction must comply with the requirements (if any) in a vaccination direction exemption guideline.

Certain requirements applying to Ministerial and Chief Health Officer exemption guidelines including in relation to internal and external review do not apply to vaccination directions. This is because vaccination directions and vaccination exemption guidelines will be based on ATAGI and Australian Government guidance and advice. Further, matters relating to vaccination direction exemptions will be medical assessments and not decisions amenable to administrative review as is the case with Ministerial and Chief Health Officer directions.

A vaccination exemption direction guideline made by the Executive is a notifiable instrument.

#### **New Division 6C.7 Miscellaneous**

##### New section 118ZN Offence—failure to comply with direction

Subsection (1) introduces an offence where a person fails to comply with a direction in force under part 6C. The maximum penalty for this offence is 50 penalty units.

Subsection (2) states that strict liability applies to the fault element of the offence in relation to a direction being in force under part 6C.

Subsection (3) provides that a defence for failing to comply with a direction under part 6C if the person has a reasonable excuse. The notes direct the reader to section 41 and 58 of the *Criminal Code 2002* outlining that the defendant has an evidential burden in relation to the defence and that a person is not criminally responsible for an offence in a sudden or extraordinary emergency.

Subsection (4) provides that before requiring a person to comply with a direction an authorised person must, if reasonably practicable, warn the person that failure to comply with the direction without a reasonable excuse is an offence.

Subsection (5) provides that failure by an authorised officer to warn a person under subsection (4) does not affect the liability of the person to be prosecuted or for an infringement notice to be given.

The approach to the new offence has adopted the approach taken with the Public Health Amendment Bill 2021 presented in the ACT Legislative Assembly on 10 November 2021.

#### New section 118ZO Directions—cautioning requirements

New section 118ZO sets out requirements that apply if a police officer believes a person who is 18 years or older has committed an offence against section 11ZN (1).

Subsection (4) provides that section 187 (1) of the *Crimes Act 1900* (ACT) does not apply to an infringement notice offence in relation to questioning about a reasonable excuse where:

- before questioning the person about whether they have a reasonable excuse for not complying with the direction, the police officer warns the person that they do not have to answer questioning or do anything but that anything they say or do may be used in evidence in accordance with section 120C (2); and
- the police officer intends to serve an infringement notice on the person or take no further action against the person in relation to the offence.

A note states that section 187 (1) of the *Crimes Act 1900* (ACT) applies Part 1C of the *Crimes Act 1914* (Cwlth) to ACT offences not punishable by imprisonment or punishable by imprisonment for 12 months or less.

#### New section 118ZP Compensation—pt 6C

New section 118ZP provides that a person is not entitled to compensation in relation to any loss or damage by a person as a result of anything done in the

exercise of a function under new part 6C. There is the potential for a large portion of the population to be directly affected by the exercise of powers under part 6C. The Act introduces sufficient and comprehensive safeguards on the exercise of a function under new part 6C, which objects remain to protect the public from the public health risks of COVID-19 noting the importance of human rights approach in the exercise of a function.

The Commonwealth and Territory governments have provided a range of economic supports throughout the COVID-19 public health emergency. The Territory retains the ability to implement support arrangements where there are significant impacts as a result of COVID-19.

A person may seek judicial review in relation to a decision made under the proposed new Part 6C. In the event the ACT Supreme Court finds a direction or decision made was unlawful in respect of a cause of action, the Court may make an order to provide a remedy in relation to the cause of action.

#### New 118ZQ Consideration of Ministerial and chief health officer directions by standing committee of Assembly

New section 118ZQ provides that the relevant standing committee nominated by the speaker for the section or the standing committee of the Legislative Assembly responsible for consideration of legal issues must report to the Assembly about human rights issues raised by Ministerial and Chief Health Officer Directions.

This section has been included to serve as a further safeguard to ensure human rights are considered and addressed in the making of Ministerial and Chief Health Officer directions. The requirement for the standing committee to consider and report on human rights issues that arise sits alongside related requirements:

- for human rights to be considered when making a COVID-19 Management Declaration and directions;
- to consult with Human Rights Commission in relation to certain matters; and
- to publish statements on how directions are consistent with human rights.

#### **Clause 6 Emergency declarations—section 119**

This clause omits the term “COVID-19 declaration” in section 119 of the *Public Health Act 1997* and substitutes it for “COVID-19 emergency direction”. This differentiates a COVID-19 emergency declaration under part 7 from that of a COVID-19 management declaration introduced under new part 6C.

## **Clause 7 Section 119 (7)**

This clause omits section 119 (7) of the *Public Health Act 1997*, which contains the definition of COVID-19 declaration. The new definition COVID-19 emergency direction which substitutes COVID-19 declaration has been inserted into the Dictionary.

## **Clause 8 Emergency actions and directions—section 120 (9), definition of COVID-19 declaration**

This clause omits the definition “COVID-19 declaration” in section 120 (9) of the *Public Health Act 1997*, as introduced by the *Public Health Amendment Bill 2021*.

## **Clause 9 Section 120 (9), definition of COVID-19 direction**

This clause omits the term “COVID-19 declaration” used in the definition of COVID-19 direction in section 120 (9) of the *Public Health Act 1997*, as introduced by the *Public Health Amendment Bill 2021*, and substitutes it for “COVID-19 emergency declaration”.

## **Clause 10 COVID-19 direction—expiry section 120D (1)**

This clause omits the term “COVID-19 declaration” within the definition “COVID-19 direction” in section 120D (1) of the *Public Health Act 1997*, as introduced by the *Public Health Amendment Bill 2021*, and substitutes it for “COVID-19 emergency declaration”.

## **Clause 11 Section 120D (2), definition of COVID-19 declaration**

This clause omits the definition of “COVID-19 declaration” in section 120D (2) of the *Public Health Act 1997*, as introduced by the *Public Health Amendment Bill 2021*.

## **Clause 12 Compensation section 122 (3) (c)**

This clause omits the term “COVID-19 declaration” in the *Public Health Act 1997* and substitutes it for “COVID-19 emergency declaration”.

## **Clause 13 Section 122 (4), definition of COVID-19 declaration**

This clause omits the definition of “COVID-19 declaration” in section 122(4) of the *Public Health Act 1997*, in accordance with clause 7 above.

## **Clause 14 New part 7A**

The Explanatory Statement and Supplementary Explanatory Statement to the COVID-19 Emergency Response (Check-in Information) Amendment Bill 2021 contain an overview on the provisions under new part 7A of the Act.

The following table is provided to assist the reader with cross-referencing of the provisions of the Act with the Explanatory Statement to the COVID-19 Emergency Response (Check-in Information) Amendment Bill 2021.

<b>Public Health Amendment Act 2021 (No 2)</b>	<b>COVID-19 Emergency Response Check-in Information Amendment Bill 2021</b>
Clause 14 new part 7A	Clause 5 — new section 2 etc
Section 123A Definitions—pt 7A	New section 2C – Definitions-pt 2
Section 123B Collection of check-in information	New section 2D – Collection of check-in information
Section 123C Use of check-in information	New section 2E – Use of check-in information
Section 123D Check-in information not admissible in court	New section 2F check-in information only admissible in court for limited purposes
Section 123E Protecting and destroying check-in information	New section 2G – Protecting and destroying check-in information

The new part 7A inserts into the *Public Health Act 1997*, the provisions relating to the protection of information collected through the Check In CBR app under the COVID-19 Emergency Response Act 2020. The consequential amendments in schedule 1 will omit the provisions from the *COVID-19 Emergency Response Act 2020* which will be inserted in the new part 7A.

### **Clause 15 New section 136A**

This clause inserts new section 136A under which the definitions “COVID-19”, “COVID-19 emergency declaration”, and “COVID-19 management declaration” introduced by this Act are set to expire on the later of:

- the expiry of the new part 6C (Public health measures—COVID-19);
- the expiry of section 120D (COVID-19 directions—expiry);
- the expiry of the new part 7A (Check-in information—COVID-19).

## Clause 16 Dictionary, new definitions

This clause inserts new definitions into the Dictionary of the *Public Health Act 1997*, which are used throughout new parts 6C and 7A and section 120D.

### Schedule 1 Consequential amendments

#### Part 1.1 COVID-19 Emergency Response Act 2020

Part 1.1 omits provisions in the *COVID-19 Emergency Response Act 2020* relating to the protection of information collected through the Check In CBR app where those provisions will be inserted in to this Act.

#### Part 1.2 Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020

Part 1.2 inserts the new section 118ZN (1) offence introduced by this Bill into the *Magistrates Court (Public Health (COVID-19) Infringement Notices Regulation 2020* (the Regulation).

Part 1.2 also substitutes section 13 (1) of the Regulation to provide that the Regulation expires on the later of the following:

- at the end of a 12-month period during which no COVID-19 emergency has been in force;
- if a COVID-19 management declaration has been made before the end of the above period, then at the end of a 12-month period during which no COVID-19 management declaration or extension has been in force.

The above provisions are important to ensure the safeguards that have been provided for under the Regulation in relation to the infringement notice scheme are able to continue to address the scale and particular threat posed by the COVID-19 and is not intended to be used more generally for an offence against the *Public Health Act 1997*.