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

PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)

GOVERNMENT AMENDMENTS

SUPPLEMENTARY EXPLANATORY STATEMENT

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PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)

Government Amendments

Outline of Government Amendments

On 2 December 2021, the Public Health Amendment Bill 2021 (No 2) (the Bill) was introduced into the Legislative Assembly. The Bill includes provisions to establish 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. The 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.

In presenting the Bill, the Minister for Health referred the Bill to the Standing Committee on Health and Community Wellbeing (the Committee) to undertake an inquiry to ensure members of the Legislative Assembly, stakeholder organisations, statutory authorities including the ACT Human Rights Commission, and general members of the public had the opportunity to review the proposed legislation and provide feedback for the Government to consider prior to debate on the Bill.

On 28 February 2022, the Committee published its report on its Inquiry into the Public Health Amendment Bill 2021 (No 2) (the report). On 22 March 2022, the ACT Government tabled its response to the Committee's report.

This supplementary explanatory statement relates to the Government amendments to the Bill as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Government amendment and help inform debate on it. It does not form part of the Bill and has not been endorsed by the Legislative Assembly. A more detailed explanation of the purposes and intended operation of the Bill are set out in the Explanatory Statement for the Bill.

The Government amendments to the Bill seek to provide a balanced approach in ensuring Directions made under the Bill protect the health and wellbeing of Canberrans from the risks associated with COVID-19 while balancing key human rights considerations and limitations.

Consultation on the Proposed Approach

The Government amendments have been drafted in response to recommendations from the Committee report on its Inquiry into the Bill and take into consideration consultation undertaken with the ACT Human Rights Commission. The amendments to the Bill were developed in consultation with the Justice and Community Safety Directorate.

Consistency with Human Rights

The preamble to the *Human Rights Act 2004* (ACT) states 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 Human Rights Act with subsection (2) stating that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

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

A detailed assessment of the rights engaged, promoted and limited under the Bill is set out in the Explanatory Statement for the Bill.

Rights Engaged

The Government amendments engage and may ***promote*** the right to life and protection of the family and children under section 9 and 11 of the Human Rights Act, respectively.

The Government amendments engage and may ***limit*** the right to privacy and reputation under section 12 of the Human Rights Act.

Rights Promoted

In its entirety, the Bill promotes the right to life under section 9 of the Human Rights 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.

Government amendment 24 engages and may promote the right to protection of the family and children (section 11) and the right to humane treatment when deprived of liberty (section 19) under the Human Rights Act by providing that a direction under a COVID-19 management declaration is not intended to interfere with oversight entities fulfilling a function which involves visiting a place of detention under another territory law.

Section 11 (2) of the Human Rights 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.

There are a number of important statutory roles which seek to protect children in places of detention and the Government amendment 24 seeks to ensure that is not displaced by the new part 6C of the Bill.

Oversight agencies are important mechanisms to ensure a person is treated humanely while deprived of liberty. Government Amendment 24 clarifies that nothing in the proposed new part 6C is intended to interfere with the exercise of a function by an oversight entity.

Government amendment 24 does provide that a person visiting a place of detention must comply with relevant directions that may apply. This may include a requirement to use Personal Protective Equipment while at the place of detention or to adhere to isolation or quarantine requirements if the person employed by the oversight entity is confirmed to have been infected with COVID-19 or has been exposed to a COVID-19 confirmed positive person.

Government amendment 22 provides for an internal right of review for an exemption decision in relation to complying with a requirement in a vaccination direction. The internal right of review is a measure to ensure vaccination directions do not have unintended consequences that may impact on an affected person's wellbeing.

This measure is in addition to existing mechanisms in the Bill that ensure that limits on human rights by vaccination directions under the Bill are reasonable and proportionate. These mechanisms provide that: before making a vaccination direction, the Executive must consult with the Chief Health Officer and the Human Rights Commissioner, the publication of this advice, publication of information on how the direction is consistent with human rights and that vaccination directions are disallowable instruments. Further, at least every 30 days a vaccination direction is in force, the Chief Health Officer must advise the Executive about whether they believe the direction is still justified.

Rights Limited

Government amendment 5 may limit the right to privacy as far as it requires a segregation or isolation direction issued on an individual to be given to the Public Advocate. The issuing of an isolation direction on an individual will contain information about the nature of the risk the person presents and the grounds on which the direction is considered necessary to prevent or alleviate the risk.

Accordingly, an isolation direction will include health information about an individual and the risk they present to the broader community.

Legitimate purpose (s28(2)(b))

The measure will assist an individual in obtaining assistance from the Public Advocate and further strengthen the protection of the health and safety of both the individual while ensuring that their rights are protected and advocated for.

Rational connection between the limitation and the purpose (s28(2)(d))

This measure is necessary and rationally connected to continuing to achieve the purpose of promoting and protecting the interests of the individual and protecting the right to life not only of the individual but of the broader community.

Proportionality (s28 (2)(e))

The measure is considered a reasonable limit to human rights because the ACT Government has a duty 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 provision of personal health information to the Public Advocate is the least restrictive approach available in the circumstances to ensure the person is able to obtain timely assistance from an independent oversight body.

Public Health Amendment Bill 2021 (No 2)

Detail

Government Amendment 1

Clause 5

Proposed new section 118N, definition of *vaccination direction*

Page 4 line 4—

This amendment corrects the definition of *vaccination direction* removing the reference to 'section 118ZM (1)' and replacing it with 'section 118Z (1)' which is the section that empowers the Executive to make a vaccination direction.

Government Amendment 2

Clause 5

Proposed new section 118P (1) (b)

Page 5, line 12—

This amendment removes '6 months' and replaces it with '90 days'.

Section 118 (1) (b) provides that a COVID-19 management declaration may remain in force for the period stated in the declaration of no longer than 6 months. This amendment reduces the period for which a COVID-19 management declaration may remain in force to 90 days.

This amendment is aimed at addressing the concern raised by recommendation 3 of the Committee report relating to the period of time during which a declaration may remain in force.

Government Amendment 3

Clause 5

Proposed new section 118P (2)

Page 5, line 16—

This amendment removes '6 months' and replaces it with '90 days'.

Section 118P (2) empowers the Executive to extend a COVID-19 management declaration, as required, for no longer than 6 months at a time. This amendment reduces that period from 6 months to 90 days.

This amendment is aimed at addressing the concern raised by recommendation 3 of the Committee report relating to the period of time during which a declaration may remain in force.

Government Amendment 4

Clause 5

Proposed new section 118P (3)

Page 5, line 18—

This amendment removes '60 days' and replaces it with '30 days'.

Section 118P (3) requires the Chief Health Officer to advise the Executive about the status of the risk presented by COVID-19 at least every 60 days. This amendment reduces that period from 60 days to 30 days.

The Chief Health Officer advice will assist the Executive in determining whether there are reasonable grounds for determining whether there are reasonable grounds for believing that COVID-19 presents a serious risk to public health such that a COVID-19 management declaration should remain in force.

This amendment is aimed at addressing the concern raised by recommendation 3 of the Committee report relating to the period of time during which a declaration may remain in force and consequentially a reduction in the intervals under which the Chief Health Officer is required to advise the Executive on the status of the COVID-19 risk.

Government Amendment 5

Clause 5

Proposed new section 118V (5)

Page 11, line 26—

This amendment inserts a new subsection 118V (5) which requires the Chief Health Officer to give a copy of a segregation or isolation direction to the public advocate, where a segregation or isolation order is issued to an individual.

This amendment is aimed at addressing the concern raised by recommendation 8 of the Committee report relating to requirements for the notification to an appropriate oversight entity.

Government Amendment 6

Clause 5

Proposed new section 118Z (3) (b)

Page 15, line 15—

This amendment removes 'the Executive' and replaces it with 'the director-general'.

Section 118Z (3) (b) is a consequential amendment having included review rights for a vaccination direction with the director-general being the relevant decision-maker in relation to an application to exempt a person.

Government Amendment 7

Clause 5

Proposed new section 118Z (3) (c)

Page 15, line 17—

This amendment removes ‘the Executive’ and replaces it with ‘the director-general’.

Section 118Z (3) (c) is a consequential amendment having included review rights for a vaccination direction with the director-general being the relevant decision-maker in relation to an application to exempt a person.

Government Amendment 8

Clause 5

Proposed new section 118ZC, definition of *affected person*, new paragraph (aa)

Page 17, line 27—

This amendment inserts a further category in the definition of *affected person* to be, in relation to a standing exemption—a person to whom the exemption applies.

The expansion of the definition of an *affected person* follows the inclusion of Government amendment 14 which provides for the making of a standing exemption by the Minister of Chief Health Officer and to ensure review rights are in place for decisions in relation to variations of a standing exemption.

Government Amendment 9

Clause 5

Proposed new section 118ZC, definition of *externally reviewable decision*, paragraph (a)

Page 18, line 9—

This amendment removes paragraph (a) under the definition of *externally reviewable decision* and replaces it to extend an externally reviewable decision to include a decision made by an internal reviewer in relation to— an application for exemption from a condition to which a standing exemption is subject for a Ministerial direction preventing or limiting entry into the ACT.

Government Amendment 10

Clause 5

Proposed new section 118ZC, definition of *relevant decision-maker*, new paragraph (c)

Page 18, line 26—

This amendment inserts a further category in the definition of *relevant decision-maker* as the director-general for an application to exempt a person from a vaccination direction. This has been included following Government amendment 22 which provides for internal review rights in relation to vaccination directions.

The ACT Health Directorate is the appropriate administrative unit to retain responsibility for exemption application decisions where such applications are largely made on medical grounds. The director-general may delegate their functions under the *Public Sector Management Act 1994*.

Government Amendment 11

Clause 5

Proposed new section 118ZC, new definition of *standing exemption*

Page 18, line 26—

This amendment inserts the new definition of *standing exemption* as a consequence of the inclusion of Government amendment 12 which provides for the making of a standing exemption.

Government Amendment 12

Clause 5

Proposed new section 118ZCA

Page 19, line 2—

The amendment inserts new section 118CA which empowers the Minister and Chief Health Officer to make a standing exemption which exempts a class of people from complying with the requirement of the respective direction either on their own initiative or following the request of a person.

Standing exemptions may be subject to certain conditions stipulated by the Minister or Chief Health Officer, such as, a person may be permitted to leave quarantine subject to conditions that the person undertake a COVID-19 test and/or wear a face mask during any period of exemption from quarantine in order to mitigate the risk of transmission of COVID-19 within the community or sectors of the community.

The ability to issue a standing exemption throughout the COVID-19 public health emergency in response to a particular public health direction has been an important safeguard which has allowed for wide-ranging exemptions to provide a flexible and responsive approach to the unique circumstances which can arise where COVID-19 presents a risk to the community.

Government Amendment 13

Clause 5

Proposed new section 118ZD (1A)

Page 19, line 6—

This amendment provides for an affected person being able to apply to the relevant decision-maker for an exemption from complying with a condition to which the person is subject to under a standing exemption.

Government Amendment 14

Clause 5

Proposed new section 118ZD (2) (c)

Page 19, line 10—

This amendment inserts 'or standing exemption' after 'relevant direction' as a consequence of the inclusion of Government amendment 12 which provides for the making of a standing exemption.

Section 118ZD relates to the grounds on which an application for exemption may be made from Ministerial and Chief Health Officer direction which must necessarily be expanded to include a standing exemption following Government amendment 12.

Government Amendment 15

Clause 5

Proposed new section 118ZD (3) (a)

Page 19, line 13—

This amendment inserts 'or standing exemption from a Ministerial direction' after 'Ministerial direction' as a consequence of the inclusion of Government amendment 12 which provides for the making of a standing exemption.

Section 118ZD (3) (a) relates to the grounds for making an application in relation to a Ministerial direction which must necessarily be expanded to now include a standing exemption from a Ministerial direction.

Government Amendment 16

Clause 5

Proposed new section 118ZD (3) (b)

Page 19, line 15—

This amendment inserts 'or standing exemption from a chief health officer direction' after 'chief health officer direction' as a consequence of the inclusion of Government amendment 12 which provides for the making of a standing exemption.

Section 118ZD (3) (b) relates to the grounds for making an application in relation to a chief health officer direction which must necessarily be expanded to now include a standing exemption from a chief health officer direction.

Government Amendment 17

Clause 5

Proposed new section 118ZE (1)

Page 20, line 2—

This amendment removes 'section 118ZD' and replaces it with 'section 118ZD (1)' to specifically pinpoint the subsection under which an application for exemption is made and an exemption may subsequently be granted.

This is a consequential amendment which results from the inclusion of subsection 118ZD (1A) outlined in Government amendment 13.

Government Amendment 18

Clause 5

Proposed new section 118ZE (1A)

Page 20, line 5—

This amendment inserts a new section 118ZE (1A) to provide the relevant decision-maker with the power to exempt an affected person in relation to a standing exemption from complying with a condition to which the exemption is subject.

Government Amendment 19

Clause 5

Proposed new section 118ZE (5) (a)

Page 20, line 25—

This amendment inserts 'or standing exemption from a Ministerial direction' after 'Ministerial direction' as a consequence of the inclusion of Government amendment 14—Standing exemption.

Government Amendment 20

Clause 5

Proposed new section 118ZE (5) (b)

Page 20, line 27—

This amendment inserts ‘or standing exemption from a chief health officer direction’ after ‘chief health officer direction’ as a consequence of the inclusion of Government amendment 14—Standing exemption.

Government Amendment 21

Clause 5

Proposed new section 118ZF (1)

Page 21, line 10—

This amendment inserts ‘internal’ before ‘review’ in subsection 118ZF (1).

Subsection 118ZF (1) states that, an affected person in relation to an internally reviewable decision may apply to the relevant decision-maker for ‘internal’ review of the decision. This amendment provides a greater degree of clarity to the subsection.

Government Amendment 22

Clause 5

Proposed new subdivision 6C.6.4A

Page 25, line 4—

This amendment inserts a new Subdivision 6C.6.4A (Exemptions—vaccination directions) to provide a person with a right to seek internal review of a decision in relation to complying with a requirement in a vaccination direction, where the decision was to:

- not exempt the person; or
- exempt the person subject to conditions.

The person may apply to the decision-maker for internal review of the decision by making an application on a ground for exemption provided in the vaccination direction.

The provisions in relation to the making of a vaccination direction require that the direction state the medical grounds (if any) on which the Executive may exempt a person from complying with the direction and may state any other grounds on which a person may be exempt from complying with the direction.

New section 118ZJA also deals with formal requirements in relation to the making of an application for internal review and that the making of an application for internal review does not suspend compliance with the direction.

This amendment also inserts a new section 118ZJB which provides for the internal review process following an application for review. The new decision-maker (internal reviewer) is required to conduct a review of the original decision and confirm the decision, vary the decision, or revoke the decision and make a new decision. The new decision-maker must give written notice of their decision in writing as soon as possible, and not later than 5 days, after the day the application for internal review is made.

In addition to the requirement to review the original decision under the grounds for exemption in the vaccination direction, the new decision-maker must also comply with the requirements of any vaccination exemption guideline in coming to a decision.

This amendment is aimed at addressing the concern raised by recommendation 5 of the Committee report relating to rights of review for vaccination directions.

Government Amendment 23

Clause 5

Proposed new section 118ZL (1) (a)

Page 26, line 14—

This is a minor and technical amendment to correct an error under section 118ZL (1) (a) which incorrectly references a ‘Ministerial direction’ instead of a ‘chief health officer direction’.

Government Amendment 24

Clause 5

Proposed new section 118ZQA

Page 30, line 12—

This amendment inserts a new section 118ZQA at the end of part 6C to clarify that nothing in part 6C is intended to interfere with the exercise of a function by an entity that involves visiting a place of detention under another territory law. However, a person visiting a place of detention is required to comply with any direction in relation to the place or the person visiting the place of detention.

A list of examples territory laws that deal with an entity that may visit a place of detention has been included.

This amendment is aimed at addressing the concern raised by recommendation 9 of the Committee report relating to oversight agencies being able to conduct of visits to places of detention.

Government Amendment 25

Clause 5

Proposed new section 118ZR (2) (ia)

Page 31, line 3—

This amendment inserts the definition *standing exemption* into the relevant definitions which are subject to expire 18 months after the day part 6C commences.

Government Amendment 26

Clause 16

Proposed new dictionary definition of standing exemption

Page 41, line 2—

This amendment inserts the definition of *standing exemption* into the Dictionary.

Government Amendment 27

Clause 16

Proposed new dictionary definition of *vaccination direction*

Page 41, line 8—

This amendment corrects the definition of *vaccination direction* in the Dictionary by removing the reference to 'section 118ZM (1)' and replacing it with 'section 118Z (1)' which is the section that empowers the Executive to make a vaccination direction.