

Public Health (COVID-19 Management) Declaration Extension 2022

Regulatory Impact Statement

DI2022-267

Background to this Statement

Regulatory Impact Statements in the Australian Capital Territory

Section 34 of the *Legislation Act 2001* requires the preparation of a Regulatory Impact Statement (RIS) if a subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or part of the community.

Section 31 of the *Legislation Act* defines ‘cost’ as including burdens, disadvantages and direct and indirect economic, environmental and social costs. The principal purpose of a RIS is to ensure that the costs and benefits of a proposed law are examined fully so that the Minister and members of the community can be satisfied that the benefits of the instrument exceed the costs.

The making of COVID-19 Public Health Directions under part 6C of the *Public Health Act 1997* (ACT) (the Act) has the potential to impose appreciable costs on the community, or part of the community, which will vary depending on the Direction that is made. However, COVID-19 Public Health Directions can only be made where a COVID-19 management declaration is in force.

Authorising Law

The Public Health (COVID-19 Management) Declaration Extension 2022 (the Declaration) is authorised by section 118O of the Act. The Declaration can be made where the Executive has reasonable grounds to believe that COVID-19 presents a serious risk to public health.

The Declaration empowers the making of COVID-19 Public Health Directions (Directions) under part 6C of the Act as follows:

- Ministerial directions for public health social measures (PHSM) (s 118R);
- Chief Health Officer directions for testing, isolation and segregation of a person (s 118U);
- Vaccination Directions, made by the Executive, for particular work, activities, or places (s 118Z).

The predominant impact on the community, or part of the community, is likely to arise through certain requirements or conditions which have been previously imposed, such as —

- (a) a person diagnosed with COVID-19 having to isolate resulting in a reduction in workplace attendance, which may result in a cost to business and to the individual employee (if unable to access leave entitlements) ;

- (b) a household contact quarantining subject to any exemption which may result in a reduction in workplace attendance;
- (c) certain workers needing to be vaccinated against COVID-19 which may result in a workplace reduction for sectors covered, should a worker choose not to be vaccinated against COVID-19;
- (d) the use of rapid-antigen tests to attend a particular premises, which is likely to impose a cost to businesses and/or individuals; and
- (e) the use of face masks to attend particular places, which is likely to impose a cost to businesses and/or individuals.

Problem Statement / Issue

On 11 March 2020, the Director General of the World Health Organisation declared the novel coronavirus SAR-CoV-2 (COVID-19) outbreak a global pandemic and requested that every country urgently take necessary measures to ready emergency response systems.

On 16 March 2020, the ACT Minister for Health declared a public health emergency under the *Public Health Act 1997* (the Act) in response to the risks posed by COVID-19. The public health emergency declaration was extended on numerous occasions, reflecting the serious, ongoing and changing nature of the pandemic.

The public health emergency declaration was revoked with effect from 29 September 2022, and a COVID-19 Management Declaration (Management Declaration) introduced on 30 September 2022 to manage the ongoing risks presented by COVID-19. The Management Declaration was initially made for a period of 90 days, until 28 December 2022, and can be extended for periods of up to 90 days at a time.

The Australian Capital Territory, consistent with all other Australian jurisdictions, continues to experience ongoing transmission of COVID-19 in the community. In the week ending 4 December 2022, the ACT recorded 2,311 new COVID cases, and sadly, in the period 28 November 2022 to 4 December 2022, two COVID-19 related deaths were reported in the ACT, increasing the total to 135 deaths for the ACT.

Active outbreaks are also continuing to be managed across the Territory in hospital, residential aged-care and disability support settings. Ongoing pressure continues to be placed on the ACT's public hospital system, with the ACT's hospitals continuing to provide care for patients affected by COVID-19; although the number of patients requiring intensive care unit (ICU) support and ventilation has remained stable. At 12 December 2022, the total number of COVID-19 active patients in hospital was 68 and there was one patient in ICU.

As at 6 December 2022, the average number of cases of COVID-19 across Australia continued to increase, with an average of 15,569 reported daily.

There remains a level of uncertainty and complexity relating to the evolution of the COVID-19 pandemic, which is likely to continue over the coming months.

Policy objectives of government intervention

The ACT continues to transition the COVID-19 response to the endemic management of COVID-19, similar to other notifiable diseases. There is a strong focus on ensuring that only critical measures to support the COVID-19 response remain as the transition process evolves.

The Territory continues to work to reduce, or limit, the rate of COVID-19 transmission among members of the community, particularly within high-risk populations (e.g., older persons and people that are immunocompromised) and in higher-risk settings (e.g., residential, aged care and disability settings).

By reducing the rate and risk of COVID-19 transmission in higher-risk populations and settings, the Territory also aims to reduce the average number of patients that require hospitalisation and specialist or intensive healthcare due to severe illness from COVID-19.

The ability to implement PHSM, Test, Trace, Isolate and Quarantine (TTIQ) requirements and vaccination requirements has been essential to alleviating the public health risk presented by COVID-19 since the commencement of the pandemic, by minimising community transmission in either a targeted or broad community scale. Implementation of public health measures is consistent with national and expert advice and seeks to align with neighbouring jurisdictions to provide coverage to protect the most vulnerable in the community from severe illness or death.

As noted above, the ACT continues to transition to managing COVID-19 consistent with other notifiable diseases, with significant easing of public health mandates taking place since the public health emergency declaration was revoked in September 2022. The ACT has subsequently experienced its first COVID-19 wave without a public health emergency in place and only baseline public health measures. Implementing a Management Declaration which enables Directions to be made quickly and efficiently to respond to any worsening of an epidemiological situation is not inconsistent with the policy objectives of any Territory law.

Reasonable alternatives

The ACT Executive agreed to the implementation of a COVID-19 Management Declaration Framework in accordance with Part 6C of the *Public Health Act 1997* (the Act) with effect from 30 September 2022. The Management Declaration supported a move away from wide-spread Public Health Emergency settings, following the revocation of the Public Health Emergency Declaration, enabling targeted public health measures to be put in place to assist with reducing the risk of COVID-19 transmission.

The COVID-19 Management Declaration was implemented for a period of 90 days, until 28 December 2022, and can be extended for up to 90 days at a time.

The Management Declaration has enabled the Minister for Health and Chief Health Officer to make COVID-19 Public Health Management Directions to maintain a base level of public health measures to support the ACT's response to the pandemic.

The only reasonable alternative to an extension of the Management Declaration would be to allow the Declaration to end.

In considering the current uncertain epidemiological situation in the ACT, it is felt that it is proportionate for the ACT Government to continue to provide a Framework that enables the implementation of targeted public health measures during this first wave experienced since the majority of mandated control measures were removed.

Options

Option 1: Allow the COVID-19 Management Declaration to end on 28 December 2022

No regulatory action is taken to mitigate the risk to public health and safety posed by COVID-19, with only recommendations made to the community. The impact of this option is dependent on each person in the ACT to maintain an awareness of the current public health advice and act in a manner consistent with this advice.

This approach acknowledges the high rate of COVID-19 vaccination achieved by the Territory population (76.8% of children aged 5 to 15 years having received two doses and 78.6% of eligible persons aged 16 years and older have received three or more doses; at 8 December 2022). It also reflects the emergence of new anti-viral treatments which can prevent more serious health outcomes for persons who are most at risk. However, it does not consider the highly transmissible nature of the Omicron Variants of Concern and its subvariants, the increasing cases which are being experienced locally and nationally, or the time limited effectiveness of the vaccine.

This approach acknowledges that the ACT is at the end stage of transitioning to endemic management of COVID-19, similar to other notifiable diseases, with only baseline public health requirements currently in place. The only public health measures that are likely to remain with an extension of the Management Declaration enable critical surveillance and monitoring of COVID-19 to continue in the ACT, through the requirement for individuals to report their positive Rapid Antigen Test

results to ACT Health. This process also enables diagnosed persons to receive important advice about symptom management and access to oral antiviral treatments.

With this option, there is minimal ability to act quickly to respond to any deterioration of the epidemiological situation, including any support for increased burden on the public health and hospital systems.

Option 2: Extend the Public Health (COVID-19 Management) Declaration by 90 days
The Executive extends a Public Health (COVID-19 Management) Declaration ('Declaration') under section 118O and 118P of the Act. This action is permitted under the Act when the Executive has reasonable grounds to believe that COVID-19 presents a serious public health risk to the Territory.

By extending the Declaration, the Executive, Minister for Health and the Chief Health Officer continue to maintain the ability to make specific Directions in a timely and responsive manner to mitigate the risk that COVID-19 presents to public health. Directions enable regulation that would prevent or limit entry to an area or into the ACT; regulate gatherings; require use of personal protective equipment, regulate certain activities or businesses; require the provision of information; require a medical examination or testing; require segregation or isolation; or require that someone be vaccinated before engaging certain work or activity or at a particular place.

This option provides the ability for the Executive, Minister for Health and Chief Health Officer to provide timely and short-term regulatory responses to help manage the rate and pattern of COVID-19 transmission in the ACT community. COVID-19 continues to present an ongoing risk to public health, including in some cases severe illness or death, particularly for persons at risk of severe disease and unvaccinated individuals. The management of active outbreaks has also remained a feature of the COVID-19 pandemic throughout 2022 and continues to impact, albeit to a lesser degree, the operations of high-risk settings like residential aged care facilities and the health and wellbeing of residents.

Directions made under the Declaration are subject to the expert advice of the Chief Health Officer (every 30 days) and review by the Human Rights Commissioner. A Declaration can be made for no longer than 90 days, and there is ability for the Executive to extend the period on one or more occasions, for periods not longer than 90 days on each occasion. The Chief Health Officer must, at least every 30 days during which a Declaration is in force, advise the Executive about the status of the risk presented by COVID-19.

Directions made under a Declaration can only be in force for periods of no longer than 90 days, and the Chief Health Officer must advise on whether these continue to be justified at least every 30 days.

These consultation and reporting processes provide high levels of transparency and safeguards to ensure that regulation is not introduced for longer than is necessary to alleviate the public health risk.

This option is preferred in an environment where the ACT Government continues to transition its COVID-19 response.

Costs and benefits of each option are considered in the Impact Analysis, below.

Impact analysis

All Canberrans have the potential to be impacted by the Management Declaration because of the making of Directions. It is planned that only a Chief Health Officer Direction will remain in place following an extension of the Management Declaration. The Chief Health Officer Direction will continue to require individuals to report their positive Rapid Antigen Test result to ACT Health to support appropriate monitoring and surveillance of COVID-19 community transmission. The requirement also provides an ability for ACT Health to provide critical information to individuals who have been diagnosed with COVID-19, including advice on symptom management and treatment options.

Option 1: Allow the COVID-19 Management Declaration to end on 28 December 2022

| Benefits | Costs |
|---|--|
| <p>Reduced regulation for ACT community (noting that current measures are minimal)</p> <p>Reliance on community members to comply with health recommendations</p> | <p>Inability to respond quickly to any deterioration in the epidemiological situation for the ACT, or provision of support (through COVID-19 Management Declarations) for public health and hospital systems.</p> <p>Inability to provide targeted and early advice and support to individuals who are diagnosed with COVID-19, particular for those who may be eligible for treatment options, which are required to be prescribed early.</p> <p>Inability to carefully monitor and undertake surveillance of COVID-19 transmission in the Territory.</p> <p>Impacts on the ability for ACT Health to undertake appropriate surveillance and monitoring of COVID-19 transmission in the ACT.</p> <p>Failure to consistently apply public health advice may result in</p> <ul style="list-style-type: none"> • Increased number of COVID-19 cases. • Increased demand for healthcare (primary and tertiary), reducing the system’s capacity to respond to non-COVID matters. • Increased risk of severe illness or death for people that are vulnerable or at-risk from COVID-19. • An increase to staff furloughing arrangements and absences due to greater rates of community transmission. <p>although the timing , size and impact of these outcomes are difficult to predict with certainty.</p> |

Option 2: Extend the Public Health (COVID-19 Management) Declaration by 90 days

| Benefits | Costs/disadvantages |
|---|--|
| <p>Provides the least restrictive legislative framework to meet the objectives of preserving the human right to life, as provides an environment where targeted Directions can be made and revoked by the Executive, Minister for Health and Chief Health Officer in response to an evolving and uncertain COVID-19 situation.</p> <p>Enables an efficient scaling up of a response to any deterioration of the epidemiological situation, if required.</p> | <p>Enables the Executive, Minister for Health and Chief Health Officer to issue Directions that may limit human rights so that the rate and risk of COVID-19 transmission is reduced. However, it should be noted that the only restriction to be maintained with the extension is the requirement to report a positive RAT test to ACT Health.</p> <p>The Act seeks to mitigate the risk that human rights will be disproportionately limited by ensuring that the Declaration and Directions:</p> <ul style="list-style-type: none"> • are time limited; • must have regard for the expert advice of the Chief Health Officer and Human Rights Commissioner; • are disallowable (in the case of the Declaration and Vaccine Directions) or notifiable (for all other Directions). |

Consistency of proposed law with scrutiny committee principles

The Standing Committee on Justice and Community Safety (the Committee) is required, under the terms of reference, to consider whether (among other things):

- (a) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - i. is in accord with the general objects of the Act under which it is made;
 - ii. unduly trespasses on rights previously established by law;
 - iii. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
 - iv. contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Declaration is an instrument under the Legislation Act¹ which is subject to disallowance by the Assembly.

The Declaration is in accordance with the objectives under s 4 of the Act, and of particular relevance to s 4(c) of the Act in relation to the provision of a rapid response

¹ See *Legislation Act 2001* (ACT), s 14.

to public health risks. This is achieved through enabling Directions to be made under part 6C of the Act under which the objects include:

- protecting the public from risks to public health presented by COVID-19, which may not present an emergency, and
- to ensure that the Directions or Guidelines recognise and respect human rights and are consistent with human rights and subject only to reasonable limits that demonstrably justifiable in accordance with s 28 of the *Human Rights Act 2004*.

The proposed instrument does not unduly trespass on rights previously established by law. It is acknowledged that the Declaration enables Directions which may be subject only to reasonable limitations on human rights where it is demonstrably justifiable. The Chief Health Officer provides expert advice and consultation is required with the ACT Human Rights Commissioner on the Directions made under part 6C of the Act. A detailed explanation of the Declaration's consistency with human rights is provided in the accompanying *Public Health (COVID-19 Management) Declaration Extension 2022 Explanatory Statement*.

The Declaration does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Directions that may be made where the Declaration is in force are subject to Division 6C.6 (Exemptions) whereby an individual may seek exemption from a Direction on stated grounds. Exemption decisions for Ministerial and Chief Health Officer directions are subject to review in accordance with part 6C of the Act. A Vaccination Direction would be an instrument under the Legislation Act² which is subject to disallowance by the Assembly.

The making of a Declaration cannot be dealt with in an Act of Legislative Assembly and is appropriately subject to legislative provisions governing the making of the Declaration, including that the Executive may make the Declaration taking into consideration stated matters in s 118O of the Act. The Explanatory Statement for the Public Health Amendment Bill 2021 (No.2), together with the Human Rights Compatibility Statement, provide further information on the rationale for part 6C of the Act.

Recommendations

Option 2 is recommended.

Option 2 enables the ACT Government to continue to manage the pandemic, noting that the COVID-19 response continues to transition to the endemic management of COVID-19, similar to other notifiable diseases. It provides for an ability to quickly and efficiently respond to deterioration in the epidemiological situation, if required.

A Declaration provides the least restrictive legislative framework to meet the objectives of preserving the human right to life, as it creates an environment where targeted Directions can be made and revoked by the Executive, Minister for Health and Chief Health Officer in a timely manner in response to the evolving COVID-19 situation.

² See *Legislation Act 2001* (ACT), s 14.

Directions enable the implementation of TTIQ, PHSM and vaccination requirements that are consistent with the National Plan and surrounding jurisdictional efforts to manage COVID-19. This creates greater certainty for individuals and businesses (particularly when operating across jurisdictional boundaries) and enables the ACT to respond to COVID-19 in a manner that is Nationally coordinated, yet appropriate to our specific context.

Consultation statement

This recommendation was made having considered the advice of the Chief Health Officer.

The ACT Human Rights Commission and Justice and Community Safety Directorate have been consulted in relation to making of Public Health Management Directions and their supporting documents.