



# LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON THE COVID-19 2021 PANDEMIC RESPONSE

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## Submission Cover Sheet

Inquiry into the COVID-19 2021 pandemic response

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Committee Secretary  
Select Committee on the COVID-19 2021 pandemic response  
ACT Legislative Assembly

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29 September 2021

Dear Committee Secretary

**Submission to Select Committee on the COVID-19 2021 pandemic response**

1. The ACT Human Rights Commission provides the following submission to the Select Committee's inquiry into the COVID-19 2021 pandemic response. We warmly welcome the committee's recent establishment, and we are grateful to see the committee commencing its work without delay. As we noted in our [open letter](#) of 15 September 2021, the nature of this emergency has given the ACT Government unprecedented power over the lives of Canberrans and we believe this committee can play an essential role in providing accountability, transparency and scrutiny of government actions.

**About the Commission and our work during the COVID-19 emergency**

2. The Commission is an independent statutory agency, established by the *Human Rights Commission Act 2005* (HRC Act), and its main object is to promote the human rights and welfare of people in the ACT. The pandemic and associated responses and impacts have direct implications for many of the Commission's functions under the HRC Act.
3. The Commission has been closely monitoring the impacts of the pandemic response on Canberrans over the course of the last 18 months, and we are continuing to advocate for government to ensure that human rights are properly considered during the current lockdown. Factsheets about current human rights issues arising from the current lockdown are available on the Commission's [website](#) and being updated as the situation evolves. Other resources, including the Commission's advocacy to government around particular issues are posted regularly. These include a position paper about how Government should consider regulating the ways employers and businesses may condition access to premises and services based on vaccination status. The Children and Young People Commissioner has also been producing videos and a regular [newsletter](#) communicating information about COVID-19 and the lockdown to children and young people.
4. The Commission recognises that the fast-moving circumstances of the pandemic have required urgent responses and involve undeniably complex challenges for government. We have sought to work constructively with government and have indicated our availability to provide advice and input on proposed actions and measures in a timely and constructive manner. Wherever possible, we have attempted to identify and raise concerns early so that government would have as much notice as possible to address them. For example, we wrote to the government in [March](#) and [June](#) this year raising privacy concerns about the potential for Check In CBR data to be lawfully accessed for purposes other than contact tracing. We welcome that those concerns were eventually addressed with the introduction (and recent passage) of the COVID-19 Emergency Response (Check-in Information) Amendment Bill 2021, which will ensure the relevant privacy safeguards operate as a matter of law, rather than simply by voluntary policy and practice.

5. However, the Commission continues to retain significant concerns about whether and how human rights are being taken into account in the formulation of emergency measures and related government responses. We are concerned by the potential for human rights obligations to be overlooked as optional or to be treated as a lower-level priority in the current crisis environment, particularly where there is a lack of transparency about how decisions are made and limited options for external scrutiny of their implementation.

**A. Public health directions – need for human rights justification and further legislative safeguards**

6. The Commission has received several enquiries from members of the community (including an access application under the *Freedom of Information Act 2016*) querying the rationale for various public health restrictions and their consistency with human rights. Of these, a number have highlighted the lack of publicly available evidence and justification that would enable the public to understand why the government considers the restrictions to be reasonable, necessary, and proportionate in accordance with s 28 of the HR Act.
7. As public health directions are issued by the Chief Health Officer (CHO), they are not subject to the usual human rights scrutiny requirements under the HR Act even though they are likely, by their very nature, to have significant human rights impacts. We appreciate of course that limitations on human rights are inevitable in a pandemic and that such measures aim to prevent transmission of COVID-19 and save lives. However, the lack of published material explaining the justification for public health directions, particularly where they involve significant rights limitations, remains an ongoing issue of concern for the Commission. We also continue to be concerned that implementation of the directions has been largely lacking in transparency. These concerns have been exacerbated by the removal of the right to seek compensation under the *Public Health Act 1997* for COVID-19 related losses.<sup>1</sup> We consider that transparency is an essential component of a human rights-based approach and assures public confidence and commitment in complying with restrictions.
8. The Commission's 2020 [submission](#) to the ACT Legislative Assembly's Select Committee on the COVID-19 Pandemic Response set out our concerns about the need for emergency measures, such as public health directions, to be accompanied by an assessment that addresses their compatibility with human rights. The Select Committee's June 2020 report adopted this position as a recommendation,<sup>2</sup> which the government's response agreed to in-principle.<sup>3</sup> In doing so, we note that the government expressed its intention to make available any detailed analysis that has been undertaken in respect of emergency measures that significantly engage rights. We are, however, concerned that public health directions involving significant limitations on human rights have since been introduced without publicly available information addressing their compatibility with human rights: see examples below.
9. We have received assurances from government that a thorough human rights assessment is conducted internally as a matter of course for each public health direction issued by the CHO. We recognise the undeniably complicated factors to be balanced in devising effective public health settings in these circumstances, and profoundly appreciate the tireless work of the CHO and ACT Health staff in this regard. Though we appreciate that each public health direction now indicates that the CHO has considered relevant human rights, a human rights-based approach nevertheless anticipates that this assessment and any underlying assumptions will be available for public scrutiny, expert analysis, and interrogation at the time that the public health direction is issued or shortly thereafter.

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<sup>1</sup> *Public Health Amendment Act 2020*.

<sup>2</sup> ACT Legislative Assembly Select Committee on COVID-19 Pandemic Response, [Interim Report 2](#) (May 2020).

<sup>3</sup> ACT Government, [Government Response to the Select Committee on COVID-19 Pandemic Response Interim Report 2](#) (July 2020).

### **EXAMPLE 1: Mandatory quarantine of public and social housing residents**

We have received several complaints from residents in public and social housing complexes that were put into full lockdown, including concerns about being subject to rolling quarantine orders and difficulties in accessing health services. The Commission has published a [factsheet](#) that explains the rights of residents during a full lockdown of public and social housing complexes.

Directions requiring a person to quarantine effectively amount to a person's detention and, thus, involve a restriction of their right to liberty. A person's rights under s 18 of the HR Act may be limited, but only where their detention is not arbitrary, is done in accordance with the law, and the limitation is reasonable and proportionate in all the circumstances, consistent with s 28 of the HR Act.

In most instances, directions to quarantine are likely to be compatible with human rights, in light of the exceptional circumstances in which they have been issued. However, the more onerous the limits on rights become – such as was the case with the hard lockdown of Condamine Court and Ainslie Village – the more difficult it is to assess whether the balance they strike is proportionate to their objective without further information. Moreover, detention that may have initially satisfied the requirements of necessity and proportionality may cease to be justified if the person's individual circumstances have changed. It is therefore essential for safeguards against arbitrariness to be put in place and strictly observed. The extent of external oversight of decision-making will be key to the assessment of whether adequate safeguards are in place to ensure that individual decisions are proportionate and compatible with individual rights.

**The Commission has sought further information from government but has not yet received an explanation as to why a person subject to a quarantine direction should not be able to seek a review of the decision. Individuals detained in Victoria under public health orders can seek review by a Detention Review Officer (DRO) who is empowered to make a non-binding recommendation to the Chief Health Officer. The Victorian Ombudsman after reviewing the lockdown of Victorian public housing towers in 2020 recommended that individuals should also have the right to seek independent merits review of their detention.**

**The Commission has also sought further information from government to better understand the oversight and accountability mechanisms that will apply to operations at the new quarantine facility at O'Connor.**

### **EXAMPLE 2: Mandating COVID-19 vaccination for high-risk workers**

Mandatory requirements for aged care workers to be vaccinated were introduced by way of a public health direction issued by the CHO. Making vaccination mandatory amounts to involuntary medical treatment and is a significant step that engages a wide range of rights, including the right to equality and non-discrimination, and the right to work. As such, any such direction should be justified in accordance with s 28 of the HR Act, which requires limitations on rights to be “set by laws”, as well as being reasonable, necessary and proportionate.

While s 120 of the *Public Health Act 1997* provides the CHO with broad powers to make directions that the CHO considers to be “necessary or desirable to alleviate the emergency”, the Commission is concerned that s 120 does not provide a sufficiently precise basis for directing a class of persons to be vaccinated. In order to comply with the HR Act, measures of such a significant nature must be based on clear and explicit powers set out in primary legislation to ensure that they are subject to proper scrutiny and accompanied by robust safeguards.

**The Commission considers that the *Public Health Act 1997* should be amended to provide a clear and precise framework for mandating vaccination, particularly if workers in other high-risk sectors are likely to be subject to such a mandate in future, such as health care workers.**

## B. Need to reduce custody numbers to manage COVID-19 risks at the AMC

10. The grave dangers of a COVID-19 outbreak in a prison environment to both detainees and staff alike have been well documented. While we appreciate that ACT Corrective Services is doing everything it can to manage the five current cases of COVID-19 (two men and three women) amongst the detainee population (current at the time of writing), we are very concerned that the fast spreading and easily transmissible nature of the Delta variant creates a real risk of a wider outbreak within the AMC, particularly in light of the high churn rate of detainees, such as those on remand.
11. Notwithstanding the best efforts of ACT Corrective Services to prevent further transmission, it must be recognised that the complexity and difficulty in managing COVID-19 is greatly increased in closed and over-crowded environments such as prisons. Precautionary measures are also likely to result in more severe conditions of detention and make it harder to humanely quarantine detainees.
12. The Commission considers that urgent steps are necessary to reduce the detainee population at the AMC and has [written](#) to the government to consider the following measures. We note that managing the risk of a widespread outbreak in the AMC is not the responsibility of ACT Corrective Services alone but requires a collective response from everyone in the justice sector, including police, prosecutors, courts, and the government.
13. **Bail considerations:** While the ACT courts have recognised that the impact of COVID-19 on an accused can be taken into account for the purposes of a bail application,<sup>4</sup> we believe there would be benefit in legislating the criteria that courts must consider when assessing the risk that the current pandemic would present to an accused if remanded, including whether the accused's trial date would be delayed and whether the remand experience would be made harsher because of the impact of COVID-19. Consideration should also be given to whether remanding an accused would result in particular hardship on the accused's family related to the pandemic.
14. Such guidance would not be a fundamental change in the approach to bail principles but would recognise the current exceptional circumstances. Legislated criteria would help to ensure that a principled and consistent approach is taken, which properly balances public safety requirements, including the interests of victims of crime, with the need to reduce, to the extent possible, the detention population during the pandemic period. We suggest that express consideration should also be given to the current elevated risk of a COVID-19 outbreak in the AMC when determining whether it is strictly necessary for someone to be held in custody before a bail hearing.
15. **Early release and temporary leave passes:** The Commission considers that steps should be taken to facilitate the early release of detainees who are particularly vulnerable to COVID-19, including Aboriginal and Torres Strait Islander detainees, detainees who are elderly or have disabilities, pregnant women, new mothers, and those who may need to care for children or other family members.
16. We note that amendments were made to the *Corrections Management Act 2007* last year to enable the Commissioner to grant extended leave permits to detainees for up to 28 days or up to three months for the purpose of receiving long-term medical or palliative care.<sup>5</sup> Additional amendments were also introduced last year to enable COVID-19 leave to be granted to non-serious offenders towards the end of their sentence. We are concerned the latter provisions still remain uncommenced,<sup>6</sup> and to date no

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<sup>4</sup> See, for example, *R v Stott (No 2)* [2020] ACTSC 62; and *The Queen v Stacker* [2020] ACTCA 34 (30 June 2020).

<sup>5</sup> *Corrections Management Act 2007*, s 205(2A), inserted by the *COVID-19 Emergency Response Act 2020*, and extended by the *COVID-19 Emergency Response Legislation Amendment Act 2021*.

<sup>6</sup> *COVID-19 Emergency Response Legislation Amendment Act 2020*, Sch 1, Pt 1.4.

guidelines have been published on their operation and implementation as required under the legislation.<sup>7</sup>

17. **Protocols for dealing with breaches of isolation or quarantine orders:** It has come to our attention that there may not be any specific protocols currently in place between ACT Policing and ACT Health for dealing with breaches of COVID-19 isolation or quarantine orders. As individuals who are subject to isolation or quarantine orders are known to be infectious or potentially infectious, it would appear self-evident that using a criminal justice response to deal with isolation or quarantine breaches must be undertaken with great care, and only as a measure of last resort. Arresting, transporting, and detaining someone who is known to be infectious or potentially infectious in the watchhouse and subsequently at the AMC undermine the purpose of such orders, namely, to contain the spread of COVID- 19.
18. We strongly recommend that police powers for enforcing isolation or quarantine orders must be informed by public health considerations, and that they must be subject to clear partnership and collaborative and consistent decision-making arrangements with ACT Health. The purpose of such powers is to support the public health goals of avoiding further COVID-19 transmission. We therefore suggest that it would be appropriate, in the first instance, for police to either direct or remove the person to the place where they are isolating/quarantining, or to another location on advice from a public health officer. Taking the person into custody will only be appropriate in exceptional circumstances.
19. Police should also be encouraged to issue warnings or cautions and not charge for any alleged ancillary minor and non-violent offences, and particularly alleged minor and non-violent administration of justice offences such as bail condition breaches, where there is no risk to community safety and with particular consideration of risks in family violence matters.

#### **C. Isolation of children and young people at Bimberi – need for express safeguards and oversight**

20. The Commission understands that new inductees arriving at Bimberi are required to quarantine in a Unit for at least five days on a health segregation, and that in the event of a child or young person presenting as symptomatic or returning a positive COVID test, they would be required to isolate in their room (pending test outcomes in the case of being symptomatic). While having been required for only two young people, each for a 24-hour period (current at the time of writing), isolation of a child or young person in custody is more extreme than detention itself and presents a significant risk of harm to the mental health of vulnerable young people, thus requiring appropriate mitigation strategies.
21. While the Commission is advised that these requirements align with advice provided by Canberra Health Services, we are currently awaiting further information to enable an assessment of the proportionality of these requirements and whether they represent the least restrictive option for addressing the health risks of COVID-19 and sufficiently account for the right of children and young people to additional protections by virtue of being a child (s 11(2)). We also consider that greater oversight is required about how minimum entitlements, including daily access to open air and physical exercise, and contact with family and kin will be provided during any period that a child or young person is isolating within their room versus quarantining in a Unit.
22. Assurance about such matters may well be obtained by enabling the Public Advocate to resume regular attendance at Bimberi, which has been on hold since the ACT commenced lockdown. Attendance at Bimberi provides the Public Advocate with improved line-of-sight to everyday operations and thus enables more effective oversight of decision-making during critical times such as during the current public health emergency.

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<sup>7</sup> COVID-19 Emergency Response Legislation Amendment Act 2020, s 216G.

#### **D. Need for express regulation of proof of vaccination requirements**

23. The Commission appreciates that the government does not intend to introduce any laws or issue any public health directions that will require people to have a 'vaccine passport' or proof of being vaccinated against COVID-19 as a condition of entry or as a condition for the delivery or provision of goods, services or facilities. The Commission welcomes the government's stance against allowing fully vaccinated Canberrans more freedoms ahead of easing restrictions for everyone.
24. However, the Commission's concerns are less about whether the ACT intends to **mandate** the use of 'vaccine passports', and more about how the government intends to **manage** their use once vaccination rates have increased and restrictions are lifted/eased for everybody across the board.
25. The Commission considers that the use of vaccination certificates or passports should not be left to the discretion of private sector entities to implement in arbitrary ways but must be expressly regulated by government by means of primary legislation to reduce the risks of unfairness and discrimination. Without express government regulation as to reasonable use, the burden would fall on individual members of the community to seek a remedy after the fact for potential discriminatory or unfair application of the requirement by a business, which would be time-consuming and emotionally taxing. Such an approach would also not provide any certainty or clarity for businesses. Moreover, we note that the HR Act obliges the government to proactively take steps to prevent breaches of human rights by third parties.
26. The Commission considers that legislation is required, which sets out:
  - The parameters for when it would not be permissible for a business to require proof of vaccination, such as access to essential goods and services;
  - Exemptions for people who cannot be vaccinated because they have a medical condition, disability, or for other legitimate reasons, for example, religious beliefs or being a child under 12 years old, along with guidance about how valid exemptions will be certified or assessed;
  - A requirement for businesses to publish a policy that addresses the reasonableness of imposing the requirement, including whether it is a short-term measure and why other ways of promoting COVID safety are not reasonably available in that setting; and
  - A sunset clause - proof of vaccination requirements should not be permitted to continue beyond the time when the public health emergency is over.

#### **E. Other emerging issues and observations**

27. The Commission has seen a significant increase in lockdown-related complaints and enquiries. The concerns that have been brought to the Commission's attention cover a broad range of matters, including:
  - employment related issues,
  - exemptions for travel and quarantine requirements on the basis of family and carer responsibilities,
  - discharge arrangements from quarantine/isolation,
  - age discrimination concerns with respect to vaccine availability for young and old,
  - discrimination concerns with respect to disability support workers and disability services,



- issues regarding access to health information, and
  - issues regarding requiring parental consent for young people to access vaccines.
28. The Discrimination, Health Services, and Disability and Community Services Commissioner, Karen Toohey, will be able to speak to these matters at the upcoming hearing on 30 September 2021.
29. The Commission is also aware of emerging local issues arising from concern about or responses to COVID-19, which include:
- **Remote attendance at ACAT hearings** – as was the case last year, hearings are typically via phone, which can be particularly challenging for mental health consumers and those who have cognitive impairment, hearing impairment, etc. While the Commission appreciates the current pandemic situation presents challenges for holding face-to-face hearings, we consider that the option of video hearings would be preferable over hearings that are conducted over the phone, as it would allow for some of the issues faced by mental health consumers and other vulnerable cohorts to be better accommodated if they have access to digital technology.
  - **Mental health:** The mental health impacts of COVID-19 and the lockdown have been well established and the Commission welcomes the additional funding recently announced by government for Canberrans needing mental health services. Of the individual consumers brought to the Public Advocate’s attention as a result of involuntary actions in the year-to-date, approximately twenty per cent have been new consumers, that is, persons who have not previously been brought to the attention of the Public Advocate. While it is not possible to definitively attribute these numbers to the effects of COVID-19 and the lockdown, it is possible that their mental health needs might be related to the circumstances of the past 18 months.
  - **COVID-19 risks to children under 12:** Even once we reach the vaccination target, we will continue to see COVID-19 transmission in the community with the risk that those who are not vaccinated, notably children under 12, being the ones who will potentially be more likely to catch it and experience symptoms. While evidence to date suggests that the symptoms for children and young people are less extreme than those affecting adults, we do not know what the next strain might bring given that each strain seems to become more virulent. The risks to children and young people therefore need to be a key feature of any planning, particularly safety planning in ECECs and primary schools. The Commission urges government to take the views of children and young people on board in planning the return to face-to-face schooling. The latest [Lock It Down! Newsletter](#) contains a summary of some of the important points about children and young people’s concerns about safety within educational settings.
  - **The need to ensure children and young people have access to reliable and accessible information** – The Children and Young People Commissioner continues to advocate on this issue and as noted above, has developed a range of age-appropriate information about COVID-19 and the lockdown for children and young people. The Commission also welcomes the government’s efforts in this regard.
  - **Closure of police stations to the public** – ACT Policing introduced a number of changes to police activities when the lockdown commenced that were initiated without consultation, including the closure of police station front offices. The Commission received a number of reports about vulnerable community members who had sought assistance from their local police station, including in relation to reporting violence and/or parole and family violence order breaches, and who were advised to use the intercom or directed to call 000 or the 131 line instead.

The Commission expressed our concerns about this and the need for ACT police stations, as an essential, frontline service, to remain readily accessible during this time of crisis. We thank ACT



Policing for addressing our concerns promptly and we are pleased that stations have now re-opened. We have recently had some early community feedback that there may still be obstacles in relation to access to police stations, and we are currently following up and monitoring these concerns. We are pleased that ACT Policing is being responsive to community concerns and we look forward to continuing to work together during the outbreak.

- **Decrease in family violence arrests** – The Victims of Crime Commissioner’s early analysis is of an emerging pattern of decline in the number of family violence arrests since the commencement of lockdown. We note the disproportionate impact of the pandemic on vulnerable groups in the community, including women and children, where research indicates that the level and severity of family and domestic violence increases during pandemics.<sup>8</sup> The Commission is keen to apply learnings from other jurisdictions as to how they respond to family and domestic violence perpetrators and promote victim safety in a lockdown environment. We note that the monitoring of bail and parole conditions in family violence matters is a particularly important tool in a lockdown environment to ensure the safety of victims of crime and must be prioritised.

30. We would be pleased to provide further information on these issues in a subsequent written submission should it be considered helpful. Thank you again for the opportunity to provide this submission and we look forward to appearing before the committee to discuss these matters further.

Yours sincerely,

**Dr Helen Watchirs OAM**

President and Human Rights  
Commissioner

**Jodie Griffiths-Cook**

Public Advocate and Children  
and Young People Commissioner

**Karen Toohey**

Discrimination, Health Services,  
and Disability and Community  
Services Commissioner

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<sup>8</sup> [‘Family violence and COVID-19: Increased vulnerability and reduced options for support’](#), International Journal of Mental Health Nursing (2020) 29, 549-552.