LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH AND COMMUNITY WELLBEING
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Submission Cover Sheet

Inquiry into Public Health Amendment Bill 2021 (No 2)

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ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Committee Secretary
Standing Committee on Health and Community Wellbeing
ACT Legislative Assembly

Via email: LACommitteeHCW@parliament.act.gov.au

21 January 2022

Dear Committee Secretary

Inquiry into Public Health Amendment Bill 2021 (No 2)

1. The ACT Human Rights Commission welcomes the opportunity to make a submission to the Standing Committee on Health and Community Wellbeing in relation to its inquiry into the Public Health Amendment Bill 2021 (No 2).

2. The Commission strongly supports the introduction of fit-for-purpose legislation for the ongoing management of the COVID-19 pandemic. As highlighted in our recent submission to the Select Committee on COVID-19,[1] we have been concerned for some time now that the terms of the emergency powers in the *Public Health Act 1997* are ill-designed for the long-term management of a pandemic of this nature. We consider that a properly tailored legislative framework has the potential to greatly increase transparency and accountability, and to strengthen human rights protections.

A. POSITIVE ASPECTS OF THE BILL

3. The Commission was consulted on the development of the bill and appreciates being afforded the opportunity to provide early feedback on the bill's interaction with the *Human Rights Act 2004* (HR Act). We are pleased to see that the bill has sought to place human rights at the forefront of government decision making when managing this pandemic.

4. We consider that the bill is a significant improvement to the current legislative framework and incorporates many of the human rights safeguards that we have been calling for. We welcome that the government has taken steps to develop a legislative framework that seeks to promote greater transparency and accountability in relation to decisions made and actions taken for the ongoing management of COVID-19. Among the positive aspects of the bill, include:

   - Ensuring that government decision-making will be subject to great oversight and scrutiny by the Legislative Assembly – for example, COVID-19 management declarations and vaccination directions made by government will be subject to disallowance by the Assembly, and a

[1] Supplementary submission to the Select Committee on the COVID-19 2021 pandemic response, available at: https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/1903660/Submission-03-a-ACT-Human-Rights-Commission-Supplementary.pdf.

relevant standing committee must report to the Assembly on any human rights issues raised by directions issued by the Minister or the Chief Health Officer;

- Requiring the medical advice and the human rights justifications relied on by the government to be published, including a requirement to consult with the Human Rights Commissioner when making directions and guidelines to help ensure that they are consistent with human rights;

- Including an objects clause to signal the intention for any limitations on rights to be demonstrably justifiable in accordance with the HR Act, which serves to reinforce existing obligations of the Minister and the Chief Health Officer under the HR Act, whereby as public authorities they are required to act and make decisions compatibly with human rights;

- Providing a standing exemption for people to leave segregation or isolation in an emergency, including to seek urgent medical care or where the person is escaping family violence;

- Creating review and exemption mechanisms, including a new right of independent merits review for people subject to quarantine and isolation directions; and

- Including a sunset clause to end the new powers after 18 months.

5. We are pleased by the addition of these safeguards. Ultimately, their inclusion will assist government to maintain public trust when taking action to protect public health. However, as set out below, we consider that there are several aspects of the bill that can be strengthened.

B. AREAS FOR IMPROVEMENT

6. While we welcome the development of a legislative framework for managing COVID-19 that more explicitly incorporates the protections of the HR Act, we are concerned that the bill falls short in a number of important ways of achieving sufficient transparency and accountability in relation to decisions made and actions taken.

(i) Chief Health Officer directions issued to a particular individual

7. Under new s 118U, the Chief Health Officer may make a direction while a COVID-19 management declaration is in force in relation to any of the following matters if the Chief Health Officer is satisfied that the direction is necessary to prevent or alleviate the risk presented by COVID-19:

    - a requirement for the medical examination or testing of a person;

    - the segregation or isolation of a person;

    - a requirement for the provision of information (including information about the identity of any person), or the production or keeping of documents.

8. A direction in relation to these matters may be issued in the form of a general direction to the public or as an individual direction in relation to a particular person. Unlike a general direction, a direction issued to a particular person is not a notifiable instrument (s 118U(6)). Further, the requirements to consult the Human Rights Commissioner and to provide public notice of how

the direction is consistent with human rights do not apply to directions made in relation a particular person (s 118Y). Also, if the direction is in relation to a particular individual, the Chief Health Officer will not be required to provide regular reports to the Minister about whether it remains justified for the direction to continue to be in force (s 118X).

9. The Commission appreciates that it may not be appropriate to extend these requirements without modification to directions that are made in relation to a particular individual, given that there would likely be privacy considerations that would have to be taken into account with respect to the latter.

10. We also note that the bill includes certain safeguards that would apply specifically to individual directions. For example, a direction issued to a particular person must be given to the person in writing (s 118U(4)), and an individual direction involving segregation or isolation will be subject to a right of external review (see definition of "externally reviewable decision" in s 118ZC). We welcome the inclusion of these safeguards, in particular the provision of external review for isolation and segregation directions.

11. However, as illustrated by the case study below, we are strongly of the view that further tailored safeguards in the form of real-time oversight and monitoring are required to protect the human rights of vulnerable individuals who are subject to an individual direction, particularly where the direction involves the detention of that person. We consider that that the bill should be amended to include the following additional safeguards:

    - **Notification and oversight of individual directions involving detention**: The bill should include a requirement to notify an existing oversight entity (such as the Public Advocate, where appropriate) when the Chief Health Officer issues a segregation or isolation direction that involves the detention of an individual. Empowering and resourcing an existing oversight entity to act in real time to monitor the implementation of detention decisions will be key to ensuring that adequate safeguards are in place to ensure that such decisions are proportionate and compatible with individual rights.

    - **Information about rights**: In addition to the requirement to provide individual directions in writing, detained people should also be given information about their rights in writing. The information should include an explanation of the process for seeking review, how to make a complaint or raise concerns, and how complaints will be dealt with. Contact information for assistance should be clear and accessible. Provision should also be made to assist the person to access legal assistance.

    - **Compensation**: We also suggest that consideration be given to reinstating the compensation provisions in the *Public Health Act 1997* for any damages or losses resulting from the implementation of COVID-19 directions. Alternatively, consideration could be given to adopting the Victorian approach, which restricts compensation claims to circumstances in which a direction was based on "insufficient grounds".[2] We consider that the availability of an accessible compensation mechanism would provide an important remedy for any breaches of rights that may occur as a result of implementing directions.

[2] *Public Health and Wellbeing Act 2008* (Vic), s 204.

CASE STUDY – NEED FOR GREATER OVERSIGHT OF IMPLEMENTATION OF CHIEF HEALTH OFFICER DIRECTIONS ISSUED TO A PARTICULAR INDIVIDUAL

X, a woman with a complex medical history, including mental health conditions and drug dependency, tested positive for COVID-19 on 3 September 2021. X was assessed by ACT Health to have been infectious since 30 August 2021.

ACT Health became aware that X was active in the community, despite being required to undertake a period of self-isolation at home, in accordance with the *Diagnosed People and Close Contacts Direction 2021*.

On 7 September 2021, X was voluntarily transported to Calvary Hospital. Options to manage X's drug dependency and to avoid opioid withdrawal were considered by a multidisciplinary team. The medical opinion was that X was unlikely to comply with the requirement to self-isolate at home, given her inability to self-regulate her behaviour and her drug dependency.

On 8 September 2021 – on the basis of that medical opinion and the view that the ACT community would be put at significant risk if X failed to self-isolate – the Acting Chief Health Officer issued an individual Public Health Emergency Direction under s 120 of the *Public Health Act 1997*, requiring X to undertake a period of isolation at Calvary Hospital.

In the hours following her admission, X's behaviour became increasingly volatile, and she made attempts to leave the hospital. X's behaviour was reported to be challenging and at times aggressive, requiring security support and on one occasion, a police response. Medical staff believed her behaviour constituted a risk to herself, other patients, staff and the community. It was decided that sedation was an appropriate option and X was successfully sedated.

After review by specialists, however, it was decided that heavy sedation, in the context of a patient with COVID-19 and potential respiratory compromise, was a risk and could be a threat to life. The multidisciplinary team discussed other options, mindful that X did not require hospitalisation because of her COVID-19 infection, but in order to keep her in isolation and to manage opiate withdrawal associated with her isolation. Consensus was reached that the safest option was to sedate, electively intubate and ventilate X.

On 9 September 2021, X was intubated, with intubation intended to continue for six days until 15 September 2021– ie, until day 14 following the onset of X's COVID-19 symptoms, noting that X was considered to have been infectious since 30 Aug 2021. It does not appear that the decision for elective intubation was discussed with X or her family, or that an advocate was appointed to act on her behalf. It is also not clear whether any non-clinical options were considered, noting X's respiratory condition did not require hospitalisation or intubation at that time.

Unfortunately, X developed pneumonia whilst ventilated, which required her period of intubation to be extended for a further four days. Then, when X was extubated, she experienced stridor & oxygen desaturation, which required her to be reintubated. After a total of 14 days of being intubated, on 23 September 2021, X was successfully extubated.

The individual public health direction issued to X was revoked by the Acting CHO on 22 September 2021, clearing X from being required to be isolated. However, X experienced significant delirium and deconditioning following her prolonged period of intubation and was required to remain in ICU for clinical reasons until 27 September 2021. On 28 September 2021, X was discharged.

(ii) Monitoring and oversight of closed environments

12. As part of the ongoing management of COVID-19, the Commission considers that it will be important to ensure that there will be ongoing monitoring and oversight of the implementation of COVID-19 measures in closed environments and places of detention such as at the AMC, Bimberi, and Dhulwa, as well as at any quarantine facilities.

13. There is a heightened risk of poor treatment and conditions in places of detention during a pandemic, making continued and timely oversight essential. Inspections and monitoring should be permitted to occur, while observing the 'do-no-harm' principle. This approach has been adopted by the NZ Ombudsman, as set out in a recent statement of principles applicable to places of detention during COVID-19 lockdown.[3] As noted in the statement of principles, monitoring places of detention remains an essential preventive safeguard for the treatment of people who have been deprived of their liberty. Such an approach would also be consistent with obligations under OPCAT, which recently commenced.

14. We suggest that similar adaptations to inspection methods should be implemented here in the ACT to ensure that unobstructed and ongoing physical access to detention places will not be compromised during the pandemic.

15. To that end, the Commission considers that the bill should expressly specify that oversight agencies must be able to conduct onsite visits to places of detention (subject, where necessary, to appropriate arrangements to enable such visits to be undertaken in a COVID- safe way). Attendance at detention places by oversight entities would provide improved line-of-sight to everyday operations and ensure that people are being treated humanely and their human rights are being protected.

16. We consider that the bill should also set out the minimum entitlements and supports that must be provided to individuals subject to quarantine and isolation directions that amount to detention (such as hotel quarantine). Alternatively, the bill should require guidelines to be made that address these issues. We draw the Committee's attention to our factsheet on the rights of residents during a full lockdown of public and social housing complexes, which provide an illustration of the types of matters that should be included in guidelines of this nature.

(iii) Vaccination directions

17. Under new s 118Z, the executive may make a vaccination direction in relation to any of the following matters while a COVID-19 management declaration is in force if the executive is satisfied that the direction is necessary to prevent or alleviate the risk presented by COVID-19:

    - a requirement for a person to be vaccinated against COVID-19 to:

        – engage in particular work;

[3] NZ Ombudsman, *OPCAT inspections and visits during COVID-19 pandemic – update and Statement of Principles*, 9 August 2021, available at: https://www.ombudsman.parliament.nz/sites/default/files/2021-11/Chief%20Ombudsman%20reaffirms%20his%20OPCAT%20Statement%20of%20Principles%20for%20places%20of%20detention%20during%20COVID-19%20'lock%20down'.pdf.

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

- a requirement for a person (such as an employer or business owner) to prevent or restrict the unvaccinated person from doing any of those things;
- a requirement for the provision of information (including information about the identity of any person), or the production or keeping of documents.

18. As we have previously stated, the Commission considers that vaccination mandates 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. We are therefore pleased to see that the bill includes express powers to make vaccination directions and will be accompanied by some important safeguards. For example:

    - A vaccination direction (including any extensions) will be subject to disallowance by the Legislative Assembly (s 118Z(7); s 118ZA(6));
    - The executive must consult with the Human Rights Commissioner when making or extending a vaccination direction (s 118ZB);
    - A vaccination direction must not prevent or limit a person from obtaining essential goods or services (s 11Z(5)).

19. While these are important improvements to the current legislative framework, the Commission considers that further safeguards are necessary to ensure that vaccination directions are implemented consistently with human rights and are subject to appropriate accountability mechanisms. In particular, we are concerned by the following omissions in the bill.

(a) No review rights

20. It is of significant concern that the internal and external review provisions in the bill do not extend to vaccination directions. Unlike Ministerial and Chief Health Officer directions, which will be subject to internal review and in some instances external review (ss 118ZE and 118ZG, respectively), the bill does not make any provision to enable a person to seek review of a vaccination direction. According to the explanatory statement, internal and external review provisions in the bill have not been extended to vaccination directions because:

> [V]accination 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.[4]

21. The Commission accepts that vaccination directions will be informed by ATAGI and related Australian Government advice. We also accept the role of medical assessments in determining

[4] Explanatory Statement, p 59.

whether a person may be medically exempted from a requirement to be vaccinated against COVID-19.

22. However, given the breadth of matters that may be covered by a vaccination direction, we disagree with the view that vaccination directions (and related exemptions) will in all instances turn exclusively on the application of such advice. For example, the bill provides that exemptions other than for medical reasons may be included in a vaccination direction (s 118Z(3)(c)). Further, as illustrated by the case study below, the implementation of a vaccination direction, particularly where it involves setting limitations or restrictions on how an unvaccinated person may be granted access to a particular place in a COVID-safe way will often require discretion to be exercised. These are not binary decisions that are incapable of administrative review.

23. The Commission considers that the failure to provide review rights for vaccination directions is a serious omission in the bill and should not be supported. In our view, express provision should be made in the bill to enable a person to seek review of a vaccination direction. The provision of review rights is essential to guard against overreach and to ensure proper accountability.

CASE STUDY: VACCINATION REQUIREMENTS FOR VISITORS TO RESIDENTIAL AGED CARE FACILITIES

Following the lifting of the lockdown on 15 October 2021, the Chief Health Officer issued a public health direction that made it a requirement for visitors to residential aged care facilities (RACF) to be fully vaccinated. These requirements were subject to limited exceptions, for example, if visitors had a valid medical exemption or were visiting for certain specified reasons (such as for end of life support).

A member of the community raised concerns with the Commission that, as a consequence of this new direction, they could not visit their parent who was residing in a RACF while accompanied by their child who was not vaccinated, and that this was having a detrimental effect on their parent's health. The Commission raised these concerns with ACT Health, noting that the overly restrictive nature of the direction coupled with the absence of review rights meant that alternative options to enable a COVID-safe visit could not be explored or facilitated.

The direction was subsequently amended to permit children under 12 years of age to visit a resident where they are accompanied by a parent or guardian who is vaccinated. Under directions currently in force, all visitors are exempted from the vaccination requirement.

The provision of review rights would have helped to guard against 'blind spots', which, as this example shows, can result in the inadvertent neglect of the material interests of vulnerable individuals or groups.

(b) No human rights scrutiny by an Assembly committee

24. The bill provides that a relevant standing committee of the Legislative Assembly must report on any human rights issues raised by Ministerial and Chief Health Officer directions (s 118ZQ). Similar scrutiny requirements, however, are not extended to vaccination directions. The Commission recommends that this omission should be rectified.

25. In addition, noting that a vaccination direction is a disallowable instrument, we can see no cogent reason why the related exemptions guidelines under s 118ZM should not also be made as a disallowable instrument.

(c) Essential goods and services

26. As noted above, the bill expressly provides that a vaccination direction must not prevent or limit a person from accessing essential goods and services. Section 118Z(5) lists two non-exhaustive examples of essential goods and services: buying groceries or accessing medical treatment. While we are pleased by the inclusion of this safeguard, we are concerned that it would remain open for individual service providers and businesses to impose their own vaccination requirements that could impact on a non-vaccinated person's ability to access essential goods and services. As we have previously noted, human rights law recognises that the obligation to protect against third party infringements of human rights may necessitate direct regulation and intervention.[5]

27. The Commission remains of the view that to prevent unfair or discriminatory application of proof of vaccination requirements by private actors, legislation is required that 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.

EXAMPLE 1

A woman complained to the Commission that she had been refused service at a fast food outlet because she could not confirm she had been vaccinated. The woman had recently recovered from COVID and had been advised to delay vaccination for a period of time on medical advice.

EXAMPLE 2

The Commission was made aware of a GP practice in Canberra that was only allowing patients to attend the clinic if they had received one vaccination dose. Telehealth and video-based services are not appropriate for all clients or for all medical conditions needing GP assessment and care. Imposing this requirement could be the basis for a discrimination complaint and a complaint about health service provision in the ACT.

EXAMPLE 3

The Commission is also concerned that individual aged care facilities may be imposing visitor restrictions based on vaccination status that go beyond those required by the public health directions issued by the Chief Health Officer or the Industry Code for Visiting Residential Aged Care Homes during COVID-19. Similar concerns have been identified by the Health Care Consumers' Association (HCCA), see: 'Consumer Issues During the ACT COVID-19 Omicron Outbreak – Visitor Restrictions in Residential Aged Care Facilities', January 2022.

[5] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, [19].

C. CONCLUSION

28. The Commission acknowledges that there is no perfect legislative response to the current pandemic but there are good practices and principles that can guide legislative action and lead to fairer and more rights protective outcomes. We have previously called for the bill to adopt a human rights approach, which goes beyond simply achieving technical or baseline compatibility with the HR Act and includes building in, wherever possible, preventative safeguards to minimise the impact on human rights and to guard against any inadvertent consequences.

29. In our view, the bill reflects a human rights approach in many respects, and we commend the government for its efforts to ensure that human rights will be properly embedded in the legislative framework for managing COVID-19. There nevertheless remain some significant issues, as described above, that remain outstanding and which we consider require attention if the bill is to be the best version it can be for the benefit of all Canberrans.

30. Thank you for the opportunity to provide this submission. We would be pleased to discuss these matters further with the Committee.

Yours sincerely,

Dr Helen Watchirs OAM
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and Disability and Community Services Commissioner