



# 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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8 November 2021

Dear Committee Secretary

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

1. The ACT Human Rights Commission provides this additional submission, further to the submission provided to the Committee on 29 September 2021. This submission focusses on the human rights considerations involved in developing pandemic-specific laws to support the ongoing management of COVID-19, including vaccination mandates and proof of vaccination requirements.

**A. Pandemic-specific legislation – human rights considerations**

2. The Commission [understands](#) that the government is considering legislative amendments to the *Public Health Act 1997* to enable the ongoing management and response to the COVID-19 pandemic.<sup>1</sup> The Commission supports the introduction of pandemic laws that are fit for purpose. We consider that a properly tailored legislative framework has the potential to greatly increase transparency and accountability. The Commission looks forward to being consulted on the development of the bill, which we understand may be introduced into the Assembly before the end of the year. In light of the short timelines involved, we have taken the step of sharing the issues raised in this submission with the government to enable their early consideration in the course of drafting of the bill.
3. As we highlighted in our previous submission, we have been concerned for some time now that the terms of the emergency powers in the Public Health Act are not sufficiently targeted and precise as to be fit for purpose. While we accept that there is no perfect legislative response to the current pandemic, there are, however, good practices and principles that can guide legislative action and lead to fairer and more rights protective outcomes. Legal certainty, clarity and transparency in decision-making, and due process safeguards to protect against overreach should be central to any legislative response to a pandemic.
4. In particular, the Commission is keen to see that the government takes a human rights-based approach to developing these amendments. A human rights-based approach goes beyond simply achieving technical or baseline compatibility with the *Human Rights Act 2004* (HR Act), but rather sets out an approach to respect, protect and fulfil human rights in both process and outcome. This includes building in, wherever possible, preventative safeguards to minimise the impact on human rights, and to guard against any inadvertent consequences.

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<sup>1</sup> R Stephen-Smith MLA, HCW—21-10-21, P 94. The Victorian Government has taken similar steps by introducing amendments to the *Public Health and Wellbeing Act 2008* (Vic) to provide a pandemic management framework for the ongoing COVID-19 response, as well as future pandemics: see, [Public Health and Wellbeing \(Pandemic Management\) Bill 2021](#).

5. In our view, pandemic-specific legislation that is developed in accordance with best practice principles and a human rights-based approach should include the following features:

**(a) Oversight and status of public health directions/pandemic orders**

6. Parliamentary supervision and scrutiny of COVID-19 legislative measures and the exercise of related powers is essential to upholding democracy and the rule of law during the pandemic. To ensure appropriate and adequate oversight by the Legislative Assembly, we consider that public health directions or pandemic orders issued in response to COVID-19 should be made in the form of delegated legislation, preferably disallowable instruments, rather than notifiable instruments. We [understand](#) that the government is considering introducing amendments to implement vaccination mandates via disallowable instrument,<sup>2</sup> which is welcome. In our view, all public health directions or pandemic orders that involve significant limitations on human rights should be made by disallowable instrument, as it would be proper for the Assembly to retain control over such matters.
7. We note that the comparable [Victorian pandemic bill](#) proposes to introduce a specific disallowance regime for all pandemic orders, whereby the equivalent legislative scrutiny committee – the Scrutiny of Acts and Regulation Committee (SARC) – is given new functions to review pandemic orders and to make recommendations to the Victorian Parliament for amendment, suspension or disallowance, including on the basis of any incompatibility with human rights.<sup>3</sup>

**(b) Human rights compatibility statement**

8. As the Committee is aware, the Commission has long been calling for human rights compatibility assessments to be published with each public health direction. We consider that any amendments to the Public Health Act should expressly require human rights statements to be provided at the time a public health direction (or pandemic order) is made, or shortly thereafter. As we have previously noted, we appreciate that the Chief Health Officer (CHO) is mindful of her obligations under the HR Act to properly consider and act compatibly with human rights when exercising her powers. We also appreciate the recent [updated statement](#) issued by the CHO setting out the considerations given to human rights principles in response to the pandemic. These, however, remain at a high level of generality and provide little transparency about the underlying evidence and reasoning taken into account to justify the adoption of particular settings and measures.
9. The Commission acknowledges that preparing comprehensive statements of compatibility can be time-consuming. However, in a time of reduced transparency and oversight, and where fundamental human rights are being heavily restricted, we believe that it is imperative for government to identify and explain to the public how their rights are being considered in the decision-making process. We note in this regard, that a human rights compatibility assessment involves more than simply identifying a legitimate objective. The public health measures implemented during the pandemic have undoubtedly been aimed at legitimate objectives, including saving lives. The HR Act, however, requires government to also demonstrate that restrictions on human rights are prescribed by law, rationally connected to their stated objective, and proportionate to achieve that objective. This includes having regard to less restrictive means of achieving the objective, whether effective safeguards are in place and whether it provides flexibility to consider individual circumstances.
10. The Commission notes that pandemic orders made under the proposed Victorian model are deemed not to be legislative instruments, however, the bill includes an express requirement for such orders to be accompanied by an explanation of the human rights that may be limited and why such limitations

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<sup>2</sup> R Stephen-Smith MLA, HCW—21-10-21, P 94.

<sup>3</sup> See, Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic), Division 4 (Scrutiny, suspension and disallowance of pandemic orders).

are reasonable and justified.<sup>4</sup> This explanation would therefore address the same information that would have been included in a human rights certificate, as required under the Victorian Charter if the pandemic order were a legislative instrument. The ACT HR Act does not require compatibility statements to be prepared for legislative instruments, but as demonstrated by the Victorian model, a best practice approach should expressly provide for such a requirement.

**EXAMPLE: Vaccination requirements for visitors to residential aged care facilities**

Following the lifting of the lockdown on 15 October 2021, the CHO 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).

By way of contrast, individual operators were granted [broad discretion](#) during the lockdown to determine visitor access to RACF premises, irrespective of vaccination status.

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.

**The preparation of a human rights assessment and external human rights scrutiny 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.**

**(c) Review rights**

11. The Commission considers that any pandemic-specific legislation should include express provisions that set out a clear process by which a person is able to seek an exemption from being subject to a public health direction (or pandemic order) and the ability to seek a review of exemption decisions. To enhance transparency and public understanding of decision-making, the bill should also provide that reasons should be provided for exemption decisions.
12. To comply with the requirements of the HR Act, isolation and quarantine orders, where they effectively amount to a person's detention, must also be subject to independent merits review. A person's right to liberty 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. Also, 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.

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<sup>4</sup> Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic), s 165AP(2).

13. As we have previously noted, individuals detained in Victoria under public health orders can seek review by a Detention Review Officer (DRO), however, a DRO is only empowered to make a non-binding recommendation to the Chief Health Officer. While the Victorian approach is an improvement to the current approach in the ACT, a fully human rights compatible approach requires a person to be able to seek independent merits review of their detention.

#### **EXAMPLE 1**

A man contacted the Commission regarding an application for a quarantine exemption that had been rejected. The man's children live in regional NSW but not in a recognized 'bubble' post code. The man advised he has custody of the children every second weekend, but he was advised he would have to quarantine for 14 days if he saw the children in NSW or they would all have to quarantine for 14 days if he brought the children to Canberra, which would be in breach of the parenting orders. The man noted the children were in a low-risk regional town. The matter was resolved after the Commission contacted ACT Health.

#### **EXAMPLE 2**

A man contacted the Commission to complain that he was in a social housing complex that had been locked down due to a number of positive cases in other parts of the complex. The man complained that he was subject to rolling lockdowns even though he was not associated with any of the people who had tested positive. He noted he had tested negative a number of times and his property in the complex had its own entry and exit points enabling him to enter and leave the property without contact with other residents. The man was concerned there was no independent review right to have the decision to keep him in quarantine and subject to an extended quarantine because of other residents testing positive.

### **(d) Penalties/Enforcement**

14. The Commission has welcomed ACT Policing's commitment to a graduated and educative approach to ensuring compliance with public health directions. However, given the inherent risk of over-policing of marginalised groups, such as people with disability, older people, Aboriginal and Torres Strait Islander peoples, people who are homeless, children and young people, or victims of family violence, we consider that the bill should include express requirements for the provision of regular public data about enforcement activities and affected demographics. Such accountability and transparency will be vital for identifying and correcting inadvertent impacts on vulnerable groups.
15. We consider that the bill should also set out a clear process for the enforcement of isolation or quarantine orders. In [recent evidence](#) provided to the estimates committee, ACT Policing indicated that they had made six arrests for alleged breaches of the health directions when no other offence has been involved.<sup>5</sup> According to police these arrests likely involved "individuals who more than likely have been advised that they are COVID-positive or have been required to quarantine".<sup>6</sup>
16. While it is not clear whether the individuals concerned were taken into police custody, it would nevertheless be important to ensure that police powers for enforcing isolation or quarantine orders are informed by public health considerations. Ideally, protocols should be developed to ensure that the exercise of such powers are subject to clear partnership and collaborative and consistent decision-making arrangements with ACT Health. As we have previously noted, the purpose of such powers is to

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<sup>5</sup> JACS—27-10-21, p 118.

<sup>6</sup> JACS—27-10-21, p 118.

support the public health goals of avoiding further COVID-19 transmission, and it would therefore 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 would only be appropriate in exceptional circumstances.

**(e) Safeguards pertaining to closed environments, including quarantine facilities**

17. The Commission recommends that the bill should include tailored safeguards to ensure sufficient transparency and timely oversight of the exercise of pandemic powers in closed environments and places of detention, including at quarantine facilities. For example, we consider that it will be important for the bill to set out the minimum entitlements that must be provided to those subjected to pandemic orders in closed environments (for example, daily access to open air and physical exercise, and contact with family and kin), as well as the ability for oversight agencies to continue to conduct onsite visits (subject to appropriate notice to enable such visits to be undertaken in a COVID-safe way).

**(f) Additional human rights safeguards**

18. We consider that the following human rights safeguards should also be included in the bill:
- **Objects clause**: The Commission considers that it will be important for the bill to include an objects clause, similar to that provided in the Victorian pandemic bill,<sup>7</sup> to confirm that limits on human rights must conform to the proportionality and reasonableness requirements imposed by the HR Act. The objects clause should also reflect that achieving compliance with pandemic directions or orders should focus on community engagement and collaboration, address information barriers and provide support to vulnerable groups.
  - **Scope and form of orders**: The bill should specify with sufficient clarity and precision the types of matters that directions or orders can cover. We have previously cautioned that the existing powers may not be specific enough to cover some of the directions that have been issued, in particular those that direct particular classes of persons to be vaccinated (see further below). Each direction or order should also specify which particular provision it is made under. The bill should also specify that all directions or orders involving quarantine or isolation must be made in writing (including electronic versions such as emails and text messages). The bill should also set out the process by which notification of the direction will be provided to the person.
  - **Exemptions**: The bill should expressly specify an exemption for all directions or orders to allow a person to leave their place of residence to obtain medical treatment or for emergency purposes, including escaping a risk of harm related to domestic and family violence.
  - **Compensation provisions**: We suggest that consideration should be given to reinstating the compensation provisions in the Public Health Act for any damages or losses resulting from the ongoing management of COVID-19. 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”.<sup>8</sup>
  - **Advisory panel**: Under the proposed Victorian pandemic legislation, an independent pandemic management advisory committee will be established to provide advice to the Minister in relation to the exercise of pandemic powers.<sup>9</sup> The committee will be able to make non-binding

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<sup>7</sup> Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic), s 165A(2).

<sup>8</sup> *Public Health and Wellbeing Act 2008* (Vic), s 204.

<sup>9</sup> Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic), 165CE.

recommendations and report to the Minister, and those reports must be tabled in Parliament. The committee is intended to have multi-disciplinary expertise, encompassing public health, infectious diseases, primary care, emergency care, critical care, law, human rights, the interests and needs of traditional owners and Aboriginal Victorians, and the interests and needs of vulnerable communities. We suggest that consideration could be given to establishing a similar advisory body in the ACT.

## **B. Regulation of proof of vaccination requirements imposed by third parties**

19. We are concerned that without clear government regulation, individual service providers and the private sector may choose to unilaterally impose vaccination requirements in inconsistent ways, to the detriment of the human rights of individuals.

### **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 which 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.

20. We note that the government's obligations under the HR Act to properly consider and to act consistently with human rights are not just confined to decisions about whether government should mandate the use of proof of vaccination requirements by third parties. These obligations also apply to decisions by government about whether to support their use, for example by developing the functionality of the Check In CBR App to enable the addition of vaccination certificates, or to permit businesses and other private entities to require proof of vaccination as a condition of entry or as a condition of the provision of goods, services or facilities. Human rights law recognises that the obligation to protect against third party infringements of human rights may necessitate direct regulation and intervention.<sup>10</sup>
21. The Commission considers 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;
  - 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; and

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<sup>10</sup> 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].

- 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.

22. In our view, these matters should be addressed in the pandemic-specific legislation being developed by the government.

### C. Vaccination mandates

23. The CHO has issued public health directions to require workers in [residential aged care facilities](#), certain [health care](#) and [education](#) settings, and [disability support workers or in-home and community aged care workers](#) to be vaccinated or to have an approved exemption in order to be permitted to attend work.

24. We note that these directions do not mandate vaccination in the sense of authorising vaccination to be forcibly administered or by making it an offence for workers to be unvaccinated, however, their mandatory effect arises because by making proof of vaccination (subject to limited exceptions) a condition of employment, workers in these sectors would effectively have no choice but to get vaccinated.

#### EXAMPLE 1

A school teacher contacted the Commission as he had been dismissed because he was not vaccinated. The man says he assessed the safest decision for him was to not get vaccinated but he is now unemployed and at financial risk. The man says when he asked his employer for medical and other information on which the mandate was based they were not able to provide him with sufficient information other than to state the mandate was now a requirement of the job. The man says that other options should have been provided to him given other measures can be put in place to reduce the risk of COVID, rather than just rely on vaccine status as the basis for being employed.

#### EXAMPLE 2

A woman contacted the Commission raising concerns about her employment in an education setting. The woman said she had recently recovered from COVID and had obtained a temporary exemption from her doctor from vaccination due to some ongoing medical issues arising from COVID. The woman said she had been stood down from work even though she has had COVID and has a temporary exemption.

25. The Commission of course accepts that vaccination mandates in high-risk settings are aimed at legitimate public health objectives. However, by their nature, vaccination mandates are likely to involve restrictions on a range of rights which are guaranteed in the HR Act, including:

- the right to equality and non-discrimination (s 8),
- the right not to be subjected to medical treatment without free consent (s 10(2)),
- the right to privacy and personal autonomy (s 12),
- the right to freedom of thought, conscience, religion and belief (s 14), and
- the right to work and rights in work (s 27B).



26. Like all interferences with human rights, vaccination mandates must therefore conform to the strict test of reasonableness, necessity and proportionality in accordance with the requirements of s 28 of the HR Act, which requires limits to be (i) set by laws, and (ii) demonstrably justified in a free and democratic society.
27. In this respect, a recent decision of the European Court of Human Rights in *Vavříčka v Czech Republic* (Applications nos. 47621/13 and 5 others, Judgment of 8 April 2021) may be relevant. The court found that mandatory vaccination in a childcare setting was a reasonable limitation on human rights, but in the context of several safeguards that may not be fully present under existing ACT law. The court's assessment took account of various factors, including:
- the vaccination requirement had a specific basis in primary legislation (applied in conjunction with secondary legislation);
  - the existence of a pressing social need and relevant and sufficient reasons necessitating the interference (noting that states have a positive obligation to take appropriate measures to protect the life and health of those within their jurisdiction); and
  - the proportionality of the interference with the legitimate aim pursued, including:
    - the existence of exemptions for reasons of medical contraindications or conscience,
    - the availability of compensation for health injuries resulting from vaccination,
    - the severity of sanctions imposed on those who refuse vaccination, and
    - the availability of administrative appeals and judicial remedies for those who wish to contest sanctions.
28. 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 hear that the government intends to address these issues in the pandemic-specific legislation being developed.
29. In our view, the following legislative safeguards should be included in the bill to guide the exercise of powers to mandate vaccination. We consider that their inclusion in primary legislation is necessary to guard against overreach and ensure that there are procedures for monitoring the operation and impact of the vaccination mandates, and avenues by which a person may seek review of an adverse impact.
- **Prior consultation**: Prior consultation should be a pre-requisite to any decision to mandate vaccination in a particular setting and sufficient time for consultation should be built into the decision-making process, which should be transparent, with reasoning applied and evidence and advice relied upon clearly set out. The bill should also require consultation with individual employees to identify whether having the vaccine is appropriate for them, according to the public health advice and their individual circumstances.
  - **Appropriate exemptions**: We consider that exemptions should be provided not just for individuals who are unable for medical reasons to be vaccinated, or for whom a COVID-19 vaccination is not reasonably available, but should also be made available, where possible, for other legitimate reasons, such as religion or other conscientious objection grounds. Individuals who have a conscientious objection to COVID-19 vaccines should not be automatically excluded in the first instance but only as a measure of last resort after steps have been taken to ensure improved access

and education (including, for example, by requiring a person who objects to vaccination to sign an “informed declination form”). Exemptions for conscientious objection reasons should only be denied if the voluntary vaccination uptake has fallen short of the coverage rates being sought, and/or where other risk mitigation measures are insufficient to manage the risks to public health. It will also be important to build in sufficient flexibility to the way in which exemptions are framed, so that individual circumstances can be properly taken into account without compromising public health or safety.

- **Review rights**: We consider that express provision should be made for a person to seek independent merits review of exemption decisions. Exemption decisions should also be accompanied by a reasoned (and evidence-supported) explanation of why a less restrictive alternative would not be available. In this respect, we note that it will be important for vaccination mandates to be specific about their aims and the evidence relied upon in concluding that mandating vaccination in those settings is necessary to achieve those aims. Clarity of purpose will be critical to determining the correctness (or otherwise) of an exemption decision in the individual circumstances.
- **Operational guidance/policies**: We consider that each service provider should be required to develop and publish comprehensive guidance on how they will deal with unvaccinated staff, including ensuring that any process followed is non-discriminatory and whether reasonable adjustments have been considered for employees with a disability. We do not support the current approach of leaving it to each individual employer to set his or her own policies in this respect, without any guidance from government. While we welcome the government’s assurances that public sector employees who remain unvaccinated will be redeployed, we note that the government must also consider the impact of a vaccination mandate on the rights of private sector employees, including their ongoing right to work, in determining whether such a mandate (and its implementation) will remain reasonable and proportionate in accordance with the HR Act.
- **Human rights statement**: As noted above, we consider that it will be essential for each vaccination mandate to be accompanied by a comprehensive human rights assessment. That assessment should include a reasoned explanation as to whether and how the mandate satisfies the criteria of necessity, including whether voluntary uptake has been attempted in the particular employment setting and not achieved its purpose.
- **Regular review and sunset clause**: The continuing necessity of the vaccination mandate should be subject to regular and transparent review based on new evidence as it emerges. A sunset provision should be included to ensure that the mandate will come to an end on a specified date, or as soon as specific conditions are satisfied, for example, when a sufficient number of people have been vaccinated.

30. Thank you for the opportunity to provide this further submission. We believe that human rights must be central to the government’s ongoing response and management of COVID-19, and 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