



Mrs Giulia Jones MLA
Chair, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
[By email: Giulia.Jones@parliament.act.gov.au]

CC: Mr Andrew Snedden, Committee Secretary
[By email: scrutiny@parliament.act.gov.au]

10 June 2020

Dear Mrs Jones

Public Health Amendment Bill 2020

We write with a view to contributing to the Committee's examination of the Public Health Amendment Bill 2020, as introduced in the ACT Legislative Assembly on 4 June 2020. We appreciate that the Legislative Assembly's revised sitting program is likely to have placed increased pressures on the Committee's workload and we hope that our contribution will be of assistance to the Committee's consideration of this bill.

As you know, the bill removes the statutory right to compensation under s 122 of the *Public Health Act 1997* (the Act) insofar as an otherwise eligible person suffers loss or damage as a consequence of anything done in the exercise of an emergency function that relates to a COVID-19 declaration in force at that time. A limited exception is provided for anything done in relation to a direction given under s 120(1)(f) which relates to the power of the chief health officer to direct the occupier of property to place the property at the disposal or control of the chief health officer.

In our view, the removal of an existing statutory right to compensation and the application of this change retrospectively gives rise to concerns under the *Human Rights Act 2004* (HR Act). The ACT Chief Health Officer has, as of 4 June 2020, published 22 public health emergency directions under s 120 of the Act, six of which presently remain in force. Although clearly pursuing the legitimate objective of protecting public health, the directions, by their nature, inevitably involve significant limitations of a broad range of rights under the HR Act. However, they have not experienced the same level of pre-legislative and parliamentary scrutiny that would normally accompany comparable limitations of rights enacted through legislation or other instruments. For example, the directions are neither subject to disallowance by the Legislative Assembly nor are they accompanied by a statement of human rights compatibility endorsed by the Attorney-General. Given their broad and general framing, the directions also raise concerns about whether they are sufficiently precise, certain and predictable so as to meet the 'quality of law' test within the meaning of s 28 of the HR Act. In these circumstances, we consider that the availability of a statutory right to compensation is an essential safeguard for ensuring that any limitations of rights in the HR Act caused by the exercise of emergency powers under the Public Health Act remain proportionate. The removal of this right therefore raises serious concerns.

We accept that the bill is aimed at the legitimate objective of ensuring that government is able to sustainably respond to the effects of the ongoing public health emergency and protect the right to life. However, we are concerned that the approach taken in the bill of excluding compensation on a largely blanket basis may not comply with the requirements of s 28 of the HR Act for limitations on rights to be reasonable, necessary and

proportionate to a legitimate objective. We note that the explanatory statement points to similar approaches being taken in Queensland, South Australia and Tasmania. However, other Australian jurisdictions have taken a more qualified approach. For example, in Victoria, compensation claims can still be brought if a relevant direction was based on 'insufficient grounds': see s 204 of the *Public Health and Wellbeing Act 2008* (Vic). The explanatory statement does not explain whether these less restrictive options were considered and, if so, why they were rejected.

Accordingly, to assist the Committee in its assessment, the Committee may wish to seek further information from the bill's proponent about:

- **why preserving qualified access to the statutory right to compensation, in line with the approach taken in Victoria under s 204 of the *Public Health and Wellbeing Act 2008* (Vic), which restricts compensation claims to circumstances in which a direction was based on 'insufficient grounds', or a variation thereof, would not provide a reasonably available less restrictive alternative.**
- **the basis for considering that the 'act of grace framework' under the *Financial Management Act 1996* – which is a purely discretionary scheme and therefore does not give a qualifying person a 'right to be compensated' – is considered to be a satisfactory alternative for compensating unreasonable loss or damage arising from implementation of public health directions; and**
- **whether the retrospective application of the amendments proposed in the bill will affect any proceedings currently on foot, contrary to the right to fair hearing (s 21, HR Act).**

Please don't hesitate to let us know if we can provide further information about these matters should that be of assistance to the Committee.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner