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Dear Ministers

Concerns about mandating use of Check In CBR app

It has come to our attention that use of the Check In CBR application has recently become mandatory for restricted businesses and individual patrons. We are writing to note our concerns that the mandatory use of the app may lack sufficient legislative safeguards to ensure its compatibility with the *Human Rights Act 2004* (HR Act). We are particularly concerned that, despite public messaging to the contrary, it will be possible to use information obtained by the app for purposes other than contact tracing.

The preamble to the *Public Health (Restricted Activities – Gatherings, Business or Undertakings) Emergency Direction 2021 (No 2)* states that the Chief Health Officer (CHO) had regard to relevant human rights in making the direction and is satisfied that any limitations of rights are demonstrably justifiable and necessary to protect the ACT community.

As the Commission was not consulted during the app's development or about it being made mandatory, it is difficult to ascertain which human rights implications have informed the CHO's decision to make the use of the app mandatory. There is also limited public justification available to assess the basis for this decision. In this regard, we would welcome further information about the reasons for mandating the use of the app and the extent to which any less restrictive alternatives were considered unsuitable.

As you know, s 28(2) of the HR Act provides that rights may only be subject to reasonable limits set by laws. The government has consistently indicated that the public health emergency directions made by the CHO are not legislative instruments, with this status also explicitly reflected on the ACT Legislation Register.¹ Because many of the app's stated safeguards (eg that information is deleted after 28 days) do not appear to be set out in legislation, we are concerned that they may not provide adequate protection for the purposes of human rights compatibility. We therefore seek further information about which law is relied on to authorise collection of personal information through the app and the related legislative safeguards that apply.

The Commission has also received enquiries from members of the community, expressing concern about potential \$1,000 fines should they be unable to check in using the app. These enquiries have been raised with us by older people whose phones are incapable of downloading the app, who have limited data plans,

¹ ACT Legislation Register, 'Public Health (Restricted Activities – Gatherings, Business or Undertakings) Emergency Direction 2021 (No 2)' <<https://www.legislation.act.gov.au/ni/2021-115/>> (25 February 2021).

and who are generally concerned about downloading and using the app without support. People from multicultural backgrounds have also reported difficulty explaining to business owners that they cannot use the app. In some cases, they advise that business owners have been unwilling to assist them to check in or provide alternative methods, leading to their being refused service.

Although we appreciate that a business profile function has been made available to check in patrons who do not have a smartphone or who are unable to check themselves in, we note that the direction does not specifically require that businesses make this option known to patrons. In this regard, we note that both the app and QR code sheets currently only present information in English and do not convey that business owners can assist people. It is also unclear when the app may be considered 'unavailable' such as to require the business to collect patrons' details in written form.

As noted above, it is also of particular concern that data collected through the app is not exclusively reserved for contact tracing. The *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth), by contrast, makes it clear that *COVIDSafe* app data must only be used for contact tracing. On the contrary, both the *Information Privacy Act 2014* and the ACT Health Privacy Policy, which the Check In CBR app links to, explicitly contemplate personal information that is collected by government being accessed for other purposes as required or authorised by law.

When the Check In CBR app was introduced in September 2020, the government noted that the information would be collected "solely for the purpose of contact tracing, it is isolated into a single area that only has access to that data for that purpose... [a]fter 28 days we delete that data."² Despite this assurance, the breadth of potential disclosures permitted under ACT privacy laws will enable such information to be stored and disclosed for purposes unrelated to contact tracing and in ways patrons may not have foreseen (eg for purposes of law enforcement, or evidence in legal proceedings). We note that we have raised similar concerns with ACT Health around existing arrangements for use of *COVIDSafe* app data by ACT Health, which remain unaddressed.

We would be happy to discuss these matters further with you.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner



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

² Kathryn Lewis, 'ACT Health launch contact tracing app to streamline process for business and patrons' (Canberra Times, 9 September 2020) <<https://www.canberratimes.com.au/story/6916601/contact-tracing-app-launched-to-streamline-process/>>