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Minister for Health  
ACT Executive  
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1 September 2021

Dear Minister

### **Human rights statements needed for public health directions**

We are writing to seek your further consideration of the need for human rights assessments supporting public health directions to be made public during the current COVID-19 lockdown and as restrictions are lifted.

The Commission has, over the previous two weeks, 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 assess whether restrictions are necessary, reasonable and proportionate (in accordance with s 28 of the *Human Rights Act 2004*).

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. Although we consider the ACT Government's responses have, for the most part, been measured and targeted, the lack of published material explaining the justification for some emergency measures remains an ongoing issue of concern for the Commission. Such transparency is an essential component of a human rights-based approach and assures public confidence and commitment in complying with restrictions.

Enquiries we have received that merit further information have, for example, sought the human rights justification for not permitting a single child living alone with their parents to have a "social support bubble" with a child from another household, similar to concessions that are made for single adults. Other enquiries have questioned why the ACT permitted only one hour of exercise per day (relative to two hours in Victoria and no restrictions in rural and regional areas of New South Wales)<sup>1</sup> and the rationale for closing public playgrounds altogether. While we are pleased to see that the latter restrictions will soon be eased, these enquiries point to the community's need to understand the basis for the government's decisions.

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.<sup>2</sup> The Select Committee's June 2020 report, adopted this position as a recommendation, which the Government's response agreed to in-principle. In doing so, we note that the Government expressed its intention to make

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<sup>1</sup> We note that a one-hour limit was only introduced in Local Government Areas of Concern in Greater Sydney on 23 August 2021 in response to extremely large case numbers in those areas.

<sup>2</sup> ACT Legislative Assembly Select Committee on COVID-19 Pandemic Response, *Interim Report 2* (May 2020) <[https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/1549330/Submission-010-ACT-Human-Rights-Commission.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/1549330/Submission-010-ACT-Human-Rights-Commission.pdf)>

available any detailed analysis that has been undertaken in respect of legislation that significantly engages rights.<sup>3</sup> We are, however, concerned that some public health directions, which involve significant limitations on human rights, have since been introduced without publicly available information addressing their compatibility with human rights. Further information about these is set out in the attached appendix.

We have previously been assured that a thorough human rights assessment is conducted internally as a matter of course for each public health emergency direction issued by the ACT's Chief Health Officer (CHO). We recognise the undeniably complicated factors to be balanced in devising effective public health settings in such fast-moving 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 anticipates that this assessment and any underlying assumptions will be available for public scrutiny, expert analysis, and interrogation. Accordingly, we encourage you to examine any possible scope for statements addressing the compatibility of public health directions with human rights to be developed and published, including with the assistance of the Human Rights Unit in the Justice and Community Safety Directorate or the ACT Government Solicitor's Office.

For our part, the Commission is continuing to monitor public health restrictions and related issues. We have recently published factsheets on our website about the present COVID-19 lockdown and human rights principles, which may assist in adjusting future settings and which are being updated as circumstances change.<sup>4</sup> We are also available to provide feedback in respect of any proposed public health directions or other measures in a timely and constructive manner.

As a related matter, we understand that consideration is presently being given to extend mandatory vaccination requirements to other high-risk employment settings (such as health care workers), and that National Cabinet is also considering a proposal to introduce vaccination passports, which may enable greater freedoms for vaccinated Australians, but which may also have significant human rights implications, particularly should it unfairly affect access to goods and services. Should these proposals be progressed here in the ACT, the Commission would value the opportunity to provide early feedback and input.

Yours sincerely



Dr Helen Watchirs OAM  
President and Human Rights Commissioner



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

Cc: ACT Office of the Chief Health Officer, Attorney-General and Minister for Human Rights

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<sup>3</sup> ACT Government, *Government Response to the Select Committee on COVID-19 Pandemic Response Interim Report 2* (July 2020) <[https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0010/1567729/Government-Response-to-interim-report-2-COVID-19-pandemic-response-tabled-2-July-2020.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1567729/Government-Response-to-interim-report-2-COVID-19-pandemic-response-tabled-2-July-2020.pdf)>

<sup>4</sup> ACT Human Rights Commission, 'COVID-19 lockdown and your rights' (August 2021) <<https://hrc.act.gov.au/humanrights/covid-19-lockdown-and-your-rights/>>

## Appendix: Existing public health directions requiring further human rights justification

The Commission notes that the following public health directions, which involve significant limitations on human rights, appear to have been introduced without any publicly available information addressing their compatibility with human rights:

- Changes to visitor access to aged care facilities: Visitor restrictions currently in place for residential aged care facilities have concerningly removed the requirement for operators to consider whether a family member's presence at the premises is for the purposes of providing care and support to the resident or for the purposes of ensuring the resident's welfare or wellbeing. In our view, these requirements should be reinserted in the relevant directions. Excluding family care and support would appear to exacerbate the situation of staff to resident ratios identified by the Royal Commission. This approach also appears contrary to the Industry Code for Visiting Residential Aged Care Homes during COVID-19, which recognises the concept of "essential care visitors". As you may know, the Code was revised in August 2021 to take account of the more virulent Delta outbreak, while retaining the ability of family members to visit residents even during a Tier 3 outbreak, particularly where they are providing essential care and support.
- Quarantine directions for close and secondary contacts: The Commission understands that two public housing complexes are currently under full lockdown to stop the spread of COVID-19. By their nature, directions requiring people to quarantine will have serious human rights implications. In most instances, such directions are likely to be compatible with human rights, in light of the exceptional circumstances in which they have been issued. However, we are concerned that the more onerous the limits on rights become, the more difficult it is to assess whether the balance they strike is proportionate to their objective without further information. In the specific context of locking down an entire building, the effect of quarantine directions may amount to detention (and not simply a restriction on freedom of movement) and should be accompanied by more tailored safeguards. For example, it may be appropriate to ensure that review rights are afforded to affected individuals in those circumstances. We note that people currently 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 appreciates that these are not matters that can be easily addressed in the current emergency circumstances, but we would welcome further consideration of these issues in due course.
- Mandatory COVID-19 vaccination requirement for aged care workers: The Commission is aware that mandatory requirements for aged care workers to be vaccinated, which were introduced by way of a public health direction issued by the ACT Chief Health Officer (CHO), are due to commence on 16 September 2021. Making vaccination mandatory amounts to involuntary medical treatment and should be justified in accordance with s 28 of the HR Act. As you know, s 28 of the HR Act requires limitations on rights to be prescribed by law, as well as being reasonable, necessary and proportionate to a legitimate objective. It is not apparent that s 120 of the *Public Health Act 1997* provides a sufficiently lawful basis for directing a class of persons to be vaccinated. The Commission considers that measures that seek to make vaccination a condition of employment (or a condition of access to goods and services) must be based on express powers that are provided in primary legislation to ensure that they are subject to proper scrutiny and are accompanied by robust safeguards.