

Public Health (Ministerial) COVID-19 Management Direction and Exemption 2022 (No. 1)

HUMAN RIGHTS COMPATIBILITY STATEMENT

Background

On 11 March 2020 the Director General of the World Health Organisation declared the COVID-19 outbreak a global pandemic and requested that every country urgently take necessary measures to ready emergency response systems.

On 16 March 2020, the ACT Minister for Health declared a public health emergency under the *Public Health Act 1997* (the Public Health Act) in response to the public health risk posed by the novel coronavirus SAR-CoV-2 (COVID-19). This declaration has been extended numerous times reflecting the serious and ongoing nature of the pandemic.

The public health emergency declaration was revoked by the Minister for Health with effect from 30 September 2022. The Executive declared that COVID-19 continues to present a serious risk to public health and a COVID-19 management declaration was made to enable public health measures to be implemented to prevent or alleviate the serious risk to public health. The COVID-19 management declaration took effect from 30 September 2022.

National Advice - facemasks

The Australian Health Principal Protection Committee (AHPPC) has regularly considered the role of face masks in suppressing the spread of COVID-19, with evidence suggesting that high community use of face masks reduces case transmission.

On 15 November 2021, the AHPPC released a statement on the role of face masks to protect individuals and the community from COVID-19.¹ In this statement, the AHPPC referenced substantial international evidence indicating that high community use of face masks reduces COVID-19 cases, subsequently reducing hospitalisation and deaths.

¹ [AHPPC statement on the role of face masks to protect individuals and the community from COVID-19 | Australian Government Department of Health and Aged Care](#) (2021)

The AHPPC recommended that individuals protect themselves and others from community transmission by wearing well-fitted face masks in certain circumstances including when symptomatic, while in airport environment and on planes, when in indoor settings or areas where physical distance cannot be safely maintained and when in high-risk settings like hospitals, healthcare settings and visiting aged care facilities.

On 14 June 2022, the AHPPC released a subsequent statement on the removal of face mask mandates in airports.² In this statement, the AHPPC revised the need for mandated mask wearing in airport terminals but recognised the ongoing role of face masks and other public health and social measures (PHSMs) in minimising COVID-19 transmission and protecting the community, including those at high risk of developing severe illness.

In its most recent statement on 8 September 2022, the AHPPC reiterated the importance of ensuring that continued protections are implemented that target those most at risk of severe disease from COVID-19, especially in settings where there is increased risk of outbreaks occurring.³ In the ACT, these settings are referred to as high-risk settings and care facilities. They include hospitals, residential aged care and disability facilities, correctional settings and custodial facilities, as well as disability service settings where services are essential, close physical contact and care is maintained, and comorbidities and complex health needs often present.

National Advice – visiting high risk facilities

On 8 September 2022, the AHPPC released a statement on reduced isolation periods for COVID-19 cases.⁴ In recognition of the need to balance a proportionate approach to isolation for all Australians with the ongoing public health risk presented by COVID-19, the AHPPC recommended that isolation periods for COVID-19 diagnosed persons be reduced to five days following their positive test. The AHPPC recommended that this apply to non-symptomatic persons and (for staff and visitors) these individuals should be excluded from attending high-risk settings until at least seven days following their positive test result.

Overview of the Direction

The Direction requires individuals to wear a face mask securely over the nose and mouth in certain indoor high-risk settings, including in disability service and residential aged care settings, hospitals, and places of detention; except where a standing exemption applies. The requirement to wear a mask applies to both people working in these settings, as well as visitors to these settings.

Standing exemptions apply to children under 12 -years old and any person that has a physical or mental condition that makes wearing a face mask unsuitable (e.g., due to obstructed breathing, serious skin condition, intellectual disability, or mental illness or disorder).

² [AHPPC Statement on the Removal of Mask Mandates in Airports | Australian Government Department of Health and Aged Care](#) (2022)

³ [AHPPC Statement – reduced isolation period for COVID-19 cases | Australian Government Department of Health and Aged Care](#)

⁴ [AHPPC Statement – reduced isolation period for COVID-19 cases | Australian Government Department of Health and Aged Care](#)

The Direction also requires individuals to wear a face mask when they are a:

- (a) diagnosed person under the *Public Health (Chief Health Officer) COVID-19 Management Direction and Exemption 2022* and they are not at their designated [quarantine or isolation] premises;
- (b) recovered person under the *Public Health (Chief Health Officer) COVID-19 Management Direction and Exemption 2022* and fewer than seven days have elapsed following a positive COVID-19 test result or
- (c) household contact under the *Public Health (Chief Health Officer) COVID-19 Management Direction and Exemption 2022* and they are in an indoor area that is not their designated [quarantine or isolation] premises.

Notwithstanding the above requirements, facemasks may be temporarily removed when in circumstances prescribed by Schedule 2 of the Direction. A responsible person (a person who engages a worker to carry out work in a business or undertaking) is required to ensure that their worker's comply with the requirement to wear a face mask.

The Direction also requires that a recovered person not attend a disability service setting, high risk setting or residential care setting on the sixth and seventh day after their positive COVID-test. This requirement does not apply in circumstances where a diagnosed person needs to enter an identified setting for urgent medical treatment, or written permission has been granted by the operator of the setting.

Individuals that fail to comply with the Direction are subject to section 120B (COVID-19 directions – offence) of the *Public Health Act 1997* which enables the implementation of strict liabilities (up to a maximum of 50 penalty units) if the person does not have a reasonable excuse for failing to comply. Where reasonably practical, a warning should precede the issue of a penalty.

The objective of the Direction is to mitigate the serious public health risk posed by COVID-19 by requiring that individuals that present a high risk of COVID-19 transmission (i.e., diagnosed persons, household contacts), or that attend high-risk indoor settings (i.e., disability service and residential aged care settings, hospitals, and places of detention) wear a face mask to reduce the risk of transmission and associated adverse outcomes for vulnerable or at-risk members of the community.

Consultation on the Proposed Approach

In making the Direction, the Minister has taken into consideration the current national advice and the advice of the Chief Health Officer. The Human Rights Commissioner and Chief Minister have also been consulted.

Consistency with Human Rights

The preamble to the *Human Rights Act 2004 (ACT)* (the Human Rights Act) states that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. This is further reflected in section 28 of the Human Rights Act with subsection (2) stating that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purposes; and
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Direction engages and promotes the right to life (s 9) under the Human Rights Act. The Direction engages and may limit the following under the Human Rights Act:

- (a) Recognition and equality before the law (s 8);
- (b) Freedom of thought, conscience, religion and belief (s 14); and
- (c) Right to work and other work-related rights (s 27B).

Rights that are promoted by the Direction

Right to life

Section 9 of the Human Rights Act provides that everyone has the right to life, and no-one may be arbitrarily deprived of it. It is generally accepted that the right to life enjoins a government from the intentional and unlawful taking of a life but also to take appropriate steps to safeguard the lives of those within its jurisdiction⁵.

The right to life extends to the public health sphere and imposes positive obligations on hospitals and health authorities to adopt appropriate measures for the protection of lives.⁶

The Direction promotes the right to life by ensuring that individuals that are at high risk of COVID-19 transmission (i.e., diagnosed persons and household contacts) and individuals that are physically present within in high-risk indoor settings (i.e., hospitals, disability, custodial and aged care settings) are either prohibited from entering, or wear a face mask to cover the nose and mouth so that the risk of COVID-19 transmission is reduced. Substantial international

⁵ See, *Osman v United Kingdom* (1999) 29 EHRR 45.

⁶ *Eriksson v Italy* (Application No 37900/97, 26 Oct 1999); *Calvelli and Ciglio v. Italy* (Application No 32967/96), ECHR 2002-I.

evidence indicates high community use of face masks reduce COVID-19 cases and a reduction in COVID-19 cases can subsequently reduce hospitalisation and deaths.⁷

The right to life and the right not to be arbitrarily deprived of life is a fundamental human right. It is this right that the limitations imposed by this Direction seek to elevate.

Rights that may be limited by the Direction

1. The nature of the right affected and the limitation (s 28 (2)(a) and (c))

Recognition and equality before the law

Section 8 of the Human Rights Act provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. The purpose is to ensure that all laws and policies are applied equally, and do not have a discriminatory effect.

Section 8 of the Human Rights Act, lists as examples discrimination on the basis of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or ‘other status’.

In addition to the grounds identified as examples in the Human Rights Act, section 8 of the *Discrimination Act 1991* (ACT) provides it is unlawful to discriminate based on a person having one or more protected attributes including but not limited to, age, race, colour, sex, sexual orientation, language, religion, disability, or other status.

Direct discrimination occurs where a person treats a person with an attribute unfavourably because of that attribute. Indirect discrimination may arise where a law is neutral on its face (i.e., there is no express intent to discriminate), but which may, in its effect, disproportionately affect certain groups whose members have one or more protected attributes. Section 8(4) of the *Discrimination Act 1991* (ACT) provides that a condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.

The Direction may indirectly limit this right because the requirement to wear a face mask may have a disproportionate impact on a person who has certain religious convictions or persons who are deaf or hearing impaired. The Direction explicitly excludes (as face masks) bandanas, scarfs or other items that are not designed to provide the wearer with protection from infection. Application of the Direction is therefore likely to have a disproportionate impact on individuals that wear religious garments to cover the face and mouth (e.g., the niqab or burqa), display facial hair consistent with religious custom (e.g., Judaism, Sikh and Muslim custom), or for whom the display of facial tattoos has cultural significance (e.g., Ta Moko or Kakiniit tribal tattoos).

⁷ AHPPC, (2021). (op. cit).

Widescale application of face masks in some circumstances and high-risk settings may limit the ability of hearing-impaired persons to observe communication cues generally, particularly when the communication preferences of hearing-impaired individuals are not otherwise known to the people around them. This Direction may therefore have a disproportionate impact for hearing impaired individuals when interacting in public and community settings.

Freedom of thought, conscience, religion and belief

Section 14 states everyone has the right to freedom of thought, conscience and religion, including the freedom to adopt a religion or belief and to demonstrate the person's religion or belief individually or as part of a community, whether in public or private through worship, observance, practice or teaching. A person must not be coerced in a way that limits their freedom to hold a belief whether directly or indirectly.

Section 14(1) of the Human Rights Act distinguishes between the absolute right to have or adopt a religion or belief, and the right to demonstrate or manifest that belief; with the latter able to be subject to reasonable limitations. Reasonable limitations must be imposed for a particular purpose and where necessary to protect public safety, order, health or morals, or for the fundamental rights and freedoms of others.⁸

As noted above ('Recognition and equality before the law'), the Direction:

- (a) indirectly discriminates on the grounds of religion as defined under the *Discrimination Act 1991*, and
- (b) engages the right to freedom of religion or belief by disproportionately impacting the ability of some religious and cultural groups to express their affiliation in accordance with custom.

Importantly, a requirement to limit movement of a recovered person for a short period, or to wear a face mask in certain circumstances and high-risk environments, does not itself remove the right of a person to hold or express their religion or belief as this right is absolute and cannot be subject to reasonable and justifiable limits under section 28 of the Human Rights Act.

Right to work and other work-related rights

Section 27B provides that everyone has the right to work, including the right to choose their occupation or profession freely, the right to the enjoyment of just and favourable conditions of work, and to enjoy the rights in section 27B without discrimination.

This direction places obligations on a responsible person (i.e., a person who engages a worker to carry out work in a business or undertaking) to ensure compliance with face mask wearing provisions. The Direction may therefore limit the rights of affected workers who will be required to wear a face mask if their place of work falls within the scope of one of the identified settings outlined in the Direction. Failure to do so would result in an individual not being able to attend their place of work. It may also result in the imposition of strict liability under section

⁸ UN Human Rights Committee, *General Comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion)* (1993).

120B of the *Public Health Act 1997* where a person refuses to wear a face mask, or a responsible person does not meet their obligations to impose this requirement.

Further, the direction prohibits staff engaged at disability service, high risk and residential care settings from attending their place of employment on days 6 and 7, following a positive COVID-19 test), unless they first have the written permission of the operator. The Direction therefore limits the rights of affected workers to engage in employment for up-to-two days.

Notwithstanding these considerations, the right to just and favourable conditions of work includes (among other things) safe working conditions.⁹ Arguably, any limitation to the right to work imposed by the Direction may equally promote the safety and wellbeing of affected workers, given the well-established international evidence that shows that wearing a mask reduces the risk of COVID-19 transmission and associated adverse health outcomes.¹⁰ The requirement for a worker that is a recovered person to seek written permission from an operator also presents an opportunity the employer to develop appropriate work health and safety plans that may reduce the risk of COVID-19 transmission in the workplace.

2. Legitimate purpose (s 28 (2)(b))

The requirements imposed by the Direction apply in targeted circumstances and settings, seek to limit the transmission of COVID-19 and by extension, mitigate the serious risk to health and life posed by COVID-19.

The ACT COVID-19 Response remains focused on preventing transmission and outbreaks in high-risk settings, as people in these settings are often vulnerable to, and more likely to experience, severe disease and poor health outcomes resulting from COVID-19.¹¹ The Direction seeks to achieve this purpose by targeting individuals that:

- (a) present a high risk of COVID-19 transmission due to their own COVID-positive status or ongoing proximity to a COVID-positive person, i.e., being a diagnosed person or household contact when not isolating or quarantining in a designated premises; or
- (b) are in attendance in high-risk settings and may therefore be at greater risk of contracting or transmitting COVID-19 infection to vulnerable people, particularly where safe social distancing cannot be maintained, e.g., disability service and residential aged care settings, hospitals and places of detention.

3. Rational connection between the limitation and the purpose (s 28 (2)(d))

⁹ UN Human Rights Committee, *International Covenant on Economic, Social and Cultural Rights*, Article 7 (1966)

¹⁰ AHPPC, (2021). (op. cit).

¹¹ Communicable Diseases Network of Australia, Australian Government Department of Health, *Coronavirus disease 2019 (COVID-19) Series of National Guidelines version 7.0*, published 3 June 2022 [https://www1.health.gov.au/internet/main/publishing.nsf/Content/7A8654A8CB144F5FCA2584F8001F91E2/\\$File/COVID-19-SoNG%20v7.0.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/7A8654A8CB144F5FCA2584F8001F91E2/$File/COVID-19-SoNG%20v7.0.pdf)

Scope of application

Identified high risk indoor settings have been targeted due to the prevalence of cohorts that are vulnerable to higher risk of severe COVID-19 related disease.

The *COVID-19 CDNA National Guideline for Public Health Units*¹² has identified that increasing age is the most important risk factor for severe COVID-19 related disease, with risk of adverse health outcomes significantly increasing at about 60 to 70 years of age. Disability and frailty, Aboriginal and Torres Strait Islander status, immunosuppression, the number, severity and nature of comorbidities and pregnancy have also been identified as risk factors for severe COVID-19 related disease.

Residential aged care facilities (RACF), residential care, disability services, places of detention and hospital settings have therefore been targeted as high-risk settings that necessitate the imposition of targeted public health mitigations. Avoidance of these settings when infectious and wearing face masks in these environments is considered particularly important given that users of these services often rely on the provision of close physical support and care from others. Further, confined indoor spaces make compliance with other PHSMs (like social distancing) difficult. These settings have also been targeted by the Direction as environments where vulnerable populations reside including people with underlying health conditions, elderly people and people of Aboriginal and Torres Strait Islander descent.

Epidemiological situation

The ACT continues to respond to COVID-19 in the context of widespread community transmission. Active outbreaks and exposures are being managed across the Territory in high-risk settings including hospitals, residential aged care, custodial and disability support settings.

Whole Genome Sequencing (WGS) is being prioritised in the ACT for cases from high risk setting outbreaks. This shows that Omicron BA.5 subvariant is the predominant subvariant operating in the ACT and nationally. BA.5 is associated with higher levels of immune escape for people who have been vaccinated or previously infected.

Evidentiary basis

Distancing and face mask wearing requirements are fundamental to well-established PHSMs that have been used to mitigate the public health risk associated with COVID-19 throughout the pandemic. Restricting movement and wearing of face masks over the nose and mouth has been used in many jurisdictions (nationally and internationally) as a containment measure for COVID-19.

¹² [COVID-19-SoNG v7.0.pdf \(health.gov.au\)](#)

International evidence cited by the AHPPC¹³ shows demonstrable public health benefits when face masks are worn appropriately, including marked reductions in COVID-19 transmission, hospitalisation, and mortality. Masks help to reduce the emission and inhalation of COVID-19 infected respiratory droplets in the air. They act as a physical barrier to droplet emission for symptomatic and asymptotically infected individuals; the latter being an important consideration given the high rates of population wide vaccination in the ACT and Australia more broadly.

Imposing requirements on individuals that present a high risk of COVID-19 transmission (e.g., diagnosed persons that are not at a designated premises) and individuals that attend high-risk settings, mitigates the risk of respiratory droplet exchange and therefore virus transmission to people located in their vicinity. By extension, the risk to health and life posed by COVID-19 is reduced in an environment where virus transmission is otherwise widespread.

Imposing strict liability for failing to comply with the Direction is necessary to support compliance and uphold its legitimate purpose.

4. *Proportionality (s 28 (2)(e))*

Section 28 of the Human Rights Act sets out the circumstances in which protected rights may be subject to reasonable limitations. Among the factors to be considered is whether the limitations imposed by the Direction are a proportionate means of achieving its objective.

COVID-19 has been declared a global pandemic by the Director General of the World Health Organisation. The Omicron BA.5 subvariant has greater immune escape than previous iterations and remains a persistent source of infection across the ACT. While there is no evidence that the BA.5 subvariant is more severe than its predecessors, higher case numbers in 2022, have seen increased pressure on our public health and hospital systems.

Restrictions imposed by the Direction have been empirically demonstrated to reduce the rate of COVID-19 transmission (and by extension hospitalisation and mortality), by acting as a physical barrier to respiratory droplet emission and inhalation between individuals. The Direction therefore acts as an important public health and safety measure to mitigate the public health risk associated with COVID-19. Pursuit of public health is considered a legitimate objective and resulting limitations reasonable and justifiable in the context of human rights including manifestation of thought, conscience and religious belief (s14).¹⁴

The Direction is the least restrictive means available to appropriately mitigate the risk of onward transmission and adverse health outcomes for vulnerable persons. The Chief Health Officer and ACT Health have maintained strong and consistent messaging throughout the pandemic that facemasks should be worn in public indoor settings when social distancing cannot be maintained. In the absence of public health directions, widespread adoption of facemasks in public indoor settings or restriction of movement, consistent with this advice, is not routinely adopted by the community.

¹³ Ibid. Citations 1 to 5, inclusive.

¹⁴ UN Human Rights Committee, *General Comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion)* (1993).

The scope of the Direction has been targeted specifically towards application in settings and circumstances where people are:

- known to present a heightened risk of onward transmission to others due to their own COVID-positive status or ongoing proximity to a COVID-positive person as a household contact; and
- visiting or working in high-risk settings where people who are vulnerable to severe adverse health outcomes associated with COVID-19 reside and where safe social distancing cannot be easily maintained.

Appropriate safeguards have also been included without limiting the legitimate purpose of the Direction. Safeguards apply in circumstances where wearing a face mask may be inappropriate or cause unintended harm or discomfort to the wearer or those around them. These safeguards are intended to ensure that any limitation on the right to equality, freedom of religion, thought conscience, religion and belief, and right to work and other work rights are appropriate and adapted to achieve the purpose and the least restrictive means of doing so. This includes the application of:

- standing exemptions to facemask wearing for people under the age of 12-years as well as people that have a physical or mental health illness, condition or disability that makes wearing a face mask unsuitable e.g., due to obstructed breathing, intellectual disability or mental health illness;
- specified circumstances when masks may be removed. For example, where the transmission risk presented to others is reduced (e.g., when consuming food or drink, working alone or more than 1.5 meters away from others), the rights and comfort of others may be impinged (e.g., when communicating with a person who is deaf or hearing impaired), and when the requirement to wear a face mask may inadvertently cause harm (e.g., in an emergency, when otherwise unsafe); and
- standing exemptions for recovered people when urgent medical treatment is required, or prior written permission granted by an operator.

This Direction also includes safeguard provisions with regards to the communication and exchange of ideas using sign language, lip reading and other associated mediums. It achieves this by enabling the removal of face masks when communicating with a person who is deaf or hearing impaired, or for whom visibility of the mouth is needed (Schedule 2 of the Direction).

Limitation Statement

The Minister considers there to be a rational connection between any limitation imposed on human rights and the purpose for the limitation such that is proportionate and a reasonable response to the risk of COVID-19.

The Direction includes the grounds on which the Minister believes the Direction is necessary to prevent or alleviate the risk of COVID-19. The requirements contained therein are the least restrictive means to appropriately mitigate the risk of onward COVID-19 transmission, leading to potential severe illness particularly where vulnerable cohorts are present.