

**CHIEF HEALTH OFFICER STATEMENT:
CONSIDERATION OF HUMAN RIGHTS IMPLICATIONS OF IMPOSED
PUBLIC HEALTH EMERGENCY DIRECTIONS**

UPDATE: OCTOBER 2021

As the ACT's Chief Health Officer, I remain mindful that section 40B of the *Human Rights Act 2004* (the Act) requires all public authorities to give proper consideration and act in a compatible way with human rights. Equally important is that section 30 of the Act requires that all Territory laws be interpreted in a human rights compatible way, in so far as it is possible to do so consistently with its purpose, and that section 28 of the Act permits limits to be placed on rights which are demonstrably justifiable in a free and democratic society.

Throughout the declared public health emergency in the preparation of each Public Health Emergency Direction under section 120 of the *Public Health Act 1997* I have been guided by these provisions and these principles. In all instances, the intention of the Directions which I have imposed have been to protect the lives and health of the Canberra community by preventing where possible, and reducing where necessary, the spread of COVID-19. Since March 2020 these protections have been achieved through Directions imposing:

- Mandatory self-isolation of persons who are confirmed to have COVID-19, and quarantine for contacts of such persons;
- restrictions on the conduct of non-essential businesses and undertakings that enforce stronger social distancing in settings in which people would ordinarily gather;
- restrictions on movement, including entry to settings that are at greater risk from COVID-19 due to the presence of vulnerable persons (such as aged care facilities), and
- restrictions on entry into the ACT from identified COVID-19 affected areas, including quarantine requirements or limitations on movement.

Since the first cases of the highly infectious COVID-19 'Delta' variant of concern were detected in Australia in mid-March 2021 (and then the first cases of community transmission in mid-2021) additional protections have been required through Directions, including:

- mandatory wearing of face masks;
- mandatory check-in at specific locations, to assist with quick contact tracing if required; and
- lockdown restrictions in response to 'Delta' cases within the ACT community.

I have given due consideration to the fact that the various Public Health Directions have engaged several human rights protected under the Act, including:

- the right to recognition and equality before the law under section 8 of the Act;
- the right to life under section 9 of the Act;
- the right to consent to medical treatment afforded by section 10 of the Act;
- the right to privacy under section 12 of the Act;
- the right to freedom of movement under section 13 of the Act;
- the right to freedom of religion under section 14 of the Act;
- the right to freedom of assembly and association under section 15 of the Act; and
- the right to work under section 27B of the Act.

I have also given due consideration to whether a limitation on these rights is reasonable having regard to:

- the objective to be served by the measure;
- the interests that are protected by the right;
- the extent to which that right may be limited;
- the effectiveness of the measure in achieving the objective;
- the availability of other less restrictive measures; and
- the procedural and other safeguards surrounding the measure.

In this regard all human rights, including the right to freedom of movement and the right to practice religion, may be subject to reasonable limitations which serve permissible purposes, such as the protection of public health.

I acknowledge that most of the Directions engage the right to privacy of individuals in their private capacity and in their professional capacity as owners of businesses, as employers or employees, and as contractors. Nevertheless, in all instances the restrictions imposed on this right by the Directions have been in my determination the least restrictive, necessary, and proportionate to the public health risks at each stage of the public health emergency thus far. I recognise that failure to comply with the Directions is an offence, however, I also note that the offence is subject to an exception where the person is able to establish a reasonable excuse.

As Chief Health Officer I nevertheless place particular emphasis on the fact that human rights principles include positive obligations such as to promote and secure the capacity of individuals to enjoy their rights which has included the protection of the community against the risks posed by the current public health emergency, and in particular the most recent outbreak in the ACT. In so doing, I have considered the need to secure other human rights protected by the Act:

- the right to life in section 9 of the Act;
- the right to security of the person in section 18 of the Act.

The scale of the risk posed by COVID-19 is demonstrated by:

- the experience internationally relating to the impacts, of both the original strain of COVID-19 and the 'Delta' variant, including morbidity rates and the impact each has had on health and hospital services,
- the continually evolving scientific understanding of the virus, including as to the effectiveness of preventative steps to limit its spread, and the available treatments;
- the infectiousness of the COVID-19 'Delta' variant of concern, reflected in that within 11 days of entering 'lockdown' the ACT had recorded the same number of confirmed cases of COVID-19 as it had in the entire period between the declaration of the public health emergency and the start of the 'lockdown' on 12 August 2021; and
- the challenges that Australia has faced to date in efforts to limit the spread of the virus – challenges which have only escalated since the arrival of the 'Delta' variant into the country and the number of outbreaks associated with that variant.

This scale of the risk is a core determinant in the process of considering potential restrictions that could be imposed, and then ultimately choosing to impose such restrictions through Directions. It is however critical that the consideration of these risks must contemplate how the public health harms which would arise from those risks would be experienced within the ACT, taking into consideration:

- the ACT's population size and demographics, including vulnerable groups;
- the limits of the ACT's hospitals and health system, including Intensive Care Unit (ICU) capacities and health system workforce capacities;
- the inter-connected relationship the ACT has with the surrounding NSW region, which extends to employment and trade;
- our vaccination rates, including in our vulnerable communities; and
- any expectations as to assistance and 'surge' capacity that could be provided by other jurisdictions (particularly if they too are experiencing capacity strains), or from the Commonwealth (including from the Australian Defence Force).

This process must also involve an assessment as to risk tolerance; what level of public health risk would the ACT be willing and able to accept in determining what would be the least restrictive measures imposed to safeguard the health and wellbeing of the overall community. These same considerations also extend to any later decisions to refine, tighten, or ease any such restrictions.

It is on this basis that the public health response of the ACT must, by necessity, differ in varying forms to that imposed by other jurisdictions. Decisions as to how quickly the ACT enters a state of 'lockdown' will be different because the ACT's contact tracing capacity and hospital system also differs to that of other jurisdictions. The 'reasonable excuses' for not being at home under 'lockdown' restrictions will vary between jurisdictions based on how specific and/or prescriptive each jurisdiction elects to be, combined with other factors such as population size and density.

As lockdowns progress the degree of community transmission reflected in reproduction rates for the virus will also influence the nature of restrictions imposed, as will the nature of the communities being affected (eg our vulnerable communities within high risk settings, our schools, our Aboriginal and Torres Strait Islander community). Also relevant will be the observed degree of compliance with restrictions, testing rates, and even how long the lockdown has been operating so as to take into consideration ‘compliance fatigue’ and the cumulative impacts on social and mental health and wellbeing.

The change in the public health risk brought about by variants of concern, has seen the need for stricter quarantine requirements necessary to limit the potential spread of the ‘Delta’ COVID-19 variant. In recognition of the highly transmissible nature of the ‘Delta’ strain it has been necessary to place quarantine restrictions on ‘secondary contacts’ (close contacts of persons who are close contacts of confirmed case), and to introduce an increased focus on testing of contacts.

It is also important to recognise that although it has been necessary for many of the Directions to be imposed in a seemingly short timeframe, there has been a considerable amount of policy consideration placed into the construction of each Direction. This work is undertaken to ensure clarity, certainty, consistency and fairness of application, and to be the least restrictive means reasonably necessary. In drafting each Direction there is a focus on ensuring there are exceptions where appropriate, and usually an exemption process in recognition that there will be individual circumstances which are unique, unforeseeable, or which require further consideration for compassionate reasons.

As safe and effective vaccines against COVID-19 are now available and an Australian vaccination program has been progressively implemented during 2021, another important consideration as to the public health risks becomes vaccination rates; generally, and within specific community groups and work forces.

The ACT’s vaccination rates are nation leading, and therefore it is not anticipated that there will be any need to limit access to public and private sector services. However, it has been determined that, to protect our most vulnerable, there should be restrictions on access to particular high risk settings (for example residential aged care facilities and certain health care settings) by workers and those in contact with vulnerable groups who have not received a COVID-19 vaccination. The ACT will continue to participate in discussions at a National level, and have regard to Australian Health Protection Principal Committee and National Cabinet considerations in determining ACT specific restrictions relating to vaccination. This may impact on a person’s right to work and right to privacy, but as it is being imposed to protect the lives and health of the vulnerable groups within our community, it will also positively engage the right to life in that it is being imposed to protect life and the security of the community.

In this respect such restrictions may be considered as somewhat analogous to restrictions imposed on working in certain vocations without necessary qualifications and/or competency. It is in this context that the residential aged care facilities (RACFs) direction has reasonably restricted a worker from entering or remaining at a RACF if they have not received at least one dose of a COVID-19 vaccine. I have participated in discussions with my Chief Health Officer counterparts through the Australian Health Protection Principal Committee (AHPPC) and considerations by the National Cabinet.

Accordingly, each of the Directions imposed during 2020 were demonstrably necessary, and indeed essential, to protect the lives of the ACT community from the significant public health risks posed by the spread of COVID-19 at that time. Despite much more being known about COVID-19 now in 2021, and a vaccination program underway, each of the Directions imposed during 2021 are also demonstrably necessary and as equally essential in protecting the lives of the ACT community due to ongoing and heightened public health threat posed by the 'Delta' variant of COVID-19.

COVID-19 remains a serious threat to health and safety, and variants of concern such as the Delta-variant have further exacerbated that risk due to greater transmissibility which makes control of outbreaks more difficult and increases risk of seeding additional outbreaks. Evidence has also suggested that infections with the Delta variant may be linked to more severe disease, as evidenced by number of hospitalisations, particularly in younger people.

For these reasons I remain satisfied that the Directions I have issued during 2020 and 2021 are compatible with the rights in the Act.