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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PUBLIC HEALTH (EMERGENCIES) AMENDMENT BILL 2020

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Rachel Stephen-Smith
Minister for Health**

PUBLIC HEALTH (EMERGENCIES) AMENDMENT BILL 2020

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

BACKGROUND

In December 2019, China reported cases of a viral pneumonia caused by a previously unknown pathogen in Wuhan City, in the Hubei Province of China. The pathogen was identified as a novel coronavirus genetically related to the virus that caused the outbreak of Severe Acute Respiratory Syndrome in 2003. The new strain of coronavirus is called SARS-CoV-2 and the disease it causes is called COVID-19. COVID-19 is presently understood to most likely spread from person-to-person contact. The current estimates of the time it takes for symptoms to develop after being exposed to the virus that causes COVID-19 is a range of 2 to 14 days. At this stage, there is no known vaccine or antiviral against COVID-19.

On 30 January 2020, the Director-General of the World Health Organisation (WHO) declared the outbreak of COVID-19 a Public Health Emergency of International Concern. On 11 March 2020, the Director-General of the WHO declared COVID-19 a global pandemic. The WHO requested that every country urgently take necessary measures to ready emergency response systems.

On 16 March 2020, the Minister for Health declared a public health emergency under section 119 of the *Public Health Act 1997* (the Act) due to the public health risk to the ACT community posed by COVID-19. The public health emergency was declared for the whole of the ACT for a period of five days (the maximum period allowed pursuant to section 119(3)(a)). It was the first time that a public health emergency had been declared under the Act. An emergency declaration can be extended and further extended by notifiable instrument for period of up to two days pursuant to section 119(4). The emergency declaration has already been extended a number of times and it is expected that there will be a continued need for the declaration to be further extended.

As at 7am on 31 March 2020, the WHO has reported that there are 771,688 confirmed cases of COVID-19 worldwide, and the Australian Government has reported 4,359 confirmed cases in Australia and 18 deaths as a result of COVID-19. As of 2pm on 31 March, the ACT had 80 confirmed cases and 1 person had died from COVID-19.

OVERVIEW OF THE BILL

Part 7 of the Act relates to public health emergencies. Section 119 of the Act provides that the Minister for Health may declare a public health emergency if

satisfied that it is justified in the circumstances. A declaration of a public health emergency is a notifiable instrument.

An emergency declaration activates a range of emergency actions and powers. While an emergency declaration is in force, the chief health officer may take any action, or give any direction, he or she considers necessary or desirable to alleviate the emergency specified in the direction. Authorised officers have a range of powers, including powers of entry and powers to prevent access to a place, for the purposes of enforcing an action or direction made by the chief health officer.

The Bill amends the Act to allow an extension (or further extensions) of a declared public health emergency to remain in force for a period of to 90 days when it relates to a declaration made because of the COVID-19 emergency. This amendment will give the ACT community greater certainty about the anticipated need for an emergency declaration to continue in the context of the COVID-19 emergency. It will also give the chief health officer and authorised persons under the Act certainty as to the lawful exercise of emergency powers under the Act and will allow the ACT Government to communicate with certainty about emergency arrangements with more notice to the community.

If the Minister is no longer satisfied that a public health emergency declaration is justified in the circumstances, the Minister has the power to repeal the declaration pursuant to section 119 of the Act and section 46 of the Legislation Act. The emergency actions and powers under Part 7 of the Act will cease once the emergency declaration (including any period of extension) is no longer in force. The Bill amends the Act to require the Minister to revoke a COVID-19 declaration that has been extended or further extended if the Minister decides, after consulting the chief health officer, that the declaration is no longer justified. The Bill also adds a requirement for the chief health officer to advise the Minister at least every 30 days about the status of the COVID-19 emergency and whether the chief health officer considers the declaration is still justified.

The Bill amends the Act to provide that the chief health officer may give a direction to the occupier of property, placing the property under the control, or at the disposal, of the chief health officer. This amendment reflects an emergency power that is available to the emergency controller pursuant to section 150C(2)(c) and section 160A(2)(c) of the *Emergencies Act 2004* during a declared state of alert or state of emergency. This amendment will empower the chief health officer to take control of property such as Personal Protection Equipment, medicines and medical equipment, or to have available at his or her disposal property such as a hotel or stadium for the purpose of a quarantine clinic or morgue.

The Bill also makes a number of minor amendments including to correct a drafting error in section 122 and to clarify when a public health declaration and a public health direction will commence.

CONSULTATION ON THE PROPOSED APPROACH

Due to the urgent nature of the Bill, consultation with the community and stakeholders was not possible. However, the need for the amendments in the Bill was determined by the Security and Emergency Management Committee of Cabinet. The Justice and Community Safety Directorate was also consulted in relation to the amendments. In addition, the ACT Health Directorate has had regular contact with the Australian Health Protection Principal Committee (AHPPC) and the National Cabinet about the developing COVID-19 situation and a nationally consistent approach to mitigating the risk.

The ACT Health Directorate has also provided regular updates to the community about COVID-19 and will continue to ensure that the community is informed about confirmed cases in the ACT, measures that are being implemented by the ACT Government and actions that should be taken by the public to limit the spread of COVID-19.

The amendment to allow the extension of a public health emergency for a period of up to 90 days is consistent with a recent amendment made to section 323 of the *Public Health Act 2005* (QLD) to allow an extension for a period of up to 90 days. The amendment is also similar to the approach in New South Wales whereby a public health order can be made by the Minister for a period of up to 90 days pursuant to section 7 of the *Public Health Act 2010* (NSW).

The amendment to allow the chief health officer to give a direction to the owner of property placing the property under the control, or at the disposal, of the chief health officer reflects an emergency power that is available to the emergency controller pursuant to section 150C(2)(c) and section 160A(2)(c) of the *Emergencies Act 2004* (ACT) during a declared state of alert or state of emergency.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill may be considered to engage the following rights under the *Human Rights Act 2004* (HRA):

- Section 8 – right to equality and non-discrimination;
- Section 9 – right to life;
- Section 12 – right to privacy;
- Section 13 – freedom of movement;

- Section 15 – peaceful assembly and freedom of association; and
- Section 18 – right to liberty and security of person

Section 28(1) of the HRA provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) provides 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 limits that are placed on human rights by the Bill are reasonable and justifiable in a free and democratic society. An assessment of the Bill's impact on relevant provisions of the HRA, against all factors in section 28(2), is provided below.

Rights Promoted

The Bill engages and promotes the right to life pursuant to section 9 of the HRA. The primary purpose of the Bill is to recognise the significant and ongoing health risk of COVID-19 to the ACT community, and to protect health and life. This purpose is achieved by allowing a declared public health emergency to be extended for up to 90 days to ensure that measures can be implemented flexibly to respond to the emerging threat. This purpose supports the right to life for everyone in the ACT.

Rights Limited

1. Nature of the right and the limitation (s28(a) and (c))

Section 8(2) provides that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind. Section 12 provides that everyone has the right not to have his or her privacy or home interfered with unlawfully or arbitrarily. Section 13 provides that everyone has the right to move freely within the ACT and to enter and leave it. Section 15 provides that everyone has the right of peaceful assembly and the right to freedom of association. Section 18 provides that everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily detained. No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The amendments in the Bill have the potential to limit each of these rights, as the amendments allow a declared public health emergency relating to COVID-19 to remain in force for a longer period of time. While a declared public health emergency is in force, the chief health officer may take any action or give any direction which he or she considers to be necessary or desirable to alleviate the emergency. This is a broad-ranging power that could involve a direction to a person to undergo a medical examination, potentially limiting the right to privacy, or a direction for the segregation or isolation of a person, potentially limiting freedom of movement, freedom of association and the right to liberty. The chief health officer has already made a number of directions which potentially limit these rights. Failure to comply with a direction of the chief health officer without reasonable excuse is subject to a maximum penalty of 50 penalty units for a person or 2000 penalty units for a utility.

During a public health emergency, an authorised person also has emergency powers to compel persons to do or refrain from certain activities to enforce an emergency direction given by the chief health officer. These powers include using reasonable force and assistance as necessary to:

- enter any place in specified circumstances, potentially limiting the right to privacy;
- prevent access to any place, potentially limiting freedom of movement, freedom of association and the right to liberty; and
- close a roadway or thoroughfare to pedestrian or vehicular traffic, potentially limiting freedom of movement.

The application and enforcement of these emergency powers has the potential to result in discrimination against a number of vulnerable groups, including Aboriginal and Torres Strait Islander people, people with disabilities or mobility issues, women, children and young people, or people living in poverty. The potential discrimination against these categories of people may arise due to their higher rates of engagement with law enforcement, the increased likelihood that they may need to escape or secure protection from violence or abuse in their place of residence, or because their socio-economic status, including homelessness, makes them more likely to be present in public places. Any directions made during a declared public health emergency may result in an adverse impact on people in these categories.

2. *Legitimate purpose (s28(b))*

The objective sought to be achieved by the Bill is to protect the life and health of all people in the ACT.

COVID-19 presents a significant risk to the health, wellbeing and lives of everyone in the ACT community. The scale of the COVID-19 pandemic is

unprecedented. As noted by the AHPPC on 17 March 2020, interventions such as social distancing may need to continue for more than six months. The AHPPC stated that “the application of extraordinary measures for a short term (for a period of four weeks) will only defer the increase in cases and will not achieve long term flattening of the curve, or, ultimately save lives.”

At international law it is recognised that during a state of public emergency which threatens the life of the nation, that governments may take measures which significantly limit or derogate from certain human rights, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹ As discussed below, the amendments introduced in this Bill are necessary and proportionate to respond to the particular threat posed by COVID-19 to the ACT community.

The amendments allow for the declaration and continuation of a public health emergency for an extended period to respond to the COVID -19 pandemic, and as a result a continuation of the powers of the chief health officer and of authorised persons. The amendments allow for greater certainty and planning to allow for the application of evidence-based interventions to mitigate the risk posed by COVID-19.

3. *Rational connection between the limitation and the purpose (s28(d))*

The limitations on the right to equality and non-discrimination, right to privacy, freedom of movement, freedom of association and the right to liberty and security of person are all necessary to ensure the public safety purpose of the Bill is achieved. The WHO and AHPPC have recommended that case isolation and social distancing are some of the most effective interventions to reduce the spread of COVID-19. The restrictions on the rights in the Bill are necessary to ensure that these recommendations can effectively be implemented and enforced in the ACT for as long as necessary. The implementation of these measures will help to limit the spread of COVID-19 in the ACT and in Australia, and will save lives.

4. *Proportionality (s28(e))*

The amendments are the least restrictive means reasonably available to achieve the objective of the Bill. The current provision in the Act that allows for a public health emergency to be extended for periods of up to two days at a time is ineffective for the COVID-19 emergency.

¹ Article 4 of the International Covenant on Civil and Political Rights; UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 72nd sess, UN Doc CPR/C/21/Rev.1/Add.11 (31 August 2001) (‘General Comment No. 29’).

The Epidemic Infectious Disease Plan for the ACT notes that during an outbreak, there is a need to make decisions early and to implement actions which are disruptive to society at large. The amendments in the Bill will allow for earlier decision-making. Obtaining public compliance measures is also vital to the success of control efforts. The ability for the chief health officer to make enforceable directions during a public health emergency and to clarify the anticipated duration of the emergency greatly assists to ensure public compliance with the interventions. The AHPPC have noted that interventions may need to be in place in Australia for several months and that a flexible response is necessary to allow for the latest health and medical advice to be implemented. The amendments in the Bill are necessary to ensure that this is possible.

Moreover, public communications are important to ensure that the public have a properly informed understanding of the risk and are effectively engaged in public health measures. Communication will assist people to make more informed decisions and will help to reduce the spread of the COVID-19. The amendments will provide increased certainty and will allow the ACT Government and chief health officer to communicate with certainty about emergency measures with sufficient notice to the community. Any impact of these amendments on rights and liberties are justified because they are necessary to protect the health of the ACT community by effectively managing the outbreak of COVID19.

The amendments in the Bill are necessary to preserve life and respond in a reasonable and proportionate way to the COVID -19 pandemic. While the powers enlivened by a declaration are significant, and the extended period for which the declaration may remain in force is longer than may be require in other types of emergency, this timeframe is evidence-based and relates to the particular nature of the pandemic. COVID-19 will continue to present a serious threat to life and public health for many months to come. In recognition of the particular nature of the measures required to address this emergency, the amendments are drafted to apply specifically to the COVID-19 emergency. In addition, a sunset provision has been included to ensure that these amendments will expire at the end of a 12-month period during which no COVID-19 declaration has been in force. The amendments are not intended to set a precedent for the duration of emergency powers more generally.

The Act already includes safeguards to minimise the limitations on human rights. The chief health officer must make a signed written record of all action taken, and of each direction issued, for the purposes of section 120(1). As a public authority under the HRA the chief health officer must give proper consideration to relevant human rights in making a direction and must not make a direction that is incompatible with a human right (section 40B of the HRA). This could include, for example, ensuring that the directions are designed, to the greatest extent possible, to avoid imposing a disproportionate burden on vulnerable groups.

An authorised person under the Act may only use such reasonable force and assistance as is necessary in exercising the emergency powers in section 121. There are also limitations on the power of entry in section 121, such that an authorised person may only enter a place when it is necessary to save a person's life, prevent injury to a person or to rescue an endangered person.

In addition, the amendments provide that where the Minister determines that the COVID-19 declaration is no longer justified, taking into account any advice from the chief health officer, the Minister must revoke the declaration. The amendments also require the chief health officer to provide regular updates to the Minister on the status of the COVID-19 pandemic as it affects the Territory and whether the emergency declaration is still necessary.

Public Health (Emergencies) Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Public Health (Emergencies) Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

Clause 1 provides that the title of the Act will be the *Public Health (Emergencies) Amendment Act 2020*.

Clause 2 Commencement

Clause 2 provides that the Act, other than schedule 1, will commence on the day after its notification day. Schedule 1 commences at the end of 12-month period during which no COVID-19 declaration has been in force.

Clause 3 Legislation amended

Clause 3 provides that the Act amends the *Public Health Act 1997*.

Clause 4 Emergency declarations, section 119(3) and (4)

Clause 4 amends section 119(3) to provide that an emergency declaration will come into force immediately after the declaration is made, or at any later time stated in the declaration. This amendment clarifies that a declaration will come into force immediately after the time that it is made and not at the beginning of the day that it is made.

The clause inserts new subsection (4)(a) to provide that a COVID-19 declaration can be extended or further extended for a period of up to 90 days. This amendment will allow for emergency arrangements in relation to COVID-19 to be made and communicated with greater certainty.

New subsection (4)(b) provides that a declaration can be extended or further extended for a period of up to two days. This subsection confirms that the existing maximum period of time allowed for an extension of a declaration under the Act is retained for a public health emergency that is not related to COVID-19.

New subsection (4A) provides that a COVID-19 declaration that is extended or further extended must be revoked if the Minister decides, following consultation with the chief health officer, that the declaration is no longer justified. New subsection (4B) provides that if a COVID-19 declaration has been extended or further extended, the chief health officer must advise the Minister at least every 30 days about the status

of the emergency and whether the chief health officer considers that the declaration is still justified. New subsection (4C) provides that a failure to comply with subsection (4B) does not affect the validity of the extension or further extension. Subsections (4A) and (4B) are important safeguards that provide a mechanism for review and minimise any limitations of the Bill on human rights.

The clause inserts subsection (4D) to provide that subsection (4)(a) applies to a COVID-19 declaration made before or after the commencement of section 3 of the Bill. This subsection provides transitional arrangements to ensure that subsection (4)(a) applies to a COVID-19 declaration that is already in force.

Clause 5 New section 119(7)

Clause 5 inserts subsection (7) which provides a definition of “COVID-19 declaration” for the purpose of section 119.

Clause 6 Emergency actions and directions, section 120(1)

Clause 6 amends section 120 to remove the words “orally or in writing” from subsection (1). These words will be in new subsection (3A) to ensure clarity.

Clause 7 New section 120(1)(f)

Clause 7 inserts section 120(1)(f) to provide that the chief health officer may give a direction to the occupier of property, placing the property under the control, or at the disposal, of the chief health officer. This amendment reflects an emergency power that is available to the emergency controller pursuant to section 150C(2)(c) and section 160A(2)(c) of the *Emergencies Act 2004* during a declared state of alert or state of emergency. This amendment will empower the chief health officer to take control of property such as Personal Protection Equipment, medicines and medical equipment, or to have available at his or her disposal property such as a hotel or stadium for the purpose of a quarantine clinic or morgue.

Clause 8 New section 120(2A)

Clause 8 inserts section 120(2A) to provide that a direction given under subsection (1) takes effect immediately after it is given, unless otherwise

directed. This amendment clarifies that a direction will take effect immediately after the time that it is made. A direction pursuant to section 120 does not need to be made by way of statutory instrument. The amendment clarifies the existing power under section 120 and does not allow a direction to commence sooner than is already permitted.

Clause 9 New section 120(3A) and (3B)

Clause 9 inserts two new subsections. Subsection (3A) provides that a direction pursuant to section 120(1) may be given orally or in writing. This amendment does not amend the existing power of the chief health officer to make a direction orally or in writing. Subsection (3B) provides that a direction or the purposes of subsection (1)(f) must be given in writing. This amendment ensures that the new power of the chief health officer to make a direction to take control of property is subject to an additional safeguard that the direction must be given in writing. This is consistent with the emergency power of the emergency controller in the *Emergencies Act 2004*.

Clause 10 Section 120(4)

Clause 10 replaces the word “issued” with the word “given”. This is a technical amendment to ensure that there is consistency of language within section 120.

Clause 11 Compensation, section 122(1)

Clause 11 inserts the word “part” in section 122(1) to replace the word “division”. This amendment is necessary to correct a drafting error as section 122 is in Part 7 of the *Public Health Act 1997*.

Schedule 1 Expiry of amendments related to COVID-19 declarations

Schedule 1 replaces the new subsection (4) from this Bill with the existing subsection (4) in the Act. It also omits new subsections 119(4A) to (4D) and subsection 119(7). As the schedule commences after a 12-month period during which no COVID-19 declaration has been in force, it operates to sunset the amendments that have been introduced to address the COVID-19 emergency.