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

PUBLIC HEALTH AMENDMENT BILL 2021

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

**Presented by
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Minister for Health**

PUBLIC HEALTH AMENDMENT BILL 2021

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PUBLIC HEALTH AMENDMENT BILL 2021

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 spreads from person-to-person contact.

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. This declaration has been extended numerous times, most recently until 14 November 2021.

OVERVIEW OF THE BILL

Pursuant to section 120 (1) of the Act, while an emergency declaration is in force, the Chief Health Officer may take any action, or give any direction, they consider to be necessary or desirable to alleviate the emergency specified in the declaration. It is an offence pursuant to section 120 (4) of the Act to fail to comply with a direction without reasonable excuse. Since March 2020, the Chief Health Officer has made a broad range of directions under section 120 (1) of the Act to introduce necessary measures to alleviate the COVID-19 emergency.

The Bill creates a new temporary offence in section 120B (1). It is an offence to fail to comply with a direction that has been given under section 120 while a COVID-19 declaration is in force. Similar to the existing offence in section 120 (4), a maximum penalty of 50 penalty units applies.

The Bill clarifies that strict liability applies in relation to the first element – that a COVID-19 direction is in force. Applying strict liability means that the prosecution will not be required to establish a fault element in relation to the existence of the direction. As a safeguard to the application of strict liability, the amendments include a requirement that a COVID-19 direction that is not given to a particular person is a notifiable instrument. This formalises the current practice of notifying directions on

the ACT Legislation Register. The Bill also introduces a requirement that, before requiring a person to comply with a COVID-19 direction, an authorised officer must, if reasonably practicable, warn a person that failure to comply with a direction without reasonable excuse is an offence. A failure to comply with this requirement does not affect the liability of the person and it is not a condition precedent for an authorised officer taking enforcement action.

For the second element, the prosecution will be required to prove that the person engaged in the conduct amounting to a failure to comply with a direction. The offence impliedly provides that the offence is committed by an omission to do an act and as a result, intention is the fault element that must be proved under the *Criminal Code 2002*.

Section 120B (3) provides that it is a defence if a person has a reasonable excuse for failing to comply with the direction, replicating the defence available under section 120 (4). The Bill clarifies that the defendant has the evidential burden in relation to the defence. The defendant must present or point to evidence that suggests a reasonable possibility that the defence can be established. The prosecution must then refute the defence beyond reasonable doubt. Whether an explanation for failing to comply with a direction is a reasonable excuse will depend on the individual circumstances of each case assessed against an objective test of reasonableness. For example, failing to comply with a face mask direction due to mere forgetfulness may not be a reasonable excuse but failing to comply with a face mask direction due to a cognitive impairment or disability is considered to be a reasonable excuse.

The Bill also creates an exception to section 187 (1) of the *Crimes Act 1900* (ACT) which applies the provisions in Part 1C of the *Crimes Act 1914* (Cwlth) to ACT offences not punishable by imprisonment or punishable by imprisonment for 12 months or less. Part 1C sets out powers of detention and obligations of police officers during investigations. The exception applies only where:

- a police officer believes a person who is 18 or older has committed an offence against section 120B (1);
- the officer intends to serve an infringement notice or take no further action;
- the officer is questioning the person if they have a reasonable excuse for failing to comply with the direction; and
- before questioning, the officer warns the person that they do not have to answer the question or do anything but that anything they say or do may be used in evidence.

The Bill amends the *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020* (the Regulation) to replace the references to the offence in

section 120 (4) of the Act with references to the new offence in section 120B (1). As a result, authorised officers will be able to issue infringement notices to persons over the age of 18 years (and over the age of 16 years in relation to a face mask direction) for the offence of failing to comply with a COVID-19 direction. The Regulation was always intended to apply only in relation to a failure to comply with directions made during a COVID-19 emergency rather than more generally and is due to sunset at the end of a 12-month period during which no COVID-19 emergency has been in force.

CONSULTATION ON THE PROPOSED APPROACH

The amendments in the Bill were identified by, and developed in, consultation with the Justice and Community Safety Directorate, ACT Policing and the ACT Director of Public Prosecutions. The ACT Human Rights Commission was also consulted on the amendments in the Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights Engaged

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

- Section 9 – Right to life
- Section 22 – Rights in criminal proceedings

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

Section 28 (2) of the HR Act provide 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.

Rights Promoted

The Bill engages and promotes the right to life pursuant to section 9 of the HR Act. 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 creating a separate offence for failing to comply with a COVID-19 direction and clarifying the elements of the offence to support enforcement of the directions. This purpose supports the right to life for everyone in the ACT.

Rights Limited

The Bill engages and limits the presumption of innocence pursuant to section 22 of the HR Act.

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

Section 22 (1) of the HR Act states that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. Section 22 (2) provides that anyone charged with a criminal offence is entitled to the minimum guarantees listed, including to be told about the right to legal assistance and not to be compelled to testify against himself or herself or to confess guilt.

The Bill may limit rights in criminal proceedings as it creates a strict liability element in section 120B (1) (a). Strict liability limits the presumption of innocence as there is no need to prove a fault element and there is a burden on the defendant to challenge the prosecution case. The evidential burden on the defendant to raise a reasonable excuse as a defence is a reverse burden of proof and may also limit the presumption of innocence.

The amendment to disapply section 187 (1) of the *Crimes Act 1900* (ACT) which extends the application of Part 1C of the *Crimes Act 1914* (Cwlth) may also limit rights in criminal proceedings. Part 1C sets out safeguards for the conduct of criminal investigations including requirements for police officers to give cautions and inform a person of their right to communicate with a legal practitioner where the person is a protected suspect or under arrest. Part 1C applies to ACT offences not punishable by imprisonment by operation of section 187 (1) of the *Crimes Act 1900* (ACT). The narrow exception to the application of Part 1C to the offence in section 120B (1) may limit rights in criminal proceedings by disapplying some of the protections that would otherwise apply.

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

The ultimate objective sought to be achieved by the Bill is to protect the life and health of all people in the ACT by clarifying the operation of the offence for failing to comply with a public health direction. The amendments support the enforcement of the directions which are made by the Chief Health Officer to implement necessary social and public health measures to alleviate the COVID-19 emergency.

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

The limitations on the presumption of innocence are necessary to ensure the public safety purpose of the Bill is achieved. The social and public health measures that are introduced through the directions are the most effective interventions to reduce the spread of COVID-19 and the amendments support the enforcement of these directions in the ACT. The application of strict liability, the evidential burden on the defendant for the defence of reasonable excuse and the limited exception to the application of Part 1C are necessary to clarify the operation of the offences and to support compliance with the directions.

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

The amendments in the Bill are the least restrictive means reasonably available to achieve the objective of supporting the enforcement of public health directions and promoting the right to life.

The amendments improve certainty about the elements of the offence and ensure that the principles in the *Criminal Code 2002* apply rather than the common law which applies to the offence at section 120(4). The application of strict liability to the element in section 120B (1)(a) is accompanied by appropriate safeguards such as a requirement that a COVID-19 direction that does not apply to a particular person is a notifiable instrument and a requirement for an authorised officer, where reasonably practicable, to warn a person that failure to comply with a direction without a reasonable excuse is an offence.

In addition, a number of defences remain open to a defendant including the defence of reasonable excuse in section 120B (3). Section 23 of the *Criminal Code 2002* provides that other defences may also be available for use for strict liability offences.

Section 120B (3) provides that the defendant has an evidential burden in relation to the defence of reasonable excuse and this formalises the common law position in relation to the existing offence in section 120 (4). It is considered reasonable and proportionate to apply an evidential onus of proof as a potential excuse would be solely within the knowledge of the defendant. The prosecution retains the onus to refute the defence beyond reasonable doubt should such a defence arise.

The limitation on rights in criminal proceedings as a result of the exception to the application of section 187 (1) of the *Crimes Act 1900* (ACT) and Part 1C of the *Crimes Act 1914* (Cwlth) is considered to be reasonable and proportionate to the objective of promoting public health and life. Safeguards have been incorporated to minimise the impact on rights. The exception is narrowly limited to circumstances where the officer believes that the person is 18 years or older, the officer intends to issue an infringement notice or take no further action, the officer is only questioning the person about whether they have a reasonable excuse, and the officer warns the person against self-incrimination.

In recognition of the particular nature of the measures required to address the COVID-19 emergency, the amendments are drafted to apply specifically to directions made while a COVID-19 emergency declaration is in force. 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

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Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Public Health Amendment Bill 2021**. In my opinion, having regard to 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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Shane Rattenbury MLA
Attorney-General

Public Health Amendment Bill 2021

Detail

Clause 1 — Name of Act

This is a technical clause. The name of the Act will be the *Public Health Amendment Act 2021*.

Clause 2 — Commencement

This clause provides that the Act will commence on the day after its notification day.

Clause 3 — Legislation amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Public Health Act 1997*. The Bill will also amend the *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020*.

Clause 4 – Emergency actions and directions New section 120 (4A)

This clause inserts subsection (4A) which provides that section 120 (4) does not apply to a COVID-19 direction.

Clause 5 – New section 120 (9)

This clause inserts definitions of “COVID-19 declaration”, “COVID-19 direction” and “given” for the purpose of section 120.

Clause 6 – New sections 120A-120D

This clause inserts sections 120A, 120B, 120C and 120D.

Section 120A – COVID-19 directions – notification requirement

New section 120A provides that a COVID-19 direction given on or after the commencement day and other than to a particular person is a notifiable instrument. Subsection (3) provides definitions of “commencement day”, “COVID-19 direction” and “given” for the purpose of section 120A.

Section 120B – COVID-19 directions – offence

New section 120B provides that it is an offence if a COVID-19 direction is in force and a person fails to comply with the direction. The maximum penalty is 50 penalty units. Strict liability applies to the first element of the offence. It is an offence even if the direction was given before, on or after the commencement day.

Subsection (3) provides that it is a defence if the person has a reasonable excuse for failing to comply with the COVID-19 direction. The defendant has an evidential burden.

Subsection (5) provides that before requiring a person to comply with a direction, an authorised person must, if reasonably practicable, warn the person that failure to comply with the direction without a reasonable excuse is an offence. Failure to comply with subsection (5) does not affect the liability of the person to be prosecuted or for an infringement notice to be given.

Subsection (7) provides definitions of “commencement day”, “COVID-19 direction” and “given” for the purpose of section 120B.

Section 120C – COVID-19 directions – cautioning requirements

New section 120C sets out requirements that apply if a police officer believes a person who is 18 years or older has committed an offence against section 120B (1).

Subsection (4) provides that section 187 (1) of the *Crimes Act 1900* (ACT) does not apply to an infringement notice offence in relation to questioning about a reasonable excuse where:

- before questioning the person about whether they have a reasonable excuse for not complying with the direction, the police officer warns the person that they do not have to answer questioning or do anything but that anything they say or do may be used in evidence in accordance with section 120C (2); and
- the police officer intends to serve an infringement notice on the person or take no further action against the person in relation to the offence.

A note states that section 187 (1) of the *Crimes Act 1900* (ACT) applies Part 1C of the *Crimes Act 1914* (Cwlth) to ACT offences not punishable by imprisonment or punishable by imprisonment for 12 months or less.

Subsection (5) provides definitions of “COVID-19 direction”, “given”, “infringement notice” and “relevant infringement notice offence” for the purpose of section 120C.

Section 120D – COVID-19 directions – expiry

New section 120D provides that sections 120 (4A), 120 (9), 120A, 120B and 120C expire at the end of a 12-month period during which no COVID-19 declaration has been in force.

Subsection (2) provides definitions of “commencement day” and “COVID-19 declaration” for the purpose of section 120D.

Schedule 1 – Other amendments

Part 1.1 – Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020

[1.1] – Section 7

This clause applies Part 3.8 of the *Magistrates Court Act 1930* to the new offence in section 120B (1) and removes its application to the existing offence in section 120 (4). Part 3.8 only applies where the offence is committed by a person who is 16 years or older in relation to a face mask direction and 18 years or older in any other case.

[1.2] – Section 8

This clause omits the reference in section 8 to the existing offence in section 120 (4) and replaces it with a reference to the new offence in section 120B (1). Section 8 makes provision for the penalty payable under an infringement notice for an offence.