

Australian Capital Territory

Public Health (Ministerial Exemption) Guideline 2022 (No 3)

Notifiable Instrument NI2022–679

made under the

Public Health Act 1997, s 118ZN (Exemptions—Ministerial directions—guidelines)

1. Name of instrument

This instrument is the *Public Health (Ministerial Exemption) Guideline 2022 (No 3)*.

2. Commencement

This instrument commences on 29 December 2022.

3. Ministerial Exemption Guideline—Duration

This instrument remains in force until the end of 29 January 2023.

4. Revocation

This instrument revokes the *Public Health (Ministerial Exemption) Guideline 2022 (No 2)* [NI2022-511].

Chris Steel MLA
Acting Minister for Health

19 December 2022



Ministerial Exemption Guideline

Public Health (Ministerial) COVID-19
Management Direction 2022 (No 3)

Issue Date: 29 December 2022

ISSUED BY:

ACTING MINISTER FOR HEALTH

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Introduction

The *Public Health Act (1997)* (the Act) part 6C establishes a regulatory framework for protecting the public from risks to public health presented by COVID-19. The Executive has made a COVID-19 management declaration as there are reasonable grounds for believing that COVID-19 presents a serious risk to public health.

The Minister may make a direction under section 118R of the Act, where a COVID-19 management declaration is in force, in relation to one or more of the following:

- a) preventing or limiting entry in the ACT or an area in the ACT;
- b) regulating gatherings, whether public or private;
- c) requiring the use of personal protective equipment;
- d) regulating the carrying on of activities, businesses or undertakings;
- e) requiring the provision of information (including information about the identity of a person), or the production or keeping of documents.

The *Public Health (Ministerial) COVID-19 Management Direction and Exemption 2022 (No. 3)* (the Direction) commenced on 29 December 2022 to prevent or alleviate the risk presented by COVID-19.

The Direction requires the use of face masks, by persons aged 12 years of age or older, in certain places. Places in which masks are mandatory are as follows:

- When working at or visiting a:
 - hospital;
 - residential aged care facility;
 - residential care facility or residential care setting; or
 - disability service setting.

These requirements are further outlined in the Direction.

The Direction also includes standing exemptions from the requirement for face masks to be worn, including any person under 12 years of age, and any person that may have a physical or mental condition that makes wearing a face mask unsuitable. The Direction also includes certain situations where a face mask can be removed, including:

- When consuming food, drink or medicine
- When seated at a food or drink premises, such as a café
- When communicating with a person who is deaf or hearing impaired, and for whom visibility of the mouth is needed for communicating
- When undertaking a work task if wearing a face mask would create a risk to health and safety
- When working in an indoor area alone, or at a workstation and at least 1.5 metres apart from other people.
- When necessary to deliver services or provide goods
- In a vehicle alone or with other members of the person's household only.
- In an emergency
- In a hospital when it is not required by any policy of the hospital.
- When verifying a person's identify
- When otherwise required or authorised by law
- When otherwise unsafe to wear a face mask.

Where the Minister has issued a Ministerial Direction requiring a person to wear a face mask, there may be circumstances in which a person is unable to do so for a reason that is not provided for in the abovementioned standing exemptions. In these cases, a person may seek an exemption from requirement to wear a face mask.

Scope

The Ministerial Exemption Guideline provides:

- guidance for an affected person in relation to making an application for:

- an exemption, and
- review of an internally reviewable decision.
- guidance for a decision-maker in relation to the procedure for considering an application for:
 - an exemption, and
 - review of an internally reviewable decision.

The Act defines an ‘affected person’ as a person to whom the Direction applies or a person to whom a standing exemption applies.

Applying for an Exemption

An affected person may apply to the Minister to be exempt from complying with a requirement under the Direction. An application for an exemption can be made on one or more of the following grounds:

- a. medical grounds;
- b. compassionate grounds;
- c. any other grounds stated in this Guideline.

To apply to be exempt from the requirement under the Direction, an affected person must lodge an electronic application to the ACT COVID-19 Exemptions Team. The application portal is available on [the COVID-19 website](#).

Affected persons who are unable to complete the online application form may contact the COVID-19 Exemptions Team directly via email to COVID.Exemptions@act.gov.au or by phone to (02) 5124 9766, to seek assistance in finding an alternative means to apply for an exemption. This includes provision of a paper based or large print version of the form, or an Exemptions Team member completing an online application on your behalf. Telephone Interpreting Service information is also provided on the form for people that need this service.

Applications to the COVID-19 Exemptions Team must include the following:

- Personal details, including full legal name, date of birth, contact and address details
- Personal identification, as follows:
 - photo identification (drivers licence, passport or identity card)
 - where photo identification is not available (for example for children), other identification with the applicant's full name (Medicare Card or birth certificate).
- Written detail outlining:
 - The grounds on which an exemption is sought
 - The date that the exemption is sought from
 - The location/s at which the exemption is needed
- Any additional relevant documentation that supports the request, such as:
 - Letter of support for the exemption request from the venue owner/operator (where the request relates to a venue owned by a third-party); and
 - Any additional information requested by the decision-maker that is reasonably required to assist in consideration of the application.

Grounds considered for removal of face masks (outside of current exemptions)

Applications on medical grounds

Exemption applications made on medical grounds which are not captured in the standing exemption in the Direction will be considered on a case-by-case basis.

Applications on compassionate grounds

Exemption applications made on compassionate grounds will be considered on a case-by-case basis. Applications will be considered where extenuating personal circumstances exist relating to end of life, or risk to personal safety.

Applications on other grounds

Exemptions may be considered on grounds the Minister considers reasonable and appropriate. This may include:

- the use of a venue or setting at which face masks are required, for purposes not related to the normal functioning of that setting; or
- entering a setting at which facemasks are usually required at a time when no other people will be present.

Supporting Documentation

In order for an exemption request to be considered, the following documentation must be provided in addition to the information outlined in ‘Applying for an exemption’

- If the request relates to a venue owned by a third party, a letter of support for the exemption request from the venue owner/operator; or
- Any additional information requested by the decision-maker that is reasonably required to assist in consideration of the application.

Making an Exemption Decision

The decision to grant or refuse an application for exemption is made by the relevant decision-maker.

The relevant decision-maker is the Minister who has delegated the function of decision-making for exemptions to particular people within the COVID-19 Response Branch of ACT Health.

Timeframes for decision making

There are requirements under the Act about the timeframes in which an exemption decision must be made.

Decision makers will issue an outcome as soon as possible, in particular where urgent decisions are required to support time critical circumstances.

Under the Act, a decision must be made within a maximum of **5 days** from the date of application (calculated as detailed below).

If additional documentation is requested by the decision maker, a decision will be made within **5 days** of the requested information being provided.

The legislation states that if a decision is not made within the time period, this is taken to be a decision not to grant an exemption. However, the Exemptions Team will endeavour to assess all applications for exemption within the timeframe.

Calculating time frames

Timeframes under which the decision-maker must make a decision are calculated from:

- the calendar day after the day the application is made; or
- the calendar day after the day that an applicant gives additional information which was requested by the decision-maker.

If the last day to make a decision is not a **working day**, then the decision must be made on the next possible working day. A working day is 8:30am to 5:00pm on Monday to Friday.

Example 1: An application for an exemption is received on Sunday 31 July. Under the Act, a decision must be made by Friday 5 August (day 5). Monday 1 August is counted as ‘day 1’. In this scenario, the 5-day decision deadline falls on Friday 5 August.

Example 2: An application for an exemption is received on Monday 1 August. Tuesday 2 August is counted as ‘day 1’. In this scenario, the 5-day decision deadline falls on a non-working day (Saturday, 6 August), meaning that the timeframe that the decision must be made by extends to the next working day, Monday 8 August.

Example 3: An application for an exemption is received on Tuesday 2 August. The decision maker determines further information is required to make the decision, and requests this on Thursday 4 August. The information requested is provided on Saturday 6 August, resetting the 5-day decision timeframe to Thursday 11 August.

Granting an application for an Exemption

In assessing an application, the decision-maker must consider the information provided in the application and where it is reasonable or required, request the applicant provide any additional information or supporting documentation to reach a decision on the application.

In reaching a decision, the decision-maker must consider the grounds for the exemption and whether the exemption should be subject to conditions which may mitigate any risk to public health. The decision-maker may consult with public health doctors, or other health professionals and subject matter experts within ACT Health as required to seek advice on any medical grounds in an application and/or any public health risk that granting the exemption may create. However, the decision-maker must act independently in exercising their discretion in accordance with their assessment of the application for an exemption. This means the decision must be made without any direction from another person.

The affected person will not be considered exempt from requirements of the Direction unless the person receives written notice from the decision-maker granting the exemption, whether or not subject to conditions.

Provision of Additional Information

The applicant may submit additional information or documentation for consideration following the submission of their original application. Additional information should be submitted via email to COVID.Exemptions@act.gov.au with reference to their application number.

The decision-maker may also, in writing, request that the applicant provide additional information if reasonably required to reach a decision.

If the applicant does not provide the decision-maker with the additional information requested under section 118ZE (6) of the Act within seven days after the day the decision-maker made the request, then the decision-maker can refuse to consider the application further. The affected person may be required to submit a new complete application for an exemption with the information required to be reconsidered for the application, however in most circumstances additional information submitted will be considered alongside the original application.

Refusing an Application for an Exemption

If the decision-maker determines that an exemption cannot be granted, they will inform the applicant in writing of the decision as soon as possible, and no later than 5 working days after:

- (i) the day the application is made; or
- (ii) if additional information is requested - the day the applicant provides the additional information to the Minister.

If the decision-maker decides not to grant an exemption but fails to inform the applicant in writing, then the failure to provide a written decision is taken to be a decision not to grant the exemption.

Where a decision is made to refuse to grant an exemption, the applicant will be informed in writing of the reasons for the decision.

If an applicant believes that they have additional information that may change the outcome of the decision, they may supply this to the Exemptions Team to request this information be considered. The Exemptions Team may consider this information and remake the decision on the basis that not all information was previously available, or request that the applicant submit a new application for exemption that contains all relevant information.

Applicants will also be informed of the process for applying for an internal review of the decision, if all relevant information has been provided and they remain dissatisfied with the outcome.

Conditions of Exemption

A decision-maker may grant an exemption subject to conditions that an applicant must comply with for the exemption to apply. This could include an exemption to remove a face mask subject to a condition, such as:

- only removing a face mask when there are no other people in the same room as the affected person;

- not to enter a certain area or premises during typical operating hours; or
- to maintain physical distancing from others.

If a person fails to comply with a condition of an exemption the exemption will no longer apply. Penalties may apply for a breach of a condition of an exemption or standing exemption.

An exempted person should ensure they are able to access a copy of their exemption at all times when in a setting that the exemption applies to.

Other considerations for an exempted person

Exemptions do not negate a person's work health and safety obligations under relevant legislation. Should a person be exempted from the requirement to wear a face mask in accordance with a Public Health COVID-19 Management Direction, it remains the responsibility of the owner or operator of the setting in which face masks are mandatory to consider the work health and safety impacts for that person, staff and clients of the applicable service.

Granting an exemption does not remove the need to implement appropriate risk mitigation measures as an owner or operator. Risk mitigation measures and controls should be considered for persons with approved exemptions.

Review of exemption decisions

Internal Review

If an applicant is dissatisfied with an exemption decision, the person may seek an internal review of the decision.

An internal review is an impartial review of the original exemption decision. It is made by an employee of ACT Health that was not the original decision-maker, based on the information that was available at the time of the original decision.

Applications for review should be submitted in full and in writing by the applicant via the [Internal Review Application form](#), and not previously been subject to an internal review process, except where exceptional circumstances exist.

Affected persons who are dissatisfied with an exemption decision may also wish to lodge an application with an external oversight agency such as the ACT Human Rights Commission or ACT Ombudsman, to request that they investigate the decision.

Timeframes for internal reviews

An internal reviewer will issue their review decision within 5 days following the date that an Internal Review Application is received by ACT Health.

Failure to provide a written outcome and reasoning of an internal review within this timeframe will be taken as confirmation of the original decision.

Grounds for review

When applying for an internal review, an applicant must include the grounds for review.

Grounds for review is the reason why an applicant believes that the original exemption decision was incorrect or unreasonable. It may include an applicant's belief that, when making the original exemption decision, the decision-maker has:

- not appropriately considered all the information provided to support the exemption application;
- misunderstood or misinterpreted the information provided;
- overlooked or placed unreasonable emphasis on certain information rather than considering all the information available.

When outlining the grounds for review, the applicant should specify which documents or evidence is relevant to their internal review application. The applicant should also specify what outcome they are seeking e.g., that an exemption be issued or that a condition attached to an exemption be varied.

Submitting an Internal Review Application

Applicants must provide their internal review application in writing.

An applicant must complete an Internal Review Application form and submit this via:

- email to ACTHealthOCHO@act.gov.au, with “Internal Review Request” and the applicant’s name in the subject line, or
- via mail, to Office of the Chief Health Officer, GPO Box 825 Canberra ACT 2601.

The request for a review of the decision should:

- a. clearly set out the grounds on which the applicant believes a decision was incorrect; and
- b. include all details of the original exemption request.

Requests for an internal review should not include new information, or evidentiary documents that have not previously been provided in the original application. In this instance, the applicant will be asked to submit a new application for exemption that includes the additional information.

Any new information should be included in a new application for exemption in accordance with this Guideline. An application for internal review that includes new information or documentation will be referred back to the original decision maker for reconsideration.

Internal reviewer requirements

For any application for internal review, the internal reviewer will be an ACT Health officer who is authorised to review an exemption decision, was not involved in the original exemption decision and has no substantive prior relationship with the applicant that may result in perceived or actual conflict of interest.

The internal reviewer will be of equal or greater seniority to the original decision-maker.

Internal review outcome

The internal reviewer will assess the original decision in relation to these Guidelines, and determine whether the original decision:

- Was made correctly and fairly in reference to policy;
- Considered procedural fairness; and
- Appropriately interpreted and considered all information provided.

The internal reviewer may seek advice from subject matter experts or stakeholders who may not have been previously consulted when making the original decision.

When providing an outcome, the internal reviewer will clearly document and provide to the applicant in writing:

- the internal review decision; and
- justification / reasoning behind the internal review decision.

When issuing an internal review decision, the internal reviewer may:

- confirm the original decision – this means the original decision is upheld in full;
- vary the original decision – this means the decision is modified. For example, changing the conditions that must be met for an exemption to be valid; or
- revoke the original decision – this means that a new exemption decision is made and is provided in writing to the applicant alongside the revocation decision.

Where a decision is modified by the internal reviewer, this may include varying the conditions of the exemption, adjusting the timeframe for which the exemption is granted, or any other modification the internal reviewer deems appropriate.

The outcome of an internal review is final.

Further Information

A full list of COVID-19 Management Directions can be found at <https://www.covid19.act.gov.au/directions>.

Review of Guideline and Schedule of Changes

These guidelines are subject to regular review. The guidelines may be updated to reflect changes to the relevant COVID-19 Management Direction and to incorporate feedback and improve processes as required.

Feedback on the Guidelines can be directed to: COVID.Exemptions@act.gov.au

Version	Commencement Date	Summary of Changes
1.0	30 September 2022	Initial Issue
2.0	14 October 2022	Removal of face mask mandates for diagnosed people, household contacts and recently recovered cases. Removal of entry restrictions into high risk settings for recently recovered cases.
3.0	29 December 2022	Remade Instrument - no change to Guidelines from 14 October 2022 version

Approval Authority

These guidelines have been drafted in accordance with the *Public Health Act 1997*. The ACT Human Rights Commission has been consulted on earlier version of the guidelines, which remain unchanged.

Chris Steel MLA
Acting Minister for Health

19 December 2022



ACT
Government