

Public Health (COVID-19 Management) Declaration 2022
Regulatory Impact Statement
DI2022-224

Background to this Statement

Regulatory Impact Statements in the Australian Capital Territory

Section 34 of the *Legislation Act 2001* requires the preparation of a Regulatory Impact Statement (RIS) if a subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or part of the community.

Section 31 of the *Legislation Act* defines 'cost' as including burdens, disadvantages and direct and indirect economic, environmental and social costs. The principal purpose of a RIS is to ensure that the costs and benefits of a proposed law are examined fully so that the Minister and members of the community can be satisfied that the benefits of the instrument exceed the costs.

The making of COVID-19 Public Health Directions under part 6C of the *Public Health Act 1997* (ACT) (the Act) has the potential to impose appreciable costs on the community, or part of the community, which will vary depending on the Direction that is made. However, COVID-19 Public Health Directions can only be made where a COVID-19 management declaration is in force.

Authorising Law

The Public Health (COVID-19 Management) Declaration 2022 (the Declaration) is authorised by section 118O of the Act. The Declaration can be made where the Executive has reasonable grounds to believe that COVID-19 presents a serious risk to public health.

The Declaration empowers the making of COVID-19 Public Health Directions (Directions) under part 6C of the Act as follows:

- Ministerial directions for public health social measures (s 118R);
- Chief Health Officer directions for testing, isolation and segregation of a person (s 118U);
- Vaccination Directions, made by the Executive, for particular work, activities, or places (s 118Z).

The predominant impact on the community, or part of the community, is likely to arise through requirements or conditions in relation to—

- (a) a person diagnosed with COVID-19 having to isolate resulting in a reduction in workplace attendance, which may result in a cost to business and to the individual employee (if unable to access leave entitlements) ;
- (b) a household contact quarantining subject to any exemption which may result in a reduction in workplace attendance;

- (c) certain workers needing to be vaccinated against COVID-19 which may result in a workplace reduction for sectors covered, should a worker choose not to be vaccinated against COVID-19;
- (d) the use of rapid-antigen tests to attend a particular premises, which is likely to impose a cost to businesses and/or individuals; and
- (e) the use of face masks to attend particular places, which is likely to impose a cost to businesses and/or individuals.

Problem Statement / Issue

On 11 March 2020, the Director General of the World Health Organisation declared the novel coronavirus SAR-CoV-2 (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 Act) in response to the risks posed by COVID-19. This declaration has been extended numerous times, reflecting the serious, ongoing and changing nature of the pandemic.

The Australian Capital Territory, consistent with all other Australian jurisdictions, continues to experience ongoing transmission of COVID-19 in the community. As at 9 September 2022, the Territory has reported 125 COVID-19 related deaths and recorded 203,680 COVID-19 cases, of which 594 are currently active.

Active outbreaks and exposures are continuing to be managed across the Territory, although the number of outbreaks has decreased in the last weeks. Outbreaks have been managed in hospital, residential aged-care and disability support settings. Ongoing pressure continues to be placed on the ACT's public hospital system, with the ACT's hospitals continuing to provide care for patients affected by COVID-19; although the number of patients requiring intensive care unit (ICU) support and ventilation has remained stable. At 9 September 2022, the total number of patients in hospital was 86 (includes active and cleared cases) and there was one patient in ICU.

As at 9 September 2022, COVID-19 cases across Australia continued to be high, with more than 80,432 active cases and a total of 10,112,229 cases and 14,421 deaths reported.

There remains significant uncertainty and complexity relating to the evolution of the COVID-19 pandemic, which is likely to continue over the coming months. A number of significant decisions will need to be taken at a national level in relation to the remaining baseline public health measures, including isolation and quarantine requirements.

The ACT continues to transition the COVID-19 response to the endemic management of COVID-19, similar to other notifiable diseases.

Policy objectives of government intervention

The Territory aims to reduce, or limit, the rate of COVID-19 transmission among members of the community, particularly within high-risk populations (eg, older persons and people that are immunocompromised) and in higher-risk settings (e.g., residential, aged care and disability settings).

The Communicable Disease Network of Australia (CDNA) and the Australian Health Principal Protection Committee (AHPPC) recommend certain test, trace, isolate and quarantine (TTIQ) measures remain in place to reduce the rate and risk of COVID-19 transmission.¹

By reducing the rate and risk of COVID-19 transmission in high-risk populations and settings, the Territory also aims to reduce the average number of patients that require hospitalisation and specialist or intensive healthcare due to severe illness from COVID-19.

The ability to implement public health social measures, TTIQ requirements and vaccination requirements has been essential to alleviating the public health risk presented by COVID-19 since the commencement of the pandemic, by minimising community transmission in either a targeted or broad community scale. Implementation of public health measures is consistent with national and expert advice and seeks to align with neighbouring jurisdictions to provide coverage to protect the most vulnerable in the community from severe illness or death.

The implementation of the Declaration which enables Directions to be made is not inconsistent with the policy objectives of any Territory law.

Reasonable alternatives

While TTIQ and Public Health and Social Measures (PHSM) continue to be needed, the only reasonable alternative to implementation of the Declaration would be to maintain a public health emergency.

The Minister for Health has extended the Public Health Emergency Declaration numerous times since March 2020 and most recently until 30 September 2022. The Declaration has enabled the Chief Health Officer to make COVID-19 Public Health Emergency Directions to maintain a level of PHSM, TTIQ and mandatory vaccination measures to alleviate the emergency.

The retention of emergency powers becomes difficult to reconcile against the move towards public health management of COVID-19 as an endemic disease, both at a local and national level, which includes lower level interventions all of which have been eased considerably since the height of the public health emergency.

¹ [National principles for modified quarantine | Australian Government Department of Health; AHPPC Statement – reduced isolation period for COVID-19 cases | Australian Government Department of Health and Aged Care; COVID-19-SoNG v7.3.pdf \(health.gov.au\)](#)

Whilst there continues to be persistent levels of community transmission across the ACT and ongoing pressure on the ACT's public hospital system, the high levels of vaccination coverage across the community and the availability of oral antiviral medication for eligible patients provides the opportunity to step down from the public health emergency declaration and move into a management situation which provides for more transparency and accountability.

Most jurisdictions across Australia are also seeking to step down from their COVID-19 emergency declarations or similar, and therefore maintaining the current Emergency Declaration in the ACT may also be considered out of step to the national approach providing a broader range of power to the Chief Health Officer whether or not they would be exercised.

There are also important community and broader business considerations to ensure confidence that the use of an emergency declaration continues to be reserved for emergency situations noting that the ACT is now able to step down from an emergency while retaining the ability to maintain critical baseline restrictions to alleviate the serious public health risk presented by COVID-19.

Options

Option 1: End the COVID-19 Public Health Emergency

No regulatory action is taken to mitigate the risk to public health and safety posed by COVID-19, with only recommendations made to the community. The impact of this option is dependent on each person in the ACT to maintain an awareness of the current public health advice and act in a manner consistent with this advice.

This approach acknowledges the high rate of COVID-19 vaccination achieved by the Territory population (77.8% of children aged 5 to 15 years having received two doses and 78.1% of eligible persons aged 16 years and older have received three or more doses; at 9 September 2022). It also reflects the emergence of new anti-viral treatments which can prevent more serious health outcomes for persons who are most at risk. However, it does not consider the highly transmissible nature of the Omicron Variant of Concern and its BA.4/5 subvariants, or the time limited effectiveness of the vaccine.

This approach also acknowledges that the ACT is at the end stage of transitioning to endemic management of COVID-19, similar to other notifiable diseases, with only baseline public health requirements currently in place. There are a number of key decisions that will be required to be taken at a national level to allow for full transition to take place. Remaining baseline requirements relating to isolation, quarantine and mask wearing requirements are currently under active consideration. Should the Public Health Emergency end too early, there is a risk that the ACT's transition will be inadequate and could potentially impact on high risk settings and businesses. This transition must also be carefully managed to ensure that those who are most vulnerable to disease are protected as far as possible

Notably in the absence of any public health directions which provide for restrictions such as isolation or the wearing of face masks, business would need to rely on workplace policies and procedures to try to limit the spread of COVID-19 in workplace settings which may prove futile where the public may not exercise the same sort of adherence to public health advice. The ability for a business to rapidly respond to a changing public health environment through a policy is also precarious and subject to factors such as resourcing and workforce consultation requirements.

Option 2: Extend the Public Health Emergency Declaration

The Minister for Health extends the current Public Health Emergency Declaration to continue to enable the Chief Health Officer to make COVID-19 Emergency Directions to maintain public health measures to protect the public from the public health risk presented by COVID-19.

This approach will become more difficult to justify with the introduction of part 6C in the *Public Health Act 1997*, which specifically provides for a step-down approach providing for transparency and Ministerial accountability to the public and given the Government's move towards transitioning to COVID-19 normal through low level public health measures. Whilst there continues to be community transmission across the ACT and some pressure on the ACT's hospital system, it is acknowledged that there is less justification for maintaining a public health emergency declaration in circumstances where the ACT has specific legislative provisions for a step-down approach and in the context of the ACT's high vaccination rates.

Most Australian jurisdictions are seeking to step down from their public health emergency declarations (or similar) and maintaining the current public health emergency settings puts the ACT at risk of being out of step with the national approach.

There is also a community and broader business expectation that the ACT will revoke the emergency declaration providing community and business confidence that the ACT is moving further towards living with COVID-19 while still protecting the most vulnerable in our society.

Option 3: Introducing the Public Health (COVID-19 Management) Declaration

The Executive makes a Public Health (COVID-19 Management) Declaration ('Declaration') under section 118O of the Act. This action is permitted under the Act when the Executive has reasonable grounds to believe that COVID-19 presents a serious public health risk to the Territory. By making a Declaration, the Executive, Minister for Health and the Chief Health Officer are permitted to make specific Directions in a timely and responsive manner to mitigate the risk that COVID-19 presents to public health. Directions enable regulation that would prevent or limit entry to an area or into the ACT; regulate gatherings; require use of personal protective equipment, regulate certain activities or businesses; require the provision of information; require a medical examination or testing; require segregation or isolation; or require that someone be vaccinated before engaging certain work or activity or at a particular place.

This option provides the ability for the Executive, Minister for Health and Chief Health Officer to provide timely and short-term regulatory responses to help manage the rate and pattern of COVID-19 transmission in the ACT community. COVID-19 continues to present an ongoing risk to public health, including in some cases severe illness or death, particularly for persons at risk of severe disease and unvaccinated individuals. The management of active outbreaks has also remained a feature of the COVID-19 pandemic throughout 2022 and continues to impact the operations of high-risk settings like residential aged care facilities and the health and wellbeing of residents.

Directions made under the Declaration are subject to the expert advice of the Chief Health Officer (every 30 days) and review by the Human Rights Commissioner. A Declaration can be made for no longer than 90 days, and there is ability for the Executive to extend the period on one or more occasions, for periods not longer than 90 days on each occasion. The Chief Health Officer must, at least every 30 days during which a Declaration is in force, advise the Executive about the status of the risk presented by COVID-19.

Directions made under a Declaration can only be in force for periods of no longer than 90 days, and the Chief Health Officer must advise on whether these continue to be justified at least every 30 days.

These consultation and reporting processes provide high levels of transparency and safeguards to ensure that regulation is not introduced for longer than is necessary to alleviate the public health risk.

This option is preferred in an environment where the ACT Government has signalled an intention to step down in a measured, staged way from public health restrictions under the National Plan to transition Australia's National COVID-19 Response. Under this plan, all states and territories are working to minimise COVID-19 by using public health measures that are consistent with the management of other infectious diseases. The Declaration will enable the ACT Government to continue to work in a coordinated and unified way with the Commonwealth and surrounding jurisdictions to transition to endemic settings, with the possibility of an extension if required. This should create a sense of certainty for individuals and businesses operating in the Territory while supporting the ACT Government to respond in a targeted way to mitigate the transmission risk associated with new variants or outbreaks, as required.

Costs and benefits of each option are considered in the Impact Analysis, below.

Impact analysis

All Canberrans have the potential to be impacted by the Declaration because of the making of Directions. The parties likely to be most affected by the Declaration and thereby a Direction include:

- people that have been diagnosed with COVID-19 or that are household contacts of a person who has been diagnosed;
- people that are vulnerable or at-risk from COVID-19, including older persons, people living with disability, immunocompromised and unvaccinated people;
- businesses and service providers that operate in high-risk settings and visitors that attend these settings, including residential facilities, aged-care, disability care

and other customer or client-facing industries where close person-to-person contact occurs; and

- healthcare providers and facilities where COVID-19 positive patients receive care.

Option 1: End the COVID-19 Public Health Emergency

| Benefits | Costs |
|---|---|
| <p>Greater freedom of movement for individuals and reduced regulation for business.</p> <p>Faster return to pre-COVID-19 business operations.</p> | <p>Active community wide COVID-19 transmission in the Territory is likely if the COVID-19 Public Health Emergency ends and no regulatory mechanisms are imposed:</p> <ul style="list-style-type: none"> • Businesses and service providers that operate in high-risk settings would be required to use their own resources to formulate and implement risk-based site plans, likely resulting in inconsistencies within and across sectors. • Individuals and entities would be required to expend resources to maintain an awareness of, and plan for, an uncertain level of community transmission . <p>Failure to consistently apply public health advice may result in</p> <ul style="list-style-type: none"> • Increased number of COVID-19 cases. • Increased demand for healthcare (primary and tertiary), reducing the system’s capacity to respond to non-COVID matters. • Increased risk of severe illness or death for people that are vulnerable or at-risk from COVID-19. • An increase to staff furloughing arrangements and absences due to greater rates of community transmission. <p>although the timing , size and impact of these outcomes are difficult to predict with certainty.</p> <p>It is likely that the conscientious community members would respond to increased community transmission of COVID-19 by reducing non-essential activities where there is a perceived higher risk of infection.</p> <p>This option would not represent a proactive promotion of the right to life under section 9 of the <i>Human Rights Act 2004</i> (HRC Act).</p> |

Option 2: Extend the Public Health Emergency Declaration

| Benefits | Costs |
|--|---|
| <p>Chief Health Officer maintains power to make Directions to respond to COVID-19 risks in the community.</p> <p>Enables quick response to making of Emergency Directions for targeted risk management, consistent application of public health advice, particularly during a winter period where higher transmission is expected.</p> | <p>Enables the Chief Health Officer to issue Directions which will engage and may limit human rights so that the public health risk of COVID-19 is alleviated, including the serious risk that uncontrolled transmission represents to the ACT.</p> <p>Lower level of transparency in making of Public Health Emergency Directions, compared with the Management Declaration approach, noting that the Public Health Emergency is becoming more difficult to justify where there is a legislative framework to step-down as we move towards living with COVID-19.</p> <p>Likely to see the ACT being out of step with responses in other Australian jurisdictions.</p> <p>The Emergency Declaration and resulting Directions may limit the return to pre-COVID business operations and service engagement levels. It is noted that failing to regulate is likely to result in increased viral transmission and poorer public health outcomes. Experience to date indicates that this is likely to result in greater staff absences and reduced citizen engagement in discretionary activities, which may also hinder a return to pre-COVID business operations.</p> |

Option 3: Introducing the Public Health (COVID-19 Management) Declaration

| Benefits | Costs/disadvantages |
|---|--|
| <p>Enables timely Directions to be issued for targeted risk management, consistent application of public health advice and staged exit from public health emergency.</p> <p>Introduces safeguards, while offering greater certainty for business and community.</p> <p>Appropriate given the significant public health costs associated with a failure to regulate.</p> | <p>Enables the Executive, Minister for Health and Chief Health Officer to issue Directions that may limit human rights so that the rate and risk of COVID-19 transmission is reduced.</p> <p>The Act seeks to mitigate the risk that human rights will be disproportionately limited by ensuring that the Declaration and Directions:</p> <ul style="list-style-type: none"> • are time limited; • must have regard for the expert advice of the Chief Health Officer and Human Rights Commissioner; • are disallowable (in the case of the Declaration and Vaccine Directions) or notifiable (for all other Directions). |

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| <p>Regulation cost borne by the Territory.</p> <p>Promotes right to life (s 9, HRC Act).</p> | <p>The Declaration and resulting Directions may limit the return to pre-COVID business operations and service engagement levels. It is noted that failing to regulate is likely to result in increased viral transmission and poorer public health outcomes. Experience to date indicates that this is likely to result in greater staff absences and reduced citizen engagement in discretionary activities, which is also likely to hinder a return to pre-COVID business operations.</p> |
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Recommendations

Option 3 is recommended.

Option 3 enables the ACT Government to continue to manage the ongoing COVID-19 pandemic without the requirement to continue to extend a Public Health Emergency, which is becoming harder to justify where there is a legislative framework to step-down and in view of the ACT's high levels of vaccination coverage, effective treatment availability and the move to transition to endemic COVID-19 management in the community.

There are risks to not implementing the Public Health (COVID-19 Management) Declaration which enables the issuing of COVID-19 Management Directions. A Declaration provides the least restrictive legislative framework to meet the objectives of preserving the human right to life, as it creates an environment where targeted Directions can be made and revoked by the Executive, Minister for Health and Chief Health Officer in a timely manner in response to the evolving COVID-19 situation.

Directions enable the implementation of TTIQ, public health social measures (PHSMs), and vaccination requirements that are consistent with the National Plan and surrounding jurisdictional efforts to manage COVID-19. This creates greater certainty for individuals and businesses (particularly when operating across jurisdictional boundaries) and enables the ACT to respond to COVID-19 in a manner that is Nationally coordinated, yet appropriate to our specific context.

Consultation statement

This recommendation was made having considered the advice of the Chief Health Officer.

The ACT Human Rights Commission and Justice and Community Safety Directorate have been consulted in relation to making of Public Health Management Directions and their supporting documents.