



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON THE COVID-19 PANDEMIC RESPONSE
Mr Alistair Coe MLA, Mrs Vicki Dunne MLA, Ms Tara Cheyne MLA,
Mr Michael Pettersson MLA, Ms Caroline Le Couteur MLA

Submission Cover Sheet

COVID-19 pandemic response

Submission Number: 011

Date Authorised for Publication: 27 May 2020

Mr. Hamish Finlay
Secretary, Select Committee on the COVID-19 pandemic response
ACT Legislative Assembly
Canberra ACT 2600

20 May 2020

Dear Mr. Finlay

Thank you for the opportunity to make a submission to the ACT Legislative Assembly's inquiry into the ACT Government's response to the COVID-19 pandemic.

I write to bring the Committee's attention to public statements by ACT Policing in connection with the COVID-19 pandemic that seem inconsistent with Canberrans' legislatively-protected freedom of movement and privacy, beyond the scope of ACT laws and health directions, and incompatible with the principle of the rule of law.

Police promise to "target unnecessary travel" and threaten fines despite no law or direction in the ACT defining or prohibiting "unnecessary travel"

On 14 April 2020, ACT Policing issued a media release (see enclosed) titled "Police continue to target unnecessary travel following Easter road blitz." It said "we still saw many drivers on the roads unnecessarily," "The health directions are in place to protect everyone's safety – by reducing our movement in the community..." "The message is clear – stay home, unless you are [leaving for the purpose of shopping, medical care, work, or exercise]," "...operations revealed some drivers still didn't understand what essential travel was," and concluded "Police will remain mobile and active on our roads," and "...we will educate before providing warnings and fines."

The title, body and conclusion of this media release gives the clear impression ACT Policing has legal authority to ensure Canberrans "stay home," and implies fines may be issued to support enforcement. Indeed, this is the impression commenters on ACT Policing's Facebook page formed.

The same release said police had spoken with "close to 400 drivers about the purpose of their travel, and 46 drivers chose to turn around on highways when they understood their travel wasn't essential." This invites the conclusion that police are stopping motorists, enquiring about the purpose of their travel, and potentially convincing them to return home. It further reinforces the conclusion it is contrary to ACT law for Canberrans to conduct "unnecessary travel" and that police have authority to enforce this law by stopping and questioning motorists.

Prior to the Easter weekend, on 8 April 2020, ACT Policing issued an earlier statement (see enclosed) that again seemed to conflate a recommendation to "stay home" with the law of the ACT: "The usual Easter Double Demerit Points period will apply... Take the 'stay home' message seriously." Facebook commenters formed the conclusion (without correction by ACT Policing) they faced police enforcement if they left home to go mountain biking, deliver Easter eggs, recharge their car battery, or visit mum for Easter lunch.

Despite these statements by ACT Policing there is in fact no law or direction defining or prohibiting “unnecessary travel” within the ACT. Neither was there a law or direction in place between 8 April and 14 April. If this is the case, police would seem to have no authority to stop, question, warn or fine motorists engaging in travel officers deemed “unnecessary”. Nor should police be implying privately or publicly that Canberrans are required by health directions to “stay home” or risk law enforcement.

Contrary to both of these media releases, the ACT’s Acting Chief Health Officer confirmed to ABC Canberra on 10 April 2020 that it is “definitely within the law” to visit relatives or visit a cemetery, so long as social distancing directions are obeyed. She also confirmed it is permissible to leave the house to visit others “in another suburb of Canberra,” take photos outside, go for a drive, feed the ducks, or go fishing. She was careful to distinguish between health advice and the enforceable requirements of the Health Minister’s directions.

Implications for freedom of movement protected by the Human Rights Act

The human rights to freedom of movement and privacy are protected in the ACT by the *Human Rights Act 2004* (ACT). Freedom of movement (section 13) is particularly broad: “Everyone has the right to move freely within the ACT...” The Act (section 40B) provides that it is “unlawful for a public authority ... to act in a way that is incompatible with a human right” unless “the law expressly requires the act to be done or decision made under a law in force in the Territory...” It would seem to be incompatible with the Act for a public authority to stop, question, or threaten to fine an individual for travelling absent the express requirement of a law or direction.

Public enquiries have established that ACT Policing’s activities over the Easter weekend actually involved stopping motorists travelling into New South Wales to warn that fines may be imposed by NSW Police for non-essential travel, and that ACT Policing themselves issued no fines in connection with what they call “unnecessary travel”. However it seems extremely unlikely that a reasonable person reading the statements issued on 8 April and 14 April would come to the conclusion that “unnecessary travel” actually means travel into NSW without a reason valid under NSW law and that “stay home” means remain within the territorial boundaries of the ACT.

Rather, ACT Policing’s statements clearly invite the conclusion it is unlawful to engage in travel within the ACT they deem “unnecessary,” and that Canberrans leaving home without a valid reason face police enforcement (as is indeed the case in other jurisdictions). Facebook commenters seeking clarification were told by ACT Policing that police will “...have conversations with the public to ensure people are only leaving their home [for certain purposes]” (emphasis mine, see below). They were again warned that fines may be issued. ACT Policing was unwilling or unable to clarify which of the “COVID-19 directions” cited in its below statement define or prohibit “unnecessary travel”.

Do police really have the power to “ensure” (including under threat of fines) that citizens abstain from activities that are entirely lawful (indeed protected under law by the *Human Rights Act*) but police personally disapprove of or recommend against?



ACT Policing genuinely interested to learn whether there are any legislative or regulatory prohibitions on unnecessary travel or whether it is just guidance at this stage? Grateful if you could clarify for me.

Like · Reply · 2d



Author

ACT Policing Hi [redacted], ACT Policing's strategy for enforcing COVID-19 directions is focused on education before warnings and fines are issued. We will continue to have conversations with the public to ensure people are only leaving their home to buy essentials, need medical care, for work or to exercise. This is about taking personal actions for the safety of our entire community.

Like · Reply · 2d



Sorry, I should have been clearer: Does the Federal Police force have the legislative or regulatory authority to issue fines or charge people with an offence if they engage in non-essential travel?

Like · Reply · 1d

It may well be a sensible *recommendation* for police to make that individuals “stay home” to reduce the spread of COVID-19 and only leave home when necessary (despite ACT Health informing the ABC it is “fine” to leave home for a range of purposes not set out by ACT Policing). But police should always be clear about what is a recommendation and what is law enforcement.

Considering the language employed by ACT Policing, their refusal to identify a health direction or law prohibiting “unnecessary travel”, and public confusion stemming from legislated police powers in nearby jurisdictions to lawfully restrict movement, it is hard to avoid the conclusion ACT Policing employed a deliberate strategy to imply “unnecessary travel” within the ACT is unlawful and subject to police enforcement in order to persuade Canberrans to stay home. In other words, it looks as if mere advice has been dressed up as a law enforceable by police. Crucially, however, neither the Legislative Assembly nor the ACT Government has determined that laws or ministerial directions enforceable by police are appropriate to restrict Canberrans’ “unnecessary” movement within the Territory.

It seems likely that as a consequence of ACT Policing’s public statements a not insignificant number of Canberrans’ rights to freedom of movement has been constrained (in addition to the right to privacy of almost 400 motorists apparently questioned over Easter about the purpose of their travel). Those particularly vulnerable to being confused or misled by ACT Policing’s apparent conflation of advice and law enforcement include non-native English speakers and migrant groups, persons living with disability, and citizens whose education has not equipped them to distinguish between a police “strategy” to “ensure,” “target”, and “blitz” an (entirely lawful) activity and an activity that is prohibited by law. A scenario in which formal legal education is almost a prerequisite to distinguish between police recommendations and law enforcement seems one in which human rights are extremely vulnerable to abuse and contrary to the spirit and intent of the *Human Rights Act*.

Implications for the rule of law in the ACT

The “rule of law” is a principle of government essential to a free democracy. If the ACT is to be governed by the rule of law, then public authorities must not exercise powers in an arbitrary manner and, in the words of former High Court Chief Justice Murray Gleeson, “all authority [must be] subject to, and constrained by, law.” In a jurisdiction that can be said to be governed by the rule of law, police can only enforce laws validly enacted by a representative parliament, and these laws must be clearly understood, operate uniformly and predictably and be subject to judicial review.

It would not be consistent with the rule of law were a public authority – *especially* one vested with responsibility for law enforcement and the legitimate use of violence – to invent a concept entirely alien to the law of that jurisdiction (“unnecessary travel”) and publicly discourage individuals from engaging in activity offensive to that concept through explicit threats (conversations to “ensure” compliance, being stopped or questioned) and implied threats (warnings, fines), absent authority granted by the law of that jurisdiction. Such a public authority could not be said to be “subject to, and constrained by, law.”

The injury to the rule of law would be even greater if (as is the case with freedom of movement) the activity that the public authority seeks to prohibit is in fact *protected* by law. Well-meaning intentions or sound medical advice can be no excuse for such an injury to the rule of law and the law-making primacy of the Assembly. Police-made “law” (even where its existence is only implied) is entirely incompatible with the rule of law and democratic government and has no legitimate place in the ACT.

As the Committee is aware, across Australia public authorities are being granted extraordinary powers in response to the COVID-19 pandemic. The public’s trust in authorities would be severely diminished should authorities abuse these (or existing) powers. It could even be said that abuse of power by public authorities at this time poses a real risk to the success of public health measures by eroding public confidence in institutions critical to their success.

Recommendations

To address these concerns and ensure human rights and the rule of law are more adequately protected in the ACT, the Standing Committee could consider adopting the following recommendations.

1. Remind ACT Policing of their obligations under the *Human Rights Act*, and caution that a lack of clarity in distinguishing between public advice and law enforcement poses real risks to Canberrans’ human rights, which are protected by law, and the operation of the rule of law in the ACT.
2. Caution ACT Policing that future messaging must eschew unclear language like “The message is clear – don’t...” and instead make clear distinctions between law “The law of the ACT is clear – don’t...” and advice “While not unlawful, police recommend against...” Additionally, police should undertake not to threaten to “ensure [compliance],” “target,” “blitz,” or fine activities that are not prohibited by law (let

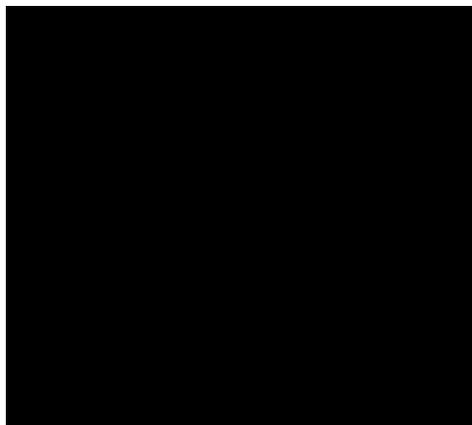
alone activities that are themselves protected by law).

3. Seek a public correction from ACT Policing clarifying that while police may wish to advise that Canberrans stay home this is not enforceable by law and police are not empowered to issue warnings or fines to restrict “unnecessary travel” within the ACT. Additionally, to avoid confusion, health advice issued by ACT Policing should be consistent with that provided by the ACT Acting Chief Health Officer to ABC Canberra on 10 April 2020.
4. Task the ACT Human Rights Commission with monitoring ACT Policing’s public communications and reporting to the Assembly instances of communications that fail to adequately distinguish between advice and law, and identify possible implications for human rights.
5. Consider legislation requiring police to identify when they are giving advice (similar to requirements for insurance companies and Australian financial services licensees), and/or cite legal authority to substantiate claims made by their public communications, if ACT Policing is unwilling to adopt these practices voluntarily.
6. Consider the necessity of training for ACT Policing in the concept of the rule of law.
7. Seek a legal opinion to inform the Standing Committee of the consistency of ACT Policing’s statements on 14 April and 8 April with section 40B of the *Human Rights Act*.

It should not need to be said that the efforts of hundreds of individual police officers to proportionately enforce the laws of the ACT despite the COVID-19 pandemic are commendable, especially in light of the confidence-damaging overreach evident in other jurisdictions. This Submission is not intended as a criticism of these individual officers. It is made out of the conviction that should the public lose confidence in the public communications of ACT Policing the work of these front-line officers would become immeasurably more difficult.

Thank you for the opportunity to provide a submission to the Standing Committee.

Yours sincerely,



ACT POLICING ONLINE NEWS

[Home](#) ► [News](#) ► [Media releases](#) ► [Police continue to target unnecessary travel following Easter road blitz](#)

Police continue to target unnecessary travel following Easter road blitz



Tuesday, 14 April 2020, 1:21pm

ACT Policing continue to stress the importance of social distancing and only travelling where essential following the Easter long weekend double demerit period.

Chief Police Officer for the ACT Ray Johnson said police were generally happy with the community's approach to social distancing, although there were some who put themselves above the safety of the entire community.

"Before the long weekend, I said this would be an Easter like no other, with Canberrans encouraged to stay home, not go interstate or to family gatherings, and most people heeded that message," Chief Police Officer Johnson said.

"That said, we still saw many drivers on the roads unnecessarily, people attending large gatherings, and people not practicing social distancing directions in places like the area around Lake Burley Griffin.

"I thank the Canberrans who did the right thing this weekend but we have to come together as a community. We don't want the actions of a few to affect future measures to help stop the spread of COVID-19."

"The health directions are in place to protect everyone's safety – by reducing our movement in the community and spending as little time with as few people as possible."

Over the long weekend, ACT Policing Traffic officers used each interaction with the community to educate and reinforce health directions and social distancing messages.

Across the four days, police spoke with close to 400 drivers about the purpose of their travel, and 46 drivers chose to turn around on highways when they understood their travel wasn't essential.

Officer in Charge of Traffic Operations, Detective Station Sergeant Marcus Boorman said the weekend operations revealed some driver's still didn't understand what essential travel was.

"While most drivers understood the importance of only traveling where necessary, we saw far too many people on the road over the long weekend who probably didn't need to be out and about," Detective Station Sergeant Boorman said.

"Police spoke with one driver who thought it would be a good idea to tow a caravan into NSW, which is surprising given our warnings.

"The message is clear - stay home, unless you are shopping for essential items, need medical care, are travelling to or from work, or if you're getting some exercise.

"Police will remain mobile and active on our roads because this weekend has shown some people still may not understand the health directions."

Police also issued close to 50 speeding infringements across the four days, with Easter Monday a particularly bad day for high range speed offences.

Yesterday, police detected:

- a 19-year-old male P plate driver speeding at 167km/h in a 100km/h zone on the Majura Parkway
- a 23-year-old woman driving at 130km/h in an 80km/h zone on Parkes Way, and
- a 36-year-old woman driving at 142km/h in a 90km/h zone on Caswell Drive in Belconnen.

In total, police issued over 100 traffic infringements across the long weekend, for offences including speeding, unregistered vehicles, and use of a mobile phone, while one driver was summonsed for driving while disqualified.

Police responded to a number of incidents over the long weekend for possible breaches of COVID-19 health directions. These included gatherings at residences and public parks, businesses thought to still be operating, and a group of three men working on a car in front of a house in Forde.

In all instances, police spoke to those involved about social distancing and the current COVID-19 directions. The groups were cooperative with police, and dispersed without incident where required, with no fines issued.

To date, no one has been fined for a breach of COVID-19 directions in the ACT. However, several people have been charged under the *Criminal Code 2002* for serious offences including acting to cause public alarm.

ACT Policing's response to COVID-19 remains a staged one – we will educate before providing warnings and fines.

For any questions relating to the ACT Government's COVID-19 response, including potential ACT Policing involvement, please call the helpline on 02 6207 7244 (8am – 8pm, 7 days a week). Only contact police on 131 444 for police assistance or Triple Zero (000) for life threatening emergencies.

Media enquiries

Police Media — (02) 5126 9070, act-police-media@afp.gov.au



[Back to top](#) ▲



Triple Zero

Emergency, police, fire or ambulance



131 444

For police assistance (excludes Victoria)



1800 333 000

Crime Stoppers

[AFP home](#) 

[ACT Policing](#) 

MENU ▲

ACT POLICING ONLINE NEWS

[Home](#) ► [News](#) ► [Media releases](#) ► [Police prepared for an Easter like no other](#)

Police prepared for an Easter like no other



Wednesday, 8 April 2020, 6:38pm

ACT Policing is reminding the community of several important messages for Easter 2020.

Chief Police Officer for the ACT, Assistant Commissioner Ray Johnson offered advice for people considering a trip away for the long weekend.

“I urge people to stay home! This Easter will be unlike any other. The coronavirus won’t be taking a long weekend, and neither will the virus containment strategies,” Chief Police Officer Johnson said.

“Resist the temptation to go away for your usual Easter break, or to a mate’s place for a barbecue. Don’t have the family around for Easter lunch.

“The message doesn’t change just because it’s a long weekend. Stay home. Unless you need to buy essential items from the shops, if you need medical care, if you’re working, or if you’re going outside to get some exercise.”

Despite the ongoing COVID-19 pandemic, police understand that Canberrans will still be driving over the long weekend, albeit in reduced numbers.

Officer in Charge of Traffic Operations for ACT Policing, Detective Station Sergeant Marcus Boorman said some of the road safety messaging for this Easter is different from previous years.

“The usual Easter Double Demerit Points period will apply. From Thursday to Monday inclusive, all speeding, mobile phone and seatbelt offences will attract double the usual demerit point penalty,” Detective Station Sergeant Boorman said.

“Just because there’s less traffic on the road, it’s no excuse to ignore the road rules. Speeding is still dangerous. Disobeying traffic lights is still dangerous. Pay attention and drive to the conditions.

“Take the ‘stay home’ message seriously. Police will be on the road over Easter because we have to. You should only be on the road if you have to. And remember, if you decide to head interstate for non-essential reasons, you might be fined, you might be turned round and sent home, or both.”

Editors please note:

The ACT Government has established a COVID-19 hotline, which is operating between 8am and 8pm daily on [02 6207 7244](tel:0262077244).

Media enquiries

Police Media — [\(02\) 5126 9070](tel:0251269070), act-police-media@afp.gov.au



[Back to top](#) ▲



Triple Zero

Emergency, police, fire or ambulance



131 444

For police assistance (excludes Victoria)



1800 333 000

Crime Stoppers

[AFP home](#) 

[ACT Policing](#) 

[MENU](#) ▲