



SELECT COMMITTEE – ON THE COVID-19 2021 PANDEMIC RESPONSE
ELIZABETH LEE MLA (CHAIR), SUZANNE ORR MLA (DEPUTY CHAIR), JO CLAY MLA

Inquiry into the COVID-19 2021 pandemic response
ANSWER TO QUESTION TAKEN ON NOTICE
30 September 2021

Asked by Mrs Jones:

In relation to:

MRS JONES: You mentioned, Dr Watchirs, the home detention, which is a part of the health orders that we are living under now where people cannot leave home for a period of time. Just for information, because I have certainly been asked about this, if someone has been arbitrarily detained for additional time because of communication issues that the government is experiencing, what is the process for them if they wish to apply for compensation under section 18(7), which says that anyone who has been unlawfully arrested or detained has the right to compensation for that detention?

Dr Watchirs: There was actually an amendment last year to the Public Health Act so that people cannot claim compensation. That was an explicit COVID measure last year that is still enforced.

MRS JONES: It is not about loss of business and so on. That also applies to the detention orders for quarantine, does it?

Dr Watchirs: That is my understanding. I can come back to you on notice if you like on that issue

Dr Helen Watchirs, President of the Commission and Human Rights Commissioner:

The answer to the Member's question is as follows:–

Right to compensation under the Public Health Act 1997

The *Public Health Act 1997* was amended last year to disapply the right to seek compensation for loss or damage resulting from anything done in relation to a COVID-19 declaration while that declaration is in force (other than directions relating to the control of property): see, *Public Health Amendment Act 2020*. Therefore, if a person suffers any loss or damage arising from the implementation of COVID-19 public health directions, including quarantine or isolation orders, they can no longer apply for compensation under s 122 of the *Public Health Act 1997*.

Right to compensation under the Human Rights Act 2004:

The *Human Rights Act 2004* (HRA) contains a right to seek compensation for unlawful detention (s 18(7)). The prohibition against arbitrary detention in s 18 applies to all forms of detention where people are deprived of their liberty, not just criminal justice processes. This right can be relevant in a broad range of circumstances, including in contexts such as public health detention. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity. Detention may be 'arbitrary' if it is unreasonable, unjust, inappropriate or disproportionate in all the circumstances of the case or not in accordance with due process.



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‘Arbitrariness’ can also occur where detention is initially lawful but becomes arbitrary because it continues for an unreasonable time or in unjustified circumstances.

Section 18(7) of the HRA is intended to give effect to the right to a remedy where the right to liberty and security of person has been contravened as a result of unlawful detention. Section 40C of the HRA creates a direct right of action, whereby a person who alleges that a public authority has breached their human rights can apply to the ACT Supreme Court for relief. It is not yet settled in the ACT whether s 18(7) creates a standalone right to sue a public authority for monetary damages, or instead provides a recognition of the importance of substantive remedies (such as the tort of false imprisonment), which are available in the ACT through existing civil law or statutory causes of action: see, for example, *Lewis v Australian Capital Territory* [2018] ACTSC 19 [529] - [531], and *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352, [235] - [257].

Approved for circulation to the Select Committee on the COVID-19 2021 Pandemic Response

Signature:

Date: 18 October 2021

By Dr Helen Watchirs, President of the Commission and Human Rights Commissioner