

# INQUIRY INTO COVID-19 EMERGENCY RESPONSE LEGISLATION AMENDMENT BILL 2020 (No 3)

STANDING COMMITTEE ON ECONOMY AND GENDER AND ECONOMIC  
EQUALITY

JANUARY 2021

REPORT 1



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Ms Nicole Lawder MLA	Chair (from 8 December 2020)
	Member (from 2 December 2020)
Ms Suzanne Orr MLA	Deputy Chair (from 8 December 2020)
	Member (from 2 December 2020)
Mr Johnathan Davis MLA	Member (from 2 December 2020)

## SECRETARIAT

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## RESOLUTION OF ESTABLISHMENT

The 10<sup>th</sup> ACT Legislative Assembly appointed the Standing Committee on Economy and Gender and Economic Equality on 2 December 2020.

Specifically, the resolution of 2 December 2020 establishing the Standing Committees of the 10<sup>th</sup> Assembly as it relates to the Standing Committee on Economy and Gender and Economic Equality states:

“That

(1) the following general-purpose standing committees be established as set out in the table below. The purpose of such committees is to enhance the scrutiny of the Executive, to examine and suggest improvements to any bills referred to it, to enable the citizens of the Territory to engage and to participate in law-making and policy review, to enable financial scrutiny of the Executive’s budget proposals and to review annual reports of taxpayer funded agencies;

(2) the committees so established may inquire and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community and within the nominated areas of responsibility;

(3) calendar and financial year annual and financial reports stand referred to the relevant standing committee for inquiry and report by 31 March of the year after the presentation of the report to the Assembly pursuant to the *Annual Reports (Government Agencies) Act 2004*;

(4) notwithstanding standing order 229, only one standing committee may meet for the consideration of the inquiry into the calendar and financial year annual and financial reports at any given time;

(5) all bills presented to the Assembly stand referred to the relevant standing committee for inquiry and report within two months from the presentation of the bill. Should the standing committee resolve not to undertake an inquiry, the chair shall advise the Assembly and the responsible minister within 14 days of the presentation of the bill in the Assembly;

...

(7) the committees so established are required to examine the expenditure proposals contained in the main appropriation bills for the Territory and any revenue estimates proposed by the government in the annual budget and prepare a report to the Assembly within 60 days of the presentation of the budget bills;

...

(12) each committee shall have power to consider and make use of the evidence and records of the relevant standing committee appointed during the previous Assembly;

(13) each committee be provided with necessary staff, facilities and resources;

- (14) the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders;
- (15) each general-purpose committee shall consist of three members, nominated by each of the three whips, with the chair of each such committee agreed by the members of that committee; and
- (16) nominations for membership of these committees be notified in writing to the Speaker within two hours following conclusion of the debate on the matter.”

The following extract from the table to the Resolution of Establishment relates to the Standing Committee on Economy and Gender and Economic Equality:

Committee	Primary Wellbeing Indicator/s	Areas of Responsibility
3. Economy and Gender and Economic Equality	Economy, Living Standards and Time	<ul style="list-style-type: none"> <li>· Chief Minister’s responsibilities</li> <li>· Treasury including taxation and revenue</li> <li>· Economic development and diversification</li> <li>· Tourism</li> <li>· Industrial Relations and Workplace Safety</li> <li>· Social impacts and outcomes of economic policies including gender considerations (excluding Office for Women)</li> <li>· Minister of State responsibilities (excluding Justice and Community Safety Directorate reporting areas)</li> <li>· Business and Better Regulation</li> <li>· Arts</li> </ul>

## TERMS OF REFERENCE

Pursuant to clause 5 of the Resolution of Establishment for general-purpose standing committees of the 10<sup>th</sup> Assembly—the terms of reference are to inquire into and report on the referred Bill within two months from its presentation.



## TABLE OF CONTENTS

<b>THE COMMITTEE.....</b>	<b>I</b>
Committee membership .....	i
Secretariat.....	i
Contact information.....	i
Resolution of Establishment .....	ii
Terms of reference .....	iii
<b>RECOMMENDATIONS.....</b>	<b>VII</b>
<b>1 INTRODUCTION AND CONDUCT OF INQUIRY .....</b>	<b>1</b>
Inquiry referral.....	1
Conduct of the inquiry.....	1
Structure of the Committee's report .....	1
Acknowledgements.....	2
<b>2 BILL CONTEXT .....</b>	<b>3</b>
Background.....	3
Pre-legislative scrutiny .....	4
Compatibility with <i>Human Rights Act 2004</i> (s. 37) .....	4
Summary of measures the Bill is seeking to enact.....	5
<b>3 COMMITTEE CONSIDERATION .....</b>	<b>9</b>
Emergency legislation.....	9
Measures the Bill seeks to enact.....	11
Reporting requirements to the Assembly .....	13
<b>4 CONCLUSION .....</b>	<b>17</b>
<b>APPENDIX A CORRESPONDENCE FROM CHIEF MINISTER (15/01/21)</b>	<b>19</b>





## RECOMMENDATIONS

### RECOMMENDATION 1

- 3.11 The Committee recommends (to the extent that work is not already taking place) after the COVID-19 pandemic crisis has passed and the ACT has exited from its state of emergency, the ACT Government give consideration to examining and reviewing the emergency measures that were enacted. This should not be limited to the ACT but should also include emerging evidence of good practice from across Australia and the globe.

### RECOMMENDATION 2

- 3.17 The Committee recommends that the ACT Legislative Assembly give consideration to amending clause 5 of the Resolution of Establishment for general-purpose standing committees to provide a reporting timeframe that allows for these committees to consider the views of the Scrutiny of Bills Committee where inquiries are undertaken into referred bills.

### RECOMMENDATION 3

- 3.27 The Committee recommends that the ACT Government update the ACT Legislative Assembly [prior to the Assembly proceeding to the next stage of its consideration of the COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3)]—why data are unavailable for the seven emergency response legislative measures for which details of their use could not be provided (as per monthly reporting at 30 November 2020).

### RECOMMENDATION 4

- 3.31 The Committee recommends that the ACT Government continue monthly reporting to the ACT Legislative Assembly on emergency response measures provided for under the *COVID-19 Emergency Response Act 2020* and the *COVID-19 Emergency Response Legislation Amendment Act 2020*. Monthly reporting should continue until such time as each measure, at a minimum, has 12 months of reported data for each measure.



# 1 INTRODUCTION AND CONDUCT OF INQUIRY

## INQUIRY REFERRAL

- 1.1 COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3) (the Bill) was presented to the ACT Legislative Assembly (the Assembly) on 2 December 2020. After agreement in principle, pursuant to clause 5 of the Resolution of Establishment for 10<sup>th</sup> Assembly general-purpose standing committees (the Resolution of Establishment), the Bill was referred to the Standing Committee on Economy and Gender and Economic Equality (the Committee) for inquiry and report.
- 1.2 Pursuant to the Resolution of Establishment, all bills presented to the Assembly stand referred to the relevant standing committee for inquiry and report within two months from presentation. A standing committee has 14 days from presentation to determine whether it will undertake an inquiry into a referred bill.

## CONDUCT OF THE INQUIRY

- 1.3 The Committee resolved on 8 December 2020 to undertake an inquiry into the Bill.
- 1.4 The Committee wrote to the Speaker and the Chief Minister (as the responsible Minister) on 10 December 2020 to inform each stakeholder of its decision.
- 1.5 In its correspondence to the Chief Minister, the Committee asked that it be provided with further information about a proposed amendment to reporting requirements to the Assembly for COVID-19 measures made under the *COVID-19 Emergency Response Act 2020* and the *COVID-19 Emergency Response Legislation Amendment Act 2020*. The Committee asked that it be provided with this information by no later than close of business Friday 15 January 2021. Further information on this matter is set out in Chapter three.
- 1.6 The Committee met on 21 and 27 January 2021 to consider the Chair's draft report which was adopted on 27 January 2021.

## STRUCTURE OF THE COMMITTEE'S REPORT

- 1.7 The Committee's report is divided into two parts, comprising a total of four chapters, covering the following main topics:

*Part 1—Context to the inquiry*

- Chapter 1—Introduction and conduct of the inquiry
- Chapter 2—Bill context

*Part 2—Views of the Committee*

- Chapter 3—Committee consideration
- Chapter 4—Conclusion

## ACKNOWLEDGEMENTS

- 1.8 The Committee thanks the Chief Minister, as well as officials from the Chief Minister, Treasury and Economic Development Directorate, who assisted the Committee during its inquiry.

## 2 BILL CONTEXT

### BACKGROUND

- 2.1 Across the globe, in reaction to the coronavirus disease (COVID-19) pandemic, over 100 countries have passed emergency laws or declared states of emergency to respond to the unfolding crisis.<sup>1</sup> This action followed the World Health Organization's (WHO) declaration<sup>2</sup> that COVID-19 was a global pandemic and that all countries urgently needed to take the required measures to prepare emergency response systems.
- 2.2 In the ACT, on 16 March 2020, the Minister for Health declared a public health emergency under section 119 of the *Public Health Act 1997* due to the public health risk to the ACT community posed by COVID-19. On 17 November 2020, the Minister for Health further extended the Public Health (Emergency) Declaration 2020 (No 1)<sup>3</sup> for 90 days due to the ongoing public health risk posed by COVID-19. The Declaration ends on 17 February 2021.<sup>4</sup>
- 2.3 As at 24 November 2020, the ACT had 115 confirmed cases and 3 people had died from COVID-19. Internationally, the impact of COVID-19 on regions, communities and health systems continues with many countries experiencing second and, in some cases, third waves of transmission.<sup>5</sup>
- 2.4 The Bill is for an Act to amend legislation to provide for emergency measures in response to the COVID-19 emergency, and for other purposes. The Bill is the fourth in a series of omnibus COVID-19 Bills.<sup>6</sup>

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<sup>1</sup> Westminster Foundation for Democracy (WFD) and the Institute of Advanced Legal Studies (IALS), University of London, Digital Conference—Are emergency measures in response to COVID-19 a threat to democracy? Fact and Fiction, 10 September 2020<<https://www.wfd.org/2020/06/26/10-september-2020-ials-wfd-digital-conference-are-emergency-measures-in-response-to-covid-19-a-threat-to-democracy-fact-and-fiction/>>.

<sup>2</sup> 11 March 2020.

<sup>3</sup> Notifiable Instrument NI2020-153.

<sup>4</sup> Explanatory Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), p. 4.

<sup>5</sup> Ibid.

<sup>6</sup> The other three bills were: (i) COVID-19 Emergency Response Bill 2020; (ii) COVID-19 Emergency Response Legislation Amendment Bill 2020; and (iii) COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 2).

2.5 In presenting the Bill, the Chief Minister told the Assembly:

This is the fourth in a series of government omnibus bills enacted in response to the pandemic. The bills have made necessary changes to our legislative framework to ensure that the government is able to continue to carry out various tasks in a way that reduces risks associated with the emergency. In common with other COVID omnibus bills, the bill will amend a range of territory laws across ministerial portfolios. It primarily amends current expiry provisions for COVID-19 measures so that they can continue to be used for the duration of the emergency.<sup>7</sup>

2.6 The Bill is proposed to form part of a suite of measures that have been enacted in response to managing the risks associated with the COVID-19 pandemic in the ACT. Specifically, this included measures to provide flexibility under specific ACT laws and to support operational areas to provide services during the pandemic and, in some cases, within the 12-month period following the expiry of the emergency response.<sup>8</sup>

## PRE-LEGISLATIVE SCRUTINY

2.7 ACT Government Directorates and justice statutory office holders were consulted in the preparation of the Bill. The following business units were consulted in relation to suitability to extend or amend the measures within their operational areas: Access Canberra; ACT Corrective Services; ACT Courts and Tribunal; ACT Policing; Chief Minister, Treasury and Economic Development Directorate; Community Services Directorate; Education Directorate; Human Rights Commission; Legal Aid ACT; ACT Director of Public Prosecutions; and the Sentence Administration Board. The ACT Bar Association and ACT Law Society were also consulted on the draft Bill.<sup>9</sup>

## COMPATIBILITY WITH *HUMAN RIGHTS ACT 2004* (s. 37)

2.8 Pursuant to section 37 of the *Human Rights Act 2004*—in the opinion of the Attorney General, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in the Explanatory Statement, the Bill as presented to the Assembly, is consistent with the *Human Rights Act 2004*.<sup>10</sup>

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<sup>7</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 41.

<sup>8</sup> *Ibid.*

<sup>9</sup> Explanatory Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), pp. 5-6.

<sup>10</sup> *Ibid.*, p. 16.

- 2.9 The Explanatory Statement summarises how extending the emergency measures engages human rights.

## SUMMARY OF MEASURES THE BILL IS SEEKING TO ENACT

- 2.10 The primary purpose of the Bill is to extend or revise certain existing COVID-19 legislative measures adopted with the *COVID-19 Emergency Response Act 2020* and *COVID-19 Emergency Response Legislation Amendment Act 2020*. In the main, the Bill extends measures that are due to expire and which are considered necessary to continue. The measures to be extended remain temporary.
- 2.11 The Bill proposes to amend COVID-19 legislative measures under 16 Acts—namely: *Associations Incorporation Act 1991*; *Bail Act 1992*; *Corrections Management Act 2007*; *COVID-19 Emergency Response Act 2020*; *Crimes Act 1900*; *Crimes (Sentence Administration) Act 2005*; *Crimes (Sentencing) Act 2005*; *Drugs of Dependence Act 1989*; *Education Act 2004*; *Evidence (Miscellaneous Provisions) Act 1991*; *Family Violence Act 2016*; *Gaming Machine Regulation 2004*; *Personal Violence Act 2016*; *Retirement Villages Act 2012*; *Supreme Court Act 1933*; and *Working with Vulnerable People (Background Checking) Act 2011*.

## AMENDMENTS TO EXPIRY PROVISIONS

- 2.12 The Bill proposes to amend expiry provisions for legislative measures enacted in response to managing the risks associated with the COVID-19 pandemic in the ACT. Generally, amendments to the expiry provisions of COVID-19 measures align with the expiry of the *COVID-19 Emergency Response Act 2020*, which will expire at the end of a 12-month period during which no COVID-19 public health emergency declaration has been in force. The Chief Minister informed the Assembly that the purpose of ‘rolling expiry arrangements’:
- ...is to ensure that emergency response measures can be available to support operational and service responses in circumstances where there is a break of no more than 12 months between the emergency declaration being enforced. In most cases the measures can only be used if a COVID-19 emergency is enforced.<sup>11</sup>

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<sup>11</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 42.

- 2.13 A small number of proposed amendments concern measures where expiry is not aligned with the expiry of the *COVID-19 Emergency Response Act 2020*—namely, measures in the *Associations Incorporation Act 1991*<sup>12</sup> and the *Supreme Court Act 1933*<sup>13</sup>.

## REPEALED MEASURES

- 2.14 The Bill repeals two measures<sup>14</sup> under one Act—the *Crimes (Sentence Administration) Act 2005*—that are no longer required.

## AMENDMENTS TO REPORTING PROVISIONS TO THE ASSEMBLY

- 2.15 The Bill proposes two amendments under the *COVID-19 Emergency Response Act* to provide for scrutiny by the Assembly of the emergency response measures. The first amendment proposes a change to the period for the reporting of the application of emergency response measures from one month to quarterly. The Chief Minister told the Assembly that amending ‘the reporting period so that reports will be made for each quarter that the declaration is in force’, reflects:

...the practical reality of zero monthly reports most of the time so far. Quarterly reports will of course ensure that the Assembly is able to continue to monitor trends over time and aligns with the length of time a public health emergency declaration may be extended by the Minister for Health under the *Public Health Act 1997*.<sup>15</sup>

- 2.16 The second amendment proposes a change to presentation requirements for subordinate laws and disallowable instruments made under a *COVID-19* emergency response measure from within one sitting day after they are notified on the legislation register to two sitting days after notification. The Chief Minister also told the Assembly that this amendment:

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<sup>12</sup> Measures allowing incorporated associations to hold meetings other than in person, using alternative forms of communication to allow for proxy arrangements and to allow the registrar-general to give general extensions of time for prescribed periods within which certain things are required under the act—extended for a further six months now due to expire on 8 October 2021. This six-month extension is to provide incorporated associations with more time to amend their rules and to incorporate these more flexible arrangements, should they be required in the future [Chief Minister’s Presentation Statement—*COVID-19 Emergency Response Legislation Amendment Bill 2020* (No 3), p. 42].

<sup>13</sup> The *Supreme Court Act* includes a measure which allows an accused to elect to be tried by a judge alone for offences that would normally be required to be heard by a jury—to expire on 31 December 2020, unless another date is prescribed by regulation. The bill proposes to amend the expiry provision for the measure to provide for expiry on 30 June 2021. The extended timeframe for the measure is to assist the Court in rescheduling trials and to avoid a backlog in trials developing at a time when *COVID-19* physical distancing measures require two courtrooms for each trial [Chief Minister’s Presentation Statement—*COVID-19 Emergency Response Legislation Amendment Bill 2020* (No 3), p. 42].

<sup>14</sup> Under sections 182 and 185—measures to permit a single judicial officer to exercise a supervisory function for the Sentence Administration Board in relation to intensive correction orders or parole and constitute quorum at the Board’s meetings during the *COVID* emergency. These measures are no longer needed, as the Board has been able to adopt the use of an audio-visual link to carry out its functions, as the need arises [Chief Minister’s Presentation Statement—*COVID-19 Emergency Response Legislation Amendment Bill 2020* (No 3), p. 43].

<sup>15</sup> Mr Andrew Barr MLA, Presentation Statement—*COVID-19 Emergency Response Legislation Amendment Bill 2020* (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 43.



...will reduce the possibility that a subordinate law or disallowable instrument will be repealed as a result of failing to meet the presentation requirement.<sup>16</sup>

## TECHNICAL AMENDMENTS

2.17 The Bill proposes technical amendments<sup>17</sup> to the provisions for the extension of registrations under the *Working with Vulnerable People (Background Checking) Act 2011*. Initially, registrations due to end during the COVID-19 emergency period were extended to a single fixed date six months after the end of the emergency.

2.18 The Bill instead proposes to extend registrations that end during the emergency period to end 12 months after the registration was due to end. These amendments:

...aim to ensure an effective and orderly transition back to normal registration processes.<sup>18</sup>

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<sup>16</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 43.

<sup>17</sup> These amendments repeal sections 60B and 60C of the Act, which extended registrations due to end during the COVID-19 emergency period to a single fixed date six months after the end of the emergency.

<sup>18</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 43.



### 3 COMMITTEE CONSIDERATION

- 3.1 As noted previously, the Bill referred to the Committee for inquiry and report is for an Act to amend legislation to provide for emergency measures in response to the COVID-19 emergency, and for other purposes. The Bill is the fourth in a series of omnibus COVID-19 Bills.
- 3.2 The amendments proposed under the Bill can be grouped under four general categories—namely amendments: (i) to expiry provisions for legislative measures enacted to assist with managing risks associated with the COVID-19 pandemic; (ii) repealing measures that are no longer required; (iii) to reporting provisions to the Assembly for the purposes of scrutiny and oversight; and (iv) of a technical nature.
- 3.3 This chapter sets out the Committee’s consideration of the issues concerning the proposed amendments.

### EMERGENCY LEGISLATION

- 3.4 The Bill *per se* falls into the category of legislation to respond to exceptional or emergency circumstances. In reaction to the COVID-19 pandemic, countries across the world have passed emergency laws or declared states of emergency to respond to the unfolding crisis. In an international symposium<sup>19</sup> held from 6 April to 26 May 2020 analysing global use of emergency powers in response to COVID-19 it was reported at that time that 80 per cent of the global population was affected in some way by emergency and executive action taken in response to COVID-19.
- 3.5 It is useful to consider the measures the Bill is seeking to enact against the UK Hansard Society’s Principles to guide the UK Parliament’s response to the pandemic. In a contribution jointly authored during April 2020 with Professor Meg Russell of the Constitution Unit at University College London, the UK Hansard Society sets out principles that should govern the UK House of Commons’ decisions on arrangements for the pandemic.
- 3.6 These principles include:
- ‘crisis arrangements should be based on wide and transparent consultation with Members to maximise support’;
  - they should be sunsetted ‘to make clear that they are temporary and create no automatic precedent for the post-crisis era’;

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<sup>19</sup> COVID-19 and States of Emergency Symposium—6 April to 26 May 2020, hosted by Verfassungsblog and Democracy Reporting International, convened by Joelle Grogan, Middlesex University, London, UK.

- they ‘must ensure fair representation for all Members and parties’;
- ‘the crisis and Parliament’s response to it should not become a pretext to shift power further towards the executive and party managers’; and
- ‘these principles should continue to guide the House’s decisions as it considers its future arrangements’.<sup>20</sup>

3.7 The UK Hansard Society’s Principles identify best practice in the use of emergency measures—namely, the universal principles that:

...delegation of power must be time-limited, and clear as to legitimate scope for its use. The use of power must be legally prescribed and proportionate to that legitimate aim. There must be meaningful oversight by an independent body, as well as the possibility for review for those subject to the law.<sup>21</sup>

## COMMITTEE COMMENT

3.8 The Committee acknowledges that due to the urgency of action needed to respond to exceptional or emergency circumstances—such as in the case of the COVID-19 pandemic—executive action and emergency measures do not undergo the same level of scrutiny or stages of approval that would be the default outside of such circumstances. Notwithstanding, this does not imply, or should not give rise to, emergency measures that are without limits or conditions.

3.9 The Committee notes that there are circumstances where emergency measures are necessary and essential. Where such measures are enacted they should be underpinned by universal principles—namely, that they must conform:

... in so far as possible in the first instance to the principles of legality, legal certainty, clarity, and transparency; or be corrected to align to these principles as soon as practicable.<sup>22</sup>

3.10 The Committee points out that after the COVID-19 pandemic crisis has passed and jurisdictions are exiting states of emergency, there will be an opportunity to examine and review the emergency measures that were enacted in the ACT. The Committee is of the view that there would be merit in examining further any lessons that can be learned concerning the emergency frameworks enacted during this time. This should not be limited to the ACT but should also include emerging evidence of good practice from across the globe.

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<sup>20</sup> UK Hansard Society—Procedure under Coronavirus restrictions: written evidence to the House of Commons Procedure Committee, April 2020—<<https://www.hansardsociety.org.uk/publications/submissions/procedure-under-coronavirus-restrictions-written-evidence-to-the-house-of-commons-procedure-committee>>.

<sup>21</sup> Grogan, J. (2020) States of Emergency, Verfassungsblog, 26 May<[verfassungsblog.de/states-of-emergency/](https://verfassungsblog.de/states-of-emergency/)>, p. 4.

<sup>22</sup> Ibid, p. 11.

## Recommendation 1

- 3.11 The Committee recommends (to the extent that work is not already taking place) after the COVID-19 pandemic crisis has passed and the ACT has exited from its state of emergency, the ACT Government give consideration to examining and reviewing the emergency measures that were enacted. This should not be limited to the ACT but should also include emerging evidence of good practice from across Australia and the globe.**

## MEASURES THE BILL SEEKS TO ENACT

- 3.12 Taking the measures that the Bill seeks to either extend, repeal and/or revise together with the consultation processes on the draft Bill—they broadly comply with the UK Hansard Society’s Principles to guide Parliament’s response to the pandemic. The measures are sunsetted, in preparing and drafting the Bill—ACT Government Directorates and justice statutory office holders have been consulted in relation to the suitability to extend or amend measures within their operational areas. The ACT Bar Association and ACT Law Society were also consulted on the draft Bill. The Bill has also been referred to two Assembly committee for consideration.

## COMMITTEE COMMENT

- 3.13 The Committee is of the view that the measures the Bill seeks to either extend, repeal and/or revise together with consultation processes used during drafting—broadly comply with the UK Hansard Society’s Principles to guide Parliament’s response to the pandemic. The measures are time-limited, in preparing and drafting the Bill, the Committee notes that ACT Government Directorates and justice statutory office holders were consulted in relation to the suitability to extend or amend measures within their operational areas. The Committee also notes that the ACT Bar Association and ACT Law Society were also consulted.
- 3.14 Further, the Bill has also been referred to two Assembly committees for consideration. The Justice and Community Safety Committee performing a legislative scrutiny role (the Scrutiny of Bills Committee) is required to: (i) consider clauses of bills introduced into the Assembly for compliance against a number of technical parameters<sup>23</sup>; (ii) report on human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act*

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<sup>23</sup> Consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly: (i) unduly trespass on personal rights and liberties; (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers; (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; (iv) inappropriately delegate legislative powers; or (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly [Refer Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)—homepage<[https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny)>].

2004; (iii) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) complies with a number of technical parameters<sup>24</sup>; and (iv) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly.

- 3.15 The Committee notes that given the timeframe<sup>25</sup> specified for bill inquiries to Assembly standing committees<sup>26</sup>, at the time of considering its report, the Scrutiny of Bills Committee<sup>27</sup> had not reported on its examination of the Bill. The Committee acknowledges that each committee to which the Bill has been referred has a distinctive legislative oversight role. The current timeframe<sup>28</sup> did not permit the Committee to have the benefit of considering a focused examination of the Bill against a set of specific accountability standards<sup>29</sup> as is provided by the Scrutiny of Bills Committee. In the Committee's view this information would have assisted it in its examination of the Bill.
- 3.16 The Minister with responsibility for the Bill should note that the Committee was not in a position to consider the views of the Scrutiny of Bills Committee as part of its inquiry and report.

## Recommendation 2

- 3.17 The Committee recommends that the ACT Legislative Assembly give consideration to amending clause 5 of the Resolution of Establishment for general-purpose standing committees to provide a reporting timeframe that allows for these committees to consider the views of the Scrutiny of Bills Committee where inquiries are undertaken into referred bills.**

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<sup>24</sup> Consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law): (i) is in accord with the general objects of the Act under which it is made; (ii) unduly trespasses on rights previously established by law; (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly [Refer Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)—homepage<[https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny)>].

<sup>25</sup> Two months after presentation of the Bill.

<sup>26</sup> Refer clause 5 of the Resolution of Establishment for general-purpose standing committees of the 10<sup>th</sup> Assembly.

<sup>27</sup> The Scrutiny of Bills Committee examines all bills and subordinate legislation presented to the Assembly. It does not comment on policy contained within legislation. Its scrutiny is non-partisan, non-political, and technical. It assists the Assembly to pass laws which are well-written, follow best practice, and are human rights compliant [Refer Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)—homepage<[https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny)>].

<sup>28</sup> The Committee is required to report on its inquiry by no later than Tuesday 2 February 2021.

<sup>29</sup> Broadly focused on: (i) protecting individual rights and liberties; (ii) keeping government accountable; (iii) maintaining administrative fairness and openness; and (iv) upholding parliamentary propriety.

## REPORTING REQUIREMENTS TO THE ASSEMBLY

3.18 The Bill proposes two amendments to measures under the *COVID-19 Emergency Response Act 2020* to provide for scrutiny by the Assembly of the emergency response measures. The first amendment proposes a change to the period for the reporting of the application of emergency response measures from one month to quarterly. The second amendment proposes a change to presentation requirements for subordinate laws and disallowable instruments made under a COVID-19 emergency response measure from within one sitting day after they are notified on the legislation register to two sitting days after notification.

3.19 Specifically, the focus of the Committee's decision to undertake an inquiry into the Bill concerned the proposed change to the reporting requirements to the Assembly for COVID-19 measures made under the *COVID-19 Emergency Response Act 2020* and the *COVID-19 Emergency Response Legislation Amendment Act 2020*, from monthly to quarterly.<sup>30</sup>

3.20 The Explanatory Statement notes that:

This amendment supports continuing scrutiny by the Legislative Assembly of COVID-19 emergency response measures by changing the reporting frequency without affecting the substantive reporting requirement.<sup>31</sup>

3.21 The Chief Minister told the Assembly that amending 'the reporting period so that reports will be made for each quarter that the declaration is in force', reflects:

...the practical reality of zero monthly reports most of the time so far. Quarterly reports will of course ensure that the Assembly is able to continue to monitor trends over time and aligns with the length of time a public health emergency declaration may be extended by the Minister for Health under the Public Health Act 1997.<sup>32</sup>

3.22 The Committee wrote<sup>33</sup> to the Chief Minister asking for further information as to the rationale/basis for the proposed change in reporting frequency to the Assembly. A copy of the Chief Minister's response is at **Appendix A**.

3.23 In response, the Chief Minister explained:

Essentially, the proposed shift is intended to reduce the costs associated with monthly reporting, while preserving a good level of transparency for the Legislative Assembly.

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<sup>30</sup> At section 3(1) *COVID-19 Emergency Response Act 2020*—effective for reporting from 2021.

<sup>31</sup> Explanatory Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), p. 22.

<sup>32</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 43.

<sup>33</sup> 10 December 2020.

Monthly reporting on the use of emergency response legislative measures was very apt last year—when the measures were new and the way in which they might be used was less clear. However, the measures and their use are now more mature.<sup>34</sup>

3.24 As to recent monthly reporting, the Chief Minister advised the Committee:

...as at 30 November 2020, 12 measures had not been used at all and that for the 1–30 November 2020 reporting period:

- only 24 of the 55 reported measures were used; and
- details of the use of seven measures could not be provided due to unavailability of data.<sup>35</sup>

## COMMITTEE COMMENT

3.25 The Committee notes the Chief Minister’s advice that the proposed change in reporting frequency ‘is intended to reduce the costs associated with monthly reporting, while preserving a good level of transparency for the Legislative Assembly’.<sup>36</sup> The Committee also notes that monthly reporting as at 30 November 2020 indicated that ‘details of the use of seven measures could not be provided due to the unavailability of data’.<sup>37</sup>

3.26 The Committee believes that information as to why data are unavailable for the seven emergency response legislative measures for which details of their use could not be provided—should be made available prior to the Assembly proceeding to the next stage of its consideration of the Bill.

## Recommendation 3

**3.27 The Committee recommends that the ACT Government update the ACT Legislative Assembly [prior to the Assembly proceeding to the next stage of its consideration of the COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3)]—why data are unavailable for the seven emergency response legislative measures for which details of their use could not be provided (as per monthly reporting at 30 November 2020).**

3.28 The Committee acknowledges the considerable administrative burden placed on directorate officers where monthly reporting to the Assembly on matters is required—especially in times

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<sup>34</sup> Mr Andrew Barr MLA, Correspondence to the Standing Committee on Economy and Gender and Economic Equality, 15 January 2021.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.



of exceptional or emergency circumstances. The Committee, however, considers that exceptional or emergency circumstances support extraordinary scrutiny.

- 3.29 The Committee also acknowledges (to date) ‘the practical reality of zero monthly reports most of the time so far’.<sup>38</sup> Notwithstanding, in the Committee’s view the limited number of monthly reports to date is a separate matter and does not provide the grounds for reducing capacity for legislative oversight. Further, the Committee notes that aside from two measures<sup>39</sup> repealed under one Act<sup>40</sup>, in the main, the emergency measures adopted under the *COVID-19 Emergency Response Act 2020* and *COVID-19 Emergency Response Legislation Amendment Act 2020*, whilst time-limited, continue. In proportionate terms, monthly reporting on these measures should continue.
- 3.30 The Committee is also of the view that it would be more meaningful if monthly reporting was continued. This is informed by best practice principles regarding data collection, analysis and research—including: (i) if reporting timeframes are changed—there is inconsistency in data collection time periods, and this creates problems for comparing data; (ii) the more time points—the better the data; and (iii) at a minimum for interrogating data to identify trends—a data set comprising 12 months of data for each measure is required.

## Recommendation 4

- 3.31 The Committee recommends that the ACT Government continue monthly reporting to the ACT Legislative Assembly on emergency response measures provided for under the *COVID-19 Emergency Response Act 2020* and the *COVID-19 Emergency Response Legislation Amendment Act 2020*. Monthly reporting should continue until such time as each measure, at a minimum, has 12 months of reported data for each measure.**

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<sup>38</sup> Mr Andrew Barr MLA, Presentation Statement—COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3), ACT Legislative Assembly, *Hansard*, 2 December 2020, p. 43.

<sup>39</sup> Under sections 182 and 185—measures to permit a single judicial officer to exercise a supervisory function for the Sentence Administration Board in relation to intensive correction orders or parole and constitute quorum at the Board’s meetings during the COVID emergency. These measures are no longer needed, as the Board has been able to adopt the use of an audio-visual link to carry out its functions, as the need arises.

<sup>40</sup> *Crimes (Sentence Administration) Act 2005*.



## 4 CONCLUSION

- 4.1 The Bill *per se* falls into the category of legislation to respond to exceptional or emergency circumstances. In reaction to the COVID-19 pandemic, countries across the globe have passed emergency laws or declared states of emergency to respond to the unfolding crisis. The Committee observes that as reported in an international symposium<sup>41</sup> analysing global use of emergency powers in response to COVID-19, approximately 80 per cent of the global population, including the ACT community, has been affected in some way by emergency and executive action taken in response to COVID-19.
- 4.2 The Committee is of the view that the measures the Bill seeks to either extend, repeal and/or revise together with consultation processes used in the drafting stage—broadly comply with the UK Hansard Society’s Principles to guide Parliament’s response to the pandemic.
- 4.3 The Committee considers that exceptional or emergency circumstances support extraordinary scrutiny and has made recommendations that align with this concept. The Committee has also made a recommendation regarding the timeframe specified for reporting on inquiries undertaken by Assembly committees into referred bills.<sup>42</sup>
- 4.4 The Committee acknowledges the extraordinary efforts that have been undertaken by the ACT Public Service and its employees to manage the risks for the ACT community at the time the COVID-19 crisis was unfolding in March 2020, throughout 2020, and now into 2021. The Committee further acknowledges that it is these efforts that have managed the health response, worked to keep the ACT community safe, provided economic support to businesses and individuals under considerable stress, and supported operational areas to provide services during the pandemic. The Committee also recognises the co-operation, work and contribution from the Federal government, private sector, non-government organisations, the ACT community and countless other organisations and individuals that have been instrumental in the efforts and initiatives to support the health, economic and social challenges faced by our community during this unprecedented time.

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<sup>41</sup> COVID-19 and States of Emergency Symposium—6 April to 26 May 2020, hosted by Verfassungsblog and Democracy Reporting International, convened by Joelle Grogan, Middlesex University, London, UK.

<sup>42</sup> Refer clause 5 of the Resolution of Establishment for general-purpose standing committees (passed by the Assembly, 2 December 2020).

- 4.5 The Committee has made **4** recommendations in relation to its inquiry into the COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3).

Ms Nicole Lawder MLA

Chair

27 January 2021

## **Appendix A      CORRESPONDENCE FROM CHIEF MINISTER (15/01/21)**





**Andrew Barr MLA**  
Chief Minister  
Treasurer  
Minister for Climate Action  
Minister for Economic Development  
Minister for Tourism  
Member for Kurrajong

Authorised for publication

27.1.21 *AB*

Ms Nicole Lawder MLA  
Chair  
Standing Committee on Economy and Gender and Economic Equality  
ACT Legislative Assembly  
GPO Box 1020  
CANBERRA ACT 2601



Dear Ms Lawder *Nicole*

Thank you for your letter of 10 December 2020 in relation to the COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3).

I note the Committee's focus on proposed amendments to reporting frequency under the COVID-19 Emergency Response Act 2020 (Reports for Legislative Assembly) and its request for further information on the rationale for the shift proposed from monthly to quarterly reporting.

Essentially, the proposed shift is intended to reduce the costs associated with monthly reporting, while preserving a good level of transparency for the Legislative Assembly.

Monthly reporting on the use of emergency response legislative measures was very apt last year – when the measures were new and the way in which they might be used was less clear. However, the measures and their use are now more mature.

Recent monthly reporting indicates that as at 30 November 2020, 12 measures had not been used at all and that for the 1-30 November 2020 reporting period:

- only 24 of the 55 reported measures were used; and
- details of the use of seven measures could not be provided due to unavailability of data.

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Quarterly reporting would enable the Legislative Assembly to monitor the use of measures and to identify trends over a longer reporting periods. It would also align with the length of time a public health emergency declaration may be extended by the Minister for Health under the *Public Health Act 1997*.

I also note that transparency is supported not only by Reports for the Legislative Assembly but also by mechanisms such as the notification of relevant instruments on the ACT Legislation Register and Committee hearings.

If the change in the Bill is adopted, the Legislative Assembly will have had the benefit of ten monthly reports on the application of each of the emergency response measures and will have the benefit of quarterly reporting going forward.

As we work towards recovery from the pandemic, including through the roll-out of the national COVID-19 immunisation program, it is important that we focus the use public resources where those resources will have most benefit for the community.

I thank the Committee for its consideration of the referred Bill, and I look forward to considering the Committee's report on the Bill.

Yours sincerely



Andrew Barr MLA  
Chief Minister

15 January 2021