Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)

SCRUTINY REPORT 9

28 SEPTEMBER 2021
THE COMMITTEE

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ROLE OF COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee’s terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.
RESOLUTION OF APPOINTMENT

(10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:

(a) considering 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;

(b) reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the Human Rights Act 2004;

(c) considering 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; and

(d) 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;
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BILLS

BILL—NO COMMENT

The Committee has examined the following bill and offers no further comment:

FINANCIAL MANAGEMENT AMENDMENT BILL 2021

This Bill amends the Financial Management Act 1996 to increase the amounts that can be paid prior to the passage of the 2021-22 appropriation bills and under the Treasurer’s advance, and to extend the timeframes for the 2020-21 consolidated annual financial statements.

BILL—COMMENT

The Committee has examined the following bill and offers these comments on it:

OPERATIONAL EFFICIENCIES (COVID-19) LEGISLATION AMENDMENT BILL 2021

This Bill will amend various Acts to permanently adopt certain legislative measures taken during the COVID-19 emergency and to temporarily extend measures put in place to assist the business activities of incorporated associations.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

Report under section 38 of the Human Rights Act 2004 (HRA)

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

RIGHT TO WORK AND OTHER WORK-RELATED RIGHTS (SECTION 27B HRA)

The Bill will amend the Human Rights Commission Act 2005 to make permanent the Commission’s jurisdiction to deal with complaints concerning the treatment of vulnerable persons. This jurisdiction potentially limits the protection of privacy provided by section 12 of the HRA by authorising the Commission to access and share information of a personal and sensitive nature in the conduct of complaint-handling functions. The Bill may also limit rights in criminal proceedings protected by section 22 of the HRA by amending the common-law privilege against self-incrimination in compelling the provision of information as part of the Commission’s investigations.

The Bill’s amendments to the Public Trustee and Guardian Act 1985 may also potentially limit the protection of privacy, as well as the right to work protected by section 27B of the HRA, right to freedom of movement protected by section 13 of the HRA and right to liberty and security of person protected by section 18 of the HRA. The amendments make permanent the ability of the Public
Trustee and Guardian to more broadly delegate guardianship and management functions to any staff member, subject to limitations on the range of functions able to be delegated and specific matters that must be satisfied before the delegation is permitted.

The Bill will also amend the *Taxation Administration Act 1999* to make permanent the ability of the Minister to provide by legislative instrument for rebate, deferral and exemption schemes. The establishment and eligibility for such schemes may limit the right to equality before the law protected by section 8 of the HRA. Authorising requirements to provide information to the Commissioner to determine eligibility for such schemes may limit the protection of privacy provided by section 12 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limitations and provides a statement of why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

RETROSPECTIVE OPERATION

Part 2 of the Bill will commence on the earlier of the day after notification of the Bill or 8 October 2021. Therefore, the Bill may have retrospective effect if it is not passed and notified until after 8 October 2021. The explanatory statement accompanying the Bill justifies this potential retrospective operation as ensuring that current provisions of the *Associations Incorporation Act 1991*, which are due to expire on the 8 October 2021, will continue to operate. This will allow associations to continue to meet using alternative methods and to allow timeframes to be extended for the duration of the Covid-19 emergency period. The explanatory statement provides the assurance that any retrospective operation will not be to the disadvantage of any person by adversely affecting their rights, or imposing liabilities.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee Resolution of Appointment paragraph (10)(a)(iv)

The amendments to the Taxation Administration Act will allow the Minister to create rebate, deferral and exemption schemes through the making of a legislative instrument and without, as currently provided for, having to be satisfied that such a scheme is reasonable and necessary to provide an economic response to a COVID-19 emergency. The explanatory statement accompanying the Bill refers to the importance of a consistent set of powers to implement rebates, referrals and exemptions without having to rely on particular powers under various Acts. The amendments will also provide greater flexibility to facilitate future revenue measures in a timely and efficient manner. The explanatory statement also notes that, under the Act, a disallowable instrument setting up a scheme under the amended provisions must be accompanied by a human rights compatibility statement. This will ensure consideration by this Committee of any impact on human rights based on the circumstances of the instrument. The Committee draws these statements to the attention of the Assembly.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.
PROPOSED AMENDMENTS

OPERATIONAL EFFICIENCIES (COVID-19) LEGISLATION AMENDMENT BILL 2021


The proposed amendments will allow the director-general to declare an emergency exists in a detention place (currently the Bimberi Youth Justice Centre) which threatens order and security or the safety of persons and which relates to a COVID-19 emergency. Such a declaration can extend for as long as a COVID-19 emergency continues and the director-general believes there are reasonable grounds for the declaration. A review of whether there are reasonable grounds for the declaration must be carried out every 28 days, and the first annual report after the declaration ends must set out any measures taken in response to the emergency.

An emergency declaration empowers the director-general to restrict activities within the detention place, access to and within the detention place, and communication with young detainees. Any restrictions must be necessary and reasonable in the circumstances. The proposed amendments may therefore limit the right to liberty and security of person protected by section 18 of the HRA and the right to humane treatment when deprived of liberty protected by section 19 of the HRA. The supplementary explanatory statement provided to the Committee includes recognition of these potential limitations and provides a justification for why they can be considered reasonable using the framework set out in section 28 of the HRA. The Committee draws this statement to the attention of the Assembly and has no further comments.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

The Committee has examined the following disallowable instruments and has no comments on them:

- Disallowable Instrument DI2021-191 being the Long Service Leave (Portable Schemes) Mental Health Community Coalition ACT Employer Declaration 2021 made under section 12 of the Long Service Leave (Portable Schemes) Act 2009 declares the Mental Health Community Coalition to be an employer for the community sector industry.

• Disallowable Instrument DI2021-193 being the Board of Senior Secondary Studies Appointment 2021 (No 2) made under section 8 of the Board of Senior Secondary Studies Act 1997 appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Australian National University.


• Disallowable Instrument DI2021-200 being the Board of Senior Secondary Studies Appointment 2021 (No 3) made under section 8 of the Board of Senior Secondary Studies Act 1997 appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Association of Independent Schools.

• Disallowable Instrument DI2021-202 being the Working with Vulnerable People Background Checking (Fees) Determination 2021 (No 1) made under section 68 of the Working with Vulnerable People (Background Checking) Act 2011 revokes DI2019-176 and determines the fees for services provided by the Working with Vulnerable People Screening Unit.

DISALLOWABLE INSTRUMENTS—COMMENT

The Committee has examined the following disallowable instruments and offers these comments on them:

ARE THESE DISALLOWABLE INSTRUMENTS?

• Disallowable Instrument DI2021-186 being the Racing Appeals Tribunal Appointment 2021 (No 1) made under section 40 and Schedule 1, section 1.1 of the Racing Act 1999 appoints specified persons as president, deputy president and members of the Racing Appeals Tribunal.

• Disallowable Instrument DI2021-187 being the Racing Appeals Tribunal Appointment 2021 (No 2) made under section 40 and Schedule 1, section 1.1 of the Racing Act 1999 appoints specified persons as members of the Racing Appeals Tribunal.

The instruments mentioned above appoint specified persons as members of the Racing Appeals Tribunal, under section 40 of the Racing Act 1999. Included in the first instrument mentioned above is the appointment of a president and deputy president of the Tribunal.

The Committee notes, with approval, that the explanatory statement for the first instrument addresses the requirement in sub-item 1.1(2) of Schedule 1 to the Racing Act that the president and deputy president be lawyers of not less than five years standing. The Committee also notes, with approval, that the explanatory statements for both instruments address, for all the specified persons, the ineligibility issues set out in sub-item 1.1(3) of Schedule 1.
The Committee notes that the various appointments are made by disallowable instrument, bringing the instruments in question within the Committee’s scrutiny role.

The Committee notes that section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions by Ministers. It provides:

227 Application—div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

(c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the relevant appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, the Committee stated:

Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that the explanatory statements for the instruments mentioned above contain no such statement.

The Committee draws the attention of the Legislative Assembly to the instruments mentioned above, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister’s confirmation that the persons appointed by the instruments mentioned above are not public servants.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before 11 November 2021, when the Legislative Assembly’s capacity to move to disallow the instruments will expire.

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HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-188 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 7) made under section 13 of the Road Transport (General) Act 1999 provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, participating in a special stage of the Innate Motorsport Test Day.

- Disallowable Instrument DI2021-199 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 8) made under section 13 of the Road Transport (General) Act 1999 provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, participating in a special stage of the Innate Motorsport Test Day.

The instruments mentioned above, both made under section 13 of the Road Transport (General) Act 1999, provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, participating in a special stage of the Innate Motorsport Test Day. The first instrument mentioned above relates to an event that was scheduled for 15 July 2021. The explanatory statement for the second instrument mentioned above indicates that that event was cancelled, due to weather conditions, and re-scheduled, for 28 July 2021. Further, it indicates that the second instrument allows for further postponement and re-scheduling, up to 8 September 2021.

The Committee notes that, similar to the explanatory statements for similar instruments, relating to similar events, the explanatory statements for both instruments contain a discussion of potential human rights implications involved in the instruments. In both instances, the human right in question is the right set out in section 13 of the Human Rights Act 2004—the right to move freely within the ACT. The Committee notes that, in each case, the potential limitation of this right is explained and justified, by reference to section 28 of the Human Rights Act.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned above.

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / RETROSPECTIVITY

- Disallowable Instrument DI2021-189 being the Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2021 (No 2) section 35 of the Liquor Regulation 2010 waives specified application fees to support licensees selling liquor for consumption on premises and liquor permit-holders with disrupted events for the period 1 July to 31 August 2021.

This instrument, made under section 35 of the Liquor Regulation 2010, waives certain application fees, for licensees under the Liquor Act 2010. Section 35 of the Liquor Regulation expressly allows the Commissioner for Fair Trading to waive or reduce fees in relation to licences or permits, if the Commissioner considers that the waiver or reduction “is appropriate because of the financial impact of the COVID-19 emergency on the business carried on under the licence or permit”. The explanatory statement for the instrument indicates that the fees waiver effected by the instrument relates to face mask requirements, imposed by a public health face masks direction, declared on 30 June 2021. The Committee notes that section 4 of the instrument provides that the waiver expires on 31 August 2021.
The Committee notes that the instrument was made on 20 July 2021 and notified on the ACT Legislation Register on 22 July 2021. However, section 2 of the instrument provides that the instrument “is taken to have commenced on 1 July 2021”. This means that the instrument has a retrospective effect.

The Committee notes, with approval, that the explanatory statement for the instrument addresses the retrospection issue, by reference to the limitations on retrospective commencement of statutory instruments, set out in section 76 of the Legislation Act 2001. In short, the explanatory statement states that the retrospectivity is “non-prejudicial”, for the purposes of section 76.

This comment does not require a response from the Minister.

**HUMAN RIGHTS ISSUES**

- **Disallowable Instrument DI2021-195 being the Public Place Names (Yarralumla) Determination 2021** made under section 3 of the Public Place Names Act 1989 determines the name of a public place in the Division of Yarralumla.

This instrument, made under section 3 of the Place Names Act 1989, names a public place in Yarralumla. The Committee notes that, similar to explanatory statements for similar instruments, the explanatory statement for the instrument discusses potential human rights implications for the instrument. The particular human right identified is the right to privacy and reputation, set out in section 12 of the Human Rights Act 2004. The explanatory statement states that this right is not engaged, because the instrument does not name the public place in question after a person.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

**ARE THESE DISALLOWABLE INSTRUMENTS?**

- **Disallowable Instrument DI2021-196 being the ACT Teacher Quality Institute Board Appointment 2021 (No 1)** made under sections 14 and 15 of the ACT Teacher Quality Institute Act 2010 and sections 78 and 79 of the Financial Management Act 1996 appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.

- **Disallowable Instrument DI2021-197 being the ACT Teacher Quality Institute Board Appointment 2021 (No 2)** made under sections 14 and 15 of the ACT Teacher Quality Institute Act 2010 and sections 78 and 79 of the Financial Management Act 1996 appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.

Each of the instruments mentioned above appoints a specified person as a member of the Board of the ACT Teacher Quality Institute, under sections 14 and 15 of the ACT Teacher Quality Institute Act 2010 and sections 78 and 79 of the Financial Management Act 1996.

The Committee notes that both appointments are made by disallowable instrument, bringing the instruments in question within the Committee’s scrutiny role.

The Committee notes that section 227 of the Legislation Act 2001 deals generally with the making of appointments to statutory positions by Ministers. It provides:
227 Application—div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

(c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the relevant appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps, the Committee stated:

Under paragraph 227(2)(a) of the Legislation Act 2001, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that the explanatory statements for the instruments mentioned above contain no such statement.

The Committee draws the attention of the Legislative Assembly to the instruments mentioned above, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister’s confirmation that the persons appointed by the instruments mentioned above are not public servants.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before 11 November 2021, when the Legislative Assembly’s capacity to move to disallow the instruments will expire.

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HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-198 being the Animal Diseases (Endemic Diseases) Declaration 2021 made under section 16 of the Animal Diseases Act 2005 revokes DI2018-34 and updates the list of declared endemic diseases in the ACT to consider the Memorandum of Understanding (Collaborative cooperation on cross-border biosecurity management) between ACT and NSW.

This instrument, made under section 16 of the Animal Diseases Act 2005, declares certain diseases to be endemic diseases, for that Act. The explanatory statement for the instrument indicates that the effect of the instrument is to “update” the list of endemic diseases, “to consider the Memorandum of Understanding (Collaborative cooperation on cross-border biosecurity management) between ACT and NSW.”

The Committee notes that the explanatory statement for the instrument states that “[t]here are no human rights implications arising from the declaration of endemic diseases” and that “[t]he instrument does not engage any rights under the Human Rights Act 2004”.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

IS THIS A DISALLOWABLE INSTRUMENT?

- Disallowable Instrument DI2021-201 being the Public Trustee and Guardian (Investment Board) Appointment 2021 (No 2) made under paragraph 48(1)(b) of the Public Trustee and Guardian Act 1985 appoints specified persons as members of the Public Trustee and Guardian Investment Board.

This instrument appoints three specified persons to the Public Trustee and Guardian Investment Board, under 48(1)(b) of the Public Trustee and Guardian Act 1985. The explanatory statement for the instrument indicates that two of the specified persons are re-appointed to the Board.

The Committee notes that the appointments are made by disallowable instrument, bringing the instruments within the Committee’s scrutiny role.

The Committee notes that section 227 of the Legislation Act 2001 deals generally with the making of appointments to statutory positions by Ministers. It provides:

227 Application—div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the relevant appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps, the Committee stated:

Under paragraph 227(2)(a) of the Legislation Act 2001, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that the explanatory statement for this instrument contains no such statement.

The Committee draws the attention of the Legislative Assembly to this instrument, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister’s confirmation that the persons appointed by this instrument are not public servants.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before 11 November 2021, when the Legislative Assembly’s capacity to move to disallow the instrument will expire.

COVID-19-RELATED INSTRUMENT

- Disallowable Instrument DI2021-214 being the Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2021 section 166A of the Gaming Machine Act 2004 revokes DI2020-252 and extends the period of time, by three months, that clubs can claim contributions made to or for the local live performance industry as community purpose contributions.

This instrument is made under section 166A of the Gaming Machine Act 2004, which gives the Minister the power to declare, in the context of the COVID-19 pandemic, that a contribution by a holder of a licence under the Act that is a club is a “community purpose contribution”, for the Act. The Committee notes that the explanatory statement for the instrument states that the instrument ….

…. provides for contributions made to, or for the benefit of, a member of the local live performance industry for the purpose of providing music or other live entertainment (other than sport) for club members and patrons, to be community purpose contributions for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency.

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The explanatory statement also indicates that the effect of the instrument is to extend the effect of an earlier instrument – the Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2020 [DI2020-252] – to 30 November 2021.

This comment does not require a response from the Minister.

COVID-19-related instrument / Human rights issues

- Disallowable Instrument DI2021-216 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 3) made under section 156 of the Residential Tenancies Act 1997 revokes DI2021-166 and introduces a moratorium on evictions for those who are in quarantine and those who are unable to meet their commitments under a residential tenancy agreement.

This instrument is made under section 156 of the Residential Tenancies Act 1997, which gives the Minister the power to make certain declarations, in relation to the COVID-19 pandemic. The Committee notes that the explanatory statement for the instrument indicates that the effect of the instrument is to “[introduce] a moratorium on evictions for those in our community who are in quarantine and for those who are unable to meet their commitments under a residential tenancy agreement due to the impact of coronavirus (COVID-19).” Under section 3 of the instrument, the moratorium operates until the earlier of:

(a) the day the transitional period ends; or

(b) the day mentioned in the Act, section 156(3).

“Transitional period” is defined in section 5 of the instrument as the period:

(a) beginning on the day after the moratorium period ends; and

(b) ending—

(i) on the day 12 weeks after the moratorium period ends; or

(ii) if the period is extended under section 6—at the end of the extended period.

“Moratorium period” is also defined in section 5 of the instrument as the period:

(a) beginning on the notification day; and

(b) ending—

(i) on the day 12 weeks after the notification day; or

(ii) if the period is extended under section 6—at the end of the extended period.

Section 6 of the instrument gives the Minister the power to extend the moratorium period or the transitional period by not more than 12 weeks.

Subsection 156(3) of the Residential Tenancies Act (ie the alternative mechanism for determining the end of the moratorium) provides that a declaration expires on:

(a) the first day no COVID-19 emergency is in force (the declaration end date); or
(b) if the Minister considers that the effect of the COVID-19 pandemic justifies a later day, being a day not later than 3 months after the declaration end date—a later day notified by the Minister before the declaration end date.

The Committee notes that the explanatory statement for the instrument discusses potential human rights implications of the instrument. The human rights discussed are the right to protection of family and children, under section 11 of the Human Rights Act 2004 and the right to privacy and home, under section 12 of the Human Rights Act. The Committee notes that the explanatory statement states that the measures implemented by the instrument promote both those rights. The explanatory statement goes on to state that the right to privacy may also be engaged by the possibility that tenants may be required to provide information to their real estate agents or landlords, in order to demonstrate a loss of income and/or that they have been diagnosed with, or are caring for someone who has COVID-19, under section 19 of the instrument. The explanatory statement states that the right to privacy may be further limited by sections 22 and 23 of the instrument, under which tenants may be required to provide personal information from ACT Health to their real estate agents, landlords and/or the ACT Civil and Administrative Tribunal, in order to demonstrate that they are subject to a COVID-19 public health direction to quarantine or self-isolate and, for that reason, are unable to comply with a notice to vacate, a termination and possession order or a warrant for eviction.

The Committee notes that the explanatory statement concludes:

These limitations are reasonable and proportionate in accordance with the test in section 28 of the [Human Rights Act]. The measures in the Declaration have an important purpose, which is to mitigate the risk of homelessness arising from financial stress due to the COVID-19 pandemic and to prevent a person or people from being required to vacate a property when they are under a direction to self-isolate or quarantine. The limitation on the right to privacy is necessary as landlords may reasonably expect tenants to demonstrate that protections under the Declaration apply because the tenant is COVID-19 impacted. This ensures that landlords may otherwise exercise their normal statutory rights under residential tenancy law if circumstances extraneous to the pandemic permit. There are no other reasonably available and less restrictive alternatives that would not require the tenant to provide personal information to a third party.

The Committee also notes that the explanatory statement also addresses (at page 2) potential arguments about the (arguable) retrospective operation of the instrument.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

COVID-19-related instrument / Human rights issues

- **Disallowable Instrument DI2021-218 being the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021 made under Section 177 of the Leases (Commercial and Retail) Act 2001** requires good faith negotiations between landlord and tenant, having regard to the overarching and leasing principles set out in the National Cabinet Code of Conduct prior to a landlord terminating the lease or taking adverse action for a prescribed breach.

This instrument is made under section 156 of the Residential Tenancies Act 1997, which gives the Minister the power to make certain declarations, in relation to the COVID-19 pandemic.
The Committee notes that the explanatory statement for the instrument indicates that the effect of the instrument is to extend the operation of two previous declarations – the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 [DI2020-92] and the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No. 2) [DI2020-283] – which “introduced the requirement for good faith negotiations between parties having regard to the overarching principles and leasing principles set out in National Cabinet’s Code of Conduct for small to medium enterprises (SMEs), prior to a landlord terminating a commercial lease or taking adverse action against an impacted tenant for a prescribed breach.” Under section 3 of the instrument, this instrument extends the operation of the relevant measures until:

(a) the first day no COVID-19 emergency is in force; or

(b) if a later day is notified by the Minister under the Act, section 177(3)(b)—that day.

Note The Minister may notify a day (not later than 3 months after the COVID-19 emergency ends) under the Act, s 177(3)(b) if the Minister considers the effect of the COVID-19 pandemic justifies this instrument being in force for a period after the COVID-19 emergency ends.

The Committee notes that, like the explanatory statements for the previous instruments, the explanatory statement for this instrument discusses potential human rights implications of the instrument. The human right discussed is the right to privacy, under section 12 of the Human Rights Act 2004. The Committee notes that the explanatory statement for the instrument concludes that …

... there is no limitation of the right to privacy because there are no legal requirements for tenants to provide information, and tenants retain control as to what information is to be shared.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

**SUBORDINATE LAWS—COMMENT**

The Committee has examined the following subordinate laws and offers these comments on them:

**RETOPSPECTIVITY / HUMAN RIGHTS ISSUES**

- **Subordinate Law SL2021-18** being the Road Transport (Vehicle Registration) Amendment Regulation 2021 (No 1) made under section 26 of the Road Transport (Driver Licensing) Act 1999, section 233 of the Road Transport (General) Act 1999 and section 13 of the Road Transport (Vehicle Registration) Act 1999 provides for the consideration and registration of vehicles that are approved to be imported and supplied to market under specified Commonwealth legislation.

This subordinate law amends various road transport regulations. The explanatory statement for the subordinate law states:

The purpose of this Regulation is to provide for the consideration and registration of vehicles approved to be imported and supplied to market under the Road Vehicle Standards Act 2018 (Cth) (RVSA), the Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018 (Cth) that commenced on 1 July 2021. This regulation also takes account of the repeal of the Motor Vehicle Standards Act 1989 (Cth) (MVSA).
The subordinate law was notified on the ACT Legislation Register on 9 August 2021. Section 2 of the subordinate law provides that (in large part) the subordinate law “is taken to have commenced on 1 July 2021”. This means that the subordinate law has retrospective effect. The Committee notes, with approval, that this issue is addressed in the explanatory statement for the subordinate law:

Taking the amendment regulation to have commenced on 1 July 2021 is not considered to be prejudicial to any person. It is not considered to operate to the disadvantage of any person who has purchased a road vehicle approved for supply to market under the RVSA and has applied for registration of that vehicle in the ACT. It serves to legitimise the registration of those vehicles for which applications for registration have been considered and granted by the road transport authority from 1 July 2021 to the day after notification of the amendment regulation on the ACT Legislation Register.

The Committee notes that the explanatory statement for the subordinate law goes on to discuss possible human rights implications of the subordinate law, stating that “[t]here are not considered to be any human rights implications arising from this amendment regulation”, on the basis that “[t]he amendments … are technical amendments to align provisions with Commonwealth legislation” and “allow for additional pathways to use a registerable vehicle and do not remove existing pathways to use a registerable vehicle”.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.

This comment does not require a response from the Minister.

COVID-19-RELATED SUBORDINATE LAW


The Committee notes that this subordinate law, made under section 84 of the Medicines, Poisons and Therapeutic Goods Act 2008, is made in the context of the COVID-19 pandemic. The Committee notes that the explanatory statement for the subordinate law states:

The intent of this amendment regulation is to support expansion of the COVID-19 vaccinating workforce at ACT Government operated vaccination clinics, to ensure the ACT has sufficient authorised immunisers to meet the forecast increase in supply and demand for COVID-19 vaccines and meet vaccination targets set out by the Australian Government Vaccination Allocation Horizons.

This comment does not require a response from the Minister.

NATIONAL REGULATION—COMMENT

The Committee has examined the following national regulation and offers these comments on it:

RETROSPECTIVE EFFECT / POSITIVE COMMENT (PROVISION OF EXPLANATORY MATERIAL) / HUMAN RIGHTS ISSUES

- Heavy Vehicle National Law as applied by the Heavy Vehicle National Law Act 2012 (Qld) and by the law of States and Territories—Heavy Vehicle National Legislation Amendment Regulation 2021 (2021 No 42), together with an explanatory statement.
This National Regulation was tabled in the Legislative Assembly on 16 September 2021. It was made under section 730 of the Heavy Vehicle National Law, set out as the Schedule to the Heavy Vehicle National Law Act 2012 (Qld), which applies in the ACT under section 7 of the Heavy Vehicle National Law (ACT) Act 2013. Under section 7, the law set out in the Queensland Act applies, in the ACT, “as amended from time to time”. The Heavy Vehicle National Law appears on the ACT Legislation Register, as the Heavy Vehicle National Law (ACT), at https://www.legislation.act.gov.au/a/db_49155/.

Section 730 provides (in part):

730 National regulations

(1) For the purposes of this section, the designated authority is the Queensland Governor acting with the advice of the Executive Council of Queensland and on the unanimous recommendation of the responsible Ministers.

(2) The designated authority may make regulations for the purposes of this Law.

Section 733 of the Heavy Vehicle National Law sets out publication requirements for National Regulations:

733 Publication of national regulations

(1) The national regulations are to be published on the NSW legislation website in accordance with Part 6A of the Interpretation Act 1987 of New South Wales.

(2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

The Committee notes that the explanatory statement for these National Regulations states that they were published on the NSW Legislation Register on 12 February 2021 and commenced on 22 February 2021.

Section 734 of the Heavy Vehicle National Law sets out the mechanism for parliamentary scrutiny of National Regulations:

734 Scrutiny of national regulations

(1) The responsible Minister for a participating jurisdiction is to refer any adverse report about a national regulation from a legislation scrutiny body for that jurisdiction to the responsible Ministers for consideration and advice.

(2) The responsible Ministers are to prepare advice on the adverse report and provide a report to the relevant responsible Minister about the issues raised.

(3) The report by the responsible Ministers is to be provided to the responsible Minister in sufficient time to ensure the responsible Minister can provide the response to the relevant scrutiny body within a period that is appropriate in the circumstances.

(4) Subsections (1) to (3) do not affect any legislative or other arrangements regarding scrutiny and disallowance in jurisdictions and do not limit a responsible Minister’s ability to respond independently to any issues raised by a legislation scrutiny body.
In this section—

*legislation scrutiny body* means a parliamentary committee (or other parliamentary body) whose functions include the scrutiny of regulations and other subordinate legislation.

Section 8 of the *Heavy Vehicle National Law (ACT) Act 2013* is the key to the Committee’s scrutiny jurisdiction, in relation to this National Regulation:

8 **Exclusion of Legislation Act**

(1) The Legislation Act does not apply to the Heavy Vehicle National Law (ACT).

(2) However, the Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation as if—

(a) a reference to a subordinate law were a reference to a national regulation; and

(b) a reference in the Legislation Act section 64(1) (Presentation of subordinate laws and disallowable instruments) to—

(i) ‘6 sitting days’ were a reference to ‘20 sitting days’; and

(ii) ‘notification day’ were a reference to ‘published’ as mentioned in the *Heavy Vehicle National Law (ACT)*, section 733(1) (Publication of national regulations); and

(c) any other necessary changes were made.

(3) Also, the Legislation Act, section 104 (References to laws include references to instruments under laws) and section 191 (Offences against 2 or more laws) apply to the Heavy Vehicle National Law (ACT) as if that Law were an Act.

(4) This section does not limit the application of the Legislation Act to the local application provisions of this Act.

The effect of section 8 is that this National Regulation was required to be tabled, in the Legislative Assembly, within 20 sitting days of being published/notified on the NSW Legislation Register. This requirement was met. There is also no issue with subsection 733(2) of the Heavy Vehicle National Law, in that the National Regulations did not commence before they were published.

Despite the fact that there is no issue with retrospective commencement, in the sense of subsection 733(2) of the Heavy Vehicle National Law, the Committee notes that the National Regulations have applied in the ACT since 22 February 2021, yet were not tabled in the Legislative Assembly until 16 September 2021. That being so, the Committee seeks the Minister’s advice as to what (if any) steps were taken to notify those who were affected by the amendments made by this National Regulation that the amendments had taken effect.

The comment immediately above requires a response from the Minister. The Committee would be grateful if the Minister could respond before 11 November 2021, when the Legislative Assembly’s capacity to move to disallow the National Regulations will expire.
Turning to the substance of these National Regulations, the Committee notes that the explanatory statement for the National Regulations states:

**Purpose of this Regulation**

The purpose of the regulation is to amend the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation* (the MDL regulation) and the *Heavy Vehicle (Vehicle Standards) National Regulation* (the VS regulation).

The amendments include:

1. Allowing the use of Blind Spot Information Systems (BSIS). BSIS informs the driver of a vehicle of a possible collision with a bicycle or another road user. Updates have been made to the VS regulation to ensure that BSIS systems are not measured in the width of the vehicle providing the overall width of the heavy vehicle including the BSIS is not more than 2.6m.
2. Updates to definitions to exempt Indirect Vision Devices (IVD) complying with ADR 14 from being included in the measurement of vehicle length and width, subject to certain conditions.
3. Prohibiting fitment of tyres that have cleats or other gripping devices to heavy trailers, where these cleats would damage the roads. This change aligns requirements for trailers with the requirement for heavy motor vehicles.
4. An update to terminology used to refer to retroreflective surfaces on warning signs and labels. This is to align regulations with changes to the relevant Australian/ New Zealand Standard.
5. There have also been changes to the VS regulation and MDL regulation to provide for the (Cwlth) *Road Vehicle Standards Act 2018* (RVSA) that commenced in full on 1 July 2021.

The Committee notes, with approval, that an explanatory statement has been provided for these National Regulations, despite suggestions (in correspondence that the Committee had, with various Ministers, during the 9th Assembly) that there is no formal requirement, under various national laws, to provide such material. The Committee notes that this is reflected in the explanatory statement for these National Regulations, which states:

While not required, the then Minister for Justice and Community Safety agreed that an explanatory statement would be provided in support of any national amendment regulation tabled in the Legislative Assembly. Some previous explanatory statements were shortened and did not include notes on clauses.

The Committee re-states its view that an explanatory statement should be provided for national laws/regulations, regardless of the absence of a requirement to do so, in the relevant empowering legislation. Explanatory statements are essential, both in terms of informing the Committee (and the Legislative Assembly) and in allowing the Committee to carry out its function, under principle (10)(d) of the Committee’s terms of reference, to assess explanatory statements against the technical and stylistic standards expected by the Committee.

The Committee notes, with approval, the inclusion of notes on clauses, in the explanatory statement for these National Regulations. This is of great assistance to the Committee (and the Legislative Assembly).
The Committee notes that the explanatory statement for the National Regulations addresses human rights implications of the instrument, stating that “[t]here are no human rights implications arising from these amendments.”

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these National Regulations.

This comment does not require a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:


  These responses⁴ can be viewed online.

PRIVATE MEMBERS’ RESPONSES

The Committee has received responses from:


- Mr Hanson, dated 20 September 2021, in relation to comments made in Scrutiny Report 8 concerning the Bail Amendment Bill 2021.

  These responses⁵ can be viewed online.

The Committee wishes to thank the Minister for Health, the Minister for the Prevention of Domestic and Family Violence, Ms Orr and Mr Hanson for their helpful responses.

Jeremy Hanson MLA
Chair
28 September 2021

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OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021

- **Report 4, dated 4 May 2021**
  - Crimes (Stealthing) Amendment Bill 2021.

- **Report 7, dated 4 May 2021**
  - Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) [response required prior to the Bill being debated].

- **Report 8, dated 24 August 2021**
  - COAG Legislation Amendment Bill 2021 [response required prior to the Bill being debated].