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Legislation Review Committee

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

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PART ONE – REGULATIONS

1. BUILDING AND DEVELOPMENT CERTIFIERS AMENDMENT (CLADDING) REGULATION 2021

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Economic and property rights

The Regulation amends the *Building and Development Certifiers Regulation 2020* to provide a 12-month extension for the commencement of professional indemnity policies for registered certifiers that exclude certain claims for cladding that does not comply with the relevant legal requirements or building codes.

This may impact situations where a claim is being made against a registered certifier for damage due to non-compliant cladding in the construction of buildings. This may involve potential fire damage or significant safety risks to building occupants or the structural integrity of the building.

The Committee understands that this amendment makes the regulation consistent with the timeline of the state initiative, Project Remediate, to help remove combustible cladding on an estimated 225 buildings, with scheduled remediation work to begin in early 2022.

The Committee recognises that the Regulations envisage professional indemnity policies to not apply to certain claims prior to the commencement of remediation work. However, where a registered certifier is unable to be adequately insured for claims involving non-compliant cladding until the specified date, affected building occupants may be required to make out-of-pocket expenditures to address any safety or structural issues in the meantime. This may impact on the economic and property rights of those occupants by preventing coverage of these claims for a further 12 months.

In these circumstances, the Committee refers to Parliament the issue of whether the economic or property rights of affected residents are adequately protected in instances where non-compliant cladding has been detected and yet to be remediated.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Adverse impact on business community – Availability of insurance

The Regulation extends the date, by 12 months until 30 June 2021, so that a professional indemnity policy may provide that it does not apply to certain claims. Specifically, claims regarding cladding installed or applied to a building that does not comply with the relevant building codes and legal requirements.

As noted above, the Committee understands that this amendment is in response to the timeline of a state initiative to help remove combustible cladding, which is now scheduled for remediation work to begin in early 2022.

This may impact on the business community as registered building certifiers are not able to obtain insurance for specific claims regarding cladding that is not compliant with *Building Code of Australia* or relevant law. Additionally, this may limit the type of work registered certifiers are

able to perform given the legislative requirement under the *Building and Development Certifiers Act 2018* that a registered certifier must not carry out certification work unless they are adequately insured (section 26). In these circumstances, the Committee refers this issue to Parliament for its consideration of its impact on the relevant building and development industries.

2. DESIGN AND BUILDING PRACTITIONERS AMENDMENT (MISCELLANEOUS) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Right to work

The Regulation expands the criteria for suspension or cancellation of a design or building practitioner's registration under the *Design and Building Practitioners Act 2020*. Specifically, the regulation allows that a 'condition on a relevant authorisation' may be applied to the practitioner's registration. Under section 46 of the Act, the Secretary may form the opinion that a person is not a suitable person to carry out the work for which the person is seeking registration or is registered. This Regulation allows those registrations to be cancelled if that condition is not met. This may restrict a practitioner's ability to work and earn a living.

However, the Committee notes that the regulation is intended to prevent only those practitioners that have a record of failing to comply with relevant building codes, legislative requirements, statutory duty or contractual obligations. In effect the regulation protects consumers from risks associated with the construction of buildings that do not meet minimum standards.

Additionally, the *Design and Building Practitioners Act 2020* Act and the *Design and Building Practitioners Act 2020* include provisions that protect the rights of practitioners whose registration is subject to conditions, suspension or cancellation. This includes avenues for administrative review and requirements that the Secretary provide evidence or reasons for their decision. In these circumstances, the Committee makes no further comment.

3. FIREARMS AMENDMENT REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Freedom of movement

The Regulation provides that a person subject to a firearms prohibition order is prohibited from attending an arms fair. An individual who attends an arms fair may do so for the purposes of obtaining firearms, parts of firearms, or ammunition. This may impact a person's freedom of movement by limiting areas and events that they may attend.

However, the Committee recognises that the right of an individual to attend an arms fair must be balanced against the interests of public safety where a person has been assessed as posing a risk in relation to possessing or handling firearms. Where a person who is the subject of a firearms prohibition order is able to obtain weapons, that person may be regarded as a potential threat to public safety.

The Committee also recognises that individuals who are subject to a firearms prohibition order have a right to seek review of the order under 75(1)(f) of the *Firearms Act 1996*. Under these circumstances, the Committee makes no further comment.

Property rights

The Regulation amends Clause 143 of the Firearms Regulation 2017 to expand the definition of apprehended violence orders. This amended definition effectively removes the right of an individual to hold a firearms licence if they are or have been the subject of a federal family violence order within the previous 10 year period. This may impact on a person's property rights in relation to the possession of a firearm.

However, the Committee recognises that the right of an individual to possess a weapon must be balanced against the community's right to be protected from violence. The inclusion of federal family violence orders in the definition of apprehended violence orders removes the necessity to apply to a NSW court to make additional orders where federal family violence orders are in already in place. Under the circumstances, the Committee makes no further comment.

4. EDUCATION AND CARE SERVICES NATIONAL AMENDMENT REGULATIONS 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offence

The Amending Regulation includes a new strict liability offence for failure to display the requisite rating certificate, with a penalty of $2000. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance and that the intent of this amendment is to provide clarity for the families utilising the services of an approved provider, the community and the sector. In these circumstances, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Significant matters in subordinate legislation – creation of offences

The Amending Regulation includes a new offence for failure to display the requisite rating certificate, with a penalty of $2000. The Committee generally prefers significant matters, including offences with penalties, to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. In this case, the penalty prescribed in the Amending Regulation appears to be in addition to the penalties included in the National Law ($3000 for an individual and $15 000 in any other case).

However, the Committee notes the regulatory context of National Law to regulate education and care services for children, and that the additional penalty supports industry compliance. Also, that clause 173 of the National Regulations prescribes matters relating to section 172 of the National Law with specificity. The Committee refers this issue to Parliament for its consideration.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Application of penalties

The Committee considers that the applicable penalty for a contravention of section 172(d) of the National Law, regarding the rating of an education or care service, may be unclear. It appears than an infringement notice may be served for contravention of section 172(d) of the National

Law, but may not be served for a failure to display the requisite rating certificate in accordance with clause 173 under the Amending Regulation.

The Committee generally comments where provisions appear unclear in their application, particularly where penalties are attached to strict liability offences (discussed above), as it may impact a person's ability to know the law to which they are subject at a given time. The Committee refers this issue of clarity to Parliament for its consideration.

5. POISONS AND THERAPEUTIC GOODS AMENDMENT (COSMETIC USE) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offences

The Regulation imposes requirements on nurses, medical practitioners, nurse practitioners, the person who occupies or controls the premises and responsible providers regarding the administration of relevant substances for cosmetic purposes, with penalties for non-compliance set out in the *Poisons and Therapeutic Goods Act 1966*. The maximum penalties which apply for contravention of a category 1 or category 2 requirement are between $5500 to $22 000 and/or imprisonment for an individual, and between $27 500 and $110 000 for a body corporate.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. The Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance, and the patient safety concerns underpinning the inclusion of these offences.

The Committee considers that the penalties applying to an individual are significant, and that adequate safeguards to ensure that a penalty is not unnecessarily applied would be beneficial. The Committee refers to Parliament the question of whether there are adequate safeguards in place to protect individuals and bodies corporate in this context.

Right to privacy

The Regulation requires the collection, use and storage of a patient's personal and health information. This may impact on a person's privacy of their personal and medical information. However the Committee notes that the protection of this information, including the length of time records must be kept, appears to be covered by privacy legislation, including (without limitation) the *Health Records and Information Privacy Act 2002*. The Committee notes the specificity of the information that the Regulation requires be collected, used and stored. Additionally, that this information appears to be necessary to safely administer the relevant substance. In these circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Increased regulation of industry: limitation on who can administer a relevant substance

The Regulations places increased controls and penalties on the conduct of cosmetic nurses and medicines, which may have an adverse impact on the business community. As noted above, the Regulation imposes penalties on businesses and individuals for non-compliance with category 1 and category 2 requirements. However, the Committee notes the patient safety purpose of this Regulation and that the Ministry of Health has consulted with industry stakeholders regarding the increased regulation. In the circumstances, the Committee makes no further comment.

Increased regulation of industry: clarity on who can issue a direction

The Regulation provides that a medical practitioner or nurse practitioner may direct a nurse to administer a relevant substance under the Regulation. However, it is unclear whether a dentist can give such a direction as the term 'dentist' appears to be distinct from (and therefore may not be captured) by the terms 'medical practitioner' or 'nurse practitioner' in the *Poisons and Therapeutic Goods Act 1966* and *Poisons and Therapeutic Goods Regulation 2008*.

The Committee notes that the Discussion Paper appears to contemplate a dentist being able to issue such direction. Additionally, that if dentists are not able to issue directions under the Regulation, the Regulation may limit their scope of practice and adversely impact this section of the business community. The Committee refers this issue of clarity to Parliament.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Significant matters in subordinate legislation

As outlined above, the Regulation includes category 1 and category 2 requirements, with penalties for non-compliance set out in the *Poisons and Therapeutic Goods Act 1966*. The Committee considers that the penalties applying to an individual (between $5500 to $22 000 and/or imprisonment) are significant.

The Committee generally prefers offences with significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. However, the Committee notes the regulatory context of the Regulation to regulate, control and prohibit the supply and use of cosmetic medicines, the patient safety purpose of this Regulation and that public consultation has been undertaken regarding this Regulation. Additionally, that section 18D of the *Poisons and Therapeutic Goods Act 1966* envisages the prescription of the category 1 and 2 requirements by regulation, despite their contravention attaching significant penalties and custodial sentences (for an individual). In the circumstances, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Requirements relating to offences

Certain category 1 and category 2 requirements included in the Regulation to which penalties attach for non-compliance may be unclear. Specifically, the term 'patient medical emergency' appears undefined despite being a key definition in these category 1 and 2 requirements that carry penalties. Additionally, the application of provisions regarding giving directions and taking records may create confusion over the requirements for written and oral directions, and exceptions to information that must be recorded.

The Committee prefers that requirements giving rise to offences resulting in significant fines or custodial sentences to be drafted with sufficient precision so that their scope and content is clear. The Committee refers to Parliament the question of whether the wording of the noted category 1 and category 2 requirements set out in the Regulation are drafted with adequate specificity given that individuals and bodies corporate will be held strictly liable for a contravention as well as the gravity of the penalties.

Clarification regarding ongoing treatment

The Regulation appears to contemplate a nurse practitioner or medical practitioner giving a written direction to administer a relevant substance a number of times at specific intervals, for a period not exceeding six months. It is unclear whether the nurse practitioner or medical practitioner must regularly monitor the patient's condition between intervals or at any time after reviewing the patient in person or by audio visual link. The Committee considers that safeguards to ensure patient safety during ongoing treatment would be beneficial in this context. The Committee also notes that public consultation was undertaken in relation to the written direction requirements to be included in the Regulation, contextualised by the intent to formalise and standardise procedure and set the minimum standard of oversight. The Committee refers this issue to Parliament.

6. PRIVATE HEALTH FACILITIES AMENDMENT (REPORTABLE INCIDENTS) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Privacy of personal information and medical records

The Regulation allows private health facilities to notify and exchange information with other relevant private health facilities or health service organisation about a reportable incident if it assists in performing their functions under *Health Administration Act 1982* (HA Act), Part 2A or the *Private Health Facilities Act 2007* (PHF Act), Part 4.

The information exchanged relates to the response and the investigation of incidents. An incident is defined as an unplanned event that results in, or has the potential for, injury, damage or loss. The sharing of such information may infringe on a person's privacy and confidentiality of personal or medical records.

However, the Committee recognises that the sharing information to health organisations is intended to assist in learning from incidents and provide a consistent and effective response to similar incidents in the future. The Committee notes that the PHF Act provides limits on sharing information, including that incident reviewers may only share information to specific committees for purposes of research and investigation authorised under section 23(1) of the HA Act. The Committee also notes that the PHF Act imposes monetary penalties for a person if they record or divulge information outside exercising the function of an incident reviewer. However, an incident reviewer would not be liable to any action, claim or demand, if they acted in good faith in exercising their role as an incident reviewer. In these circumstances, the Committee makes no further comment.

7. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION (NO 3) 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Personal liberty

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

The Regulation allows penalty notices to be issued for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021.

The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

8. RESIDENTIAL TENANCIES (COVID-19 PANDEMIC EMERGENCY RESPONSE) AMENDMENT REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity, property rights and freedom of contract

The Regulation reinstates, with amendments, Part 6A of the Residential Tenancies Regulation 2019 to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it exempts financially impacted tenants from provisions that would ordinarily terminate their residential tenancy agreement or allow the recovery of possession of the property. This exemption applies where rent or charges have not been paid, and where that tenant gives notice and continues to pay at least 25 per cent of the rent payable under the agreement.

The exemption limits landlord's rights in response to the pandemic. For example, during the moratorium period from 14 July 2021 to the end of 11 September 2021, a landlord generally cannot give a tenant who is financially impacted by COVID-19 a termination notice under the Act for non-payment of rent. A landlord may continue to seek termination in other circumstances including (without limitation) to sell the premises, for illegal use of the premises or hardship to the landlord.

By altering the terms of the existing agreement already entered into by the tenant and the landlord, this Regulation retrospectively limits landlords' rights under such tenancy agreements. The Committee generally comments on provisions drafted to have retrospective effect,

especially where they retrospectively limit rights, because they impact the rule of law principle that a person is entitled to know the law to which they are subject to at any given time.

Similarly, by limiting the ability of the landlord to exercise his/her rights under an existing agreement and specifically limiting the landlord's right to terminate for breach of contract resulting from non-payment of rent or charges, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited to last for the period from 14 July 2021 to 11 September 2021. The Committee notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

9. ROAD TRANSPORT AMENDMENT (VEHICLE REGISTRATION) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property rights

The Regulation allows Transport for NSW (TfNSW) to refuse to register or cancel the registration of a vehicle if the vehicle is subject to a recall notice. This may impact individuals' property rights to their vehicle under registrations that have previously been granted. However, the Committee notes that this may only be done where there has been a recall notice issued under the federal Australian Consumer Law or Road Vehicle Standards Rules if it appears that the suppliers have not taken satisfactory action to prevent the vehicle or its components from causing injury to any person. Given the safety objectives behind these provisions, the Committee makes no further comment.

10. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION 2021

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

The *Strata Schemes Management Amendment (COVID-19) Regulation 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of, and documents relating to, a strata meeting may be served by email and instruments. It also provides that documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally

prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

11. UNIFORM CIVIL PROCEDURE (AMENDMENT NO 97) RULE 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Rights of the child

The Rule amends the age at which a child can be named as a defendant in District Court proceedings, from 10 to 12 years old, in relation to child care orders made under the *Children and Young Persons (Care and Protection) Act 1998*. This amendment aims to provide consistency with that Act, which provides that there is a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative. This may impact on those children under the age of 12 by removing the assumption that they are able to provide instructions regarding an appeal of a child care order to which they are subject.

However, the Committee notes that the decision to specify an age of 12 years old in the Act was based on child development evidence that indicated most 10 and 11 year olds are not able to understand the legal ramifications of their instructions. Additionally, while a child may be the named defendant in legal proceedings, the requirement that they are able to give legal instructions is a rebuttable presumption. This means that, where appropriate, the legal representative of the child may apply to the Court to make a declaration that the child either is capable (if under 12 years) or not capable (if over 12 years) of giving proper instructions.

Therefore, noting that the amendment seeks to align the Uniform Civil Procedure Rules with the provisions in the *Children and Young Persons (Care and Protection) Act 1998* regarding District Court appeals for care orders made under that Act, and that it is a rebuttable presumption, the Committee makes no further comment.

12. WEAPONS PROHIBITION AMENDMENT REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property right

Schedule 1, clause 3 of the Regulation amends Clause 46 of the Weapons Prohibition Regulation 2017 to expand the definition of apprehended violence orders. This amended definition effectively prevents an individual from obtaining a permit to possess or use a prohibited weapon if they are or have been the subject of a family violence order within the previous 10 year period. This may impact on a person's property rights by restricting firearm ownership.

However, the Committee recognises that a person's property rights regarding firearm ownership must be balanced against public safety concerns. This is especially where a person has been subject to an apprehended violence order. The Committee also recognises the administrative intention of the regulation. Specifically, that the inclusion of federal family violence orders in

the definition of apprehended violence orders removes the necessity to reapply to a NSW court for additional orders where federal orders are in already in place. Under the circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Restriction on ability to sell attachments for firearms

The Regulation prohibits the possession or use of bump stocks in NSW (Clause 3). The prohibition may curtail the ability of arms dealers to sell bump stocks. The federal government prohibited the import into Australia of bump stocks in 2020. Where there is a genuine reason for possessing a bump stock, a permit can be sought under section 11 of the *Weapons Prohibition Act 1998*. Consequently, any impact on arms dealers is likely to be negligible.

The Committee also recognises that the right of individuals to use, possess or sell items such as weapons and attachments to weapons must be balanced against the right of the community to be protected against violence. Under the circumstances, the Committee makes no further comment.

Part One – Regulations

1. Building and Development Certifiers Amendment (Cladding) Regulation 2021

Date published	18 June 2021
Date tabled	LA: 22 June 2021 LC: 22 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to extend the period, by 12 months, within which a professional indemnity policy may commence that excludes, from the application of the policy, certain claims made against an insured person relating to cladding.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Economic and property rights

2. The Regulation is made under the *Building and Development Certifiers Act 2018*, which sets out the legislative framework for the registration of certifiers and recognises that certification work is an important public function with potential impacts on public health, safety and amenity and to ensure that it is carried out impartially, ethically and in the public interest.

3. Under the *Building and Development Certifiers Act 2018*, a registered certifier must not carry out certification work unless they are adequately insured (section 26).

4. Under this section, adequately insured means that a registered certifier is indemnified by insurance that complies with the regulations against any liability with which the registered certifier may become subject as a result of carrying out the certification work, or is part of some other arrangement approved by the regulations that provides indemnity against the liability.

5. The Regulation amends clause 19 of the *Building and Development Certifiers Regulation 2020*. Clause 19 states that a professional indemnity policy may provide that it does not apply to certain claims, including:

(a) cladding that does not comply with the requirements of the *Building Code of Australia*, an Australian Standard or an Act or other law of the Commonwealth, this State or any other State or Territory to the extent that it applies to cladding, or

(b) cladding that is used, installed or applied to a building in a manner that does not comply with the requirements of the *Building Code of Australia*, an Australian Standard or an Act or other law of the Commonwealth, this State or any other State or Territory to the extent that it applies to the use, installation or application of cladding, or

(c) cladding that is used, installed or applied to a building in a manner that does not comply with the manufacturer's conditions of use of the cladding.

6. The amending Regulation provides that clause 19 applies to professional indemnity policies commencing on or before 30 June 2022 – an extension of 12 months from the previously stated date of 30 June 2021.

The Regulation amends the *Building and Development Certifiers Regulation 2020* to provide a 12-month extension for the commencement of professional indemnity policies for registered certifiers that exclude certain claims for cladding that does not comply with the relevant legal requirements or building codes.

This may impact situations where a claim is being made against a registered certifier for damage due to non-compliant cladding in the construction of buildings. This may involve potential fire damage or significant safety risks to building occupants or the structural integrity of the building.

The Committee understands that this amendment makes the regulation consistent with the timeline of the state initiative, Project Remediate, to help remove combustible cladding on an estimated 225 buildings, with scheduled remediation work to begin in early 2022. [1]

The Committee recognises that the Regulations envisage professional indemnity policies to not apply to certain claims prior to the commencement of remediation work. However, where a registered certifier is unable to be adequately insured for claims involving non-compliant cladding until the specified date, affected building occupants may be required to make out-of-pocket expenditures to address any safety or structural issues in the meantime. This may impact on the economic and property rights of those occupants by preventing coverage of these claims for a further 12 months.

In these circumstances, the Committee refers to Parliament the issue of whether the economic or property rights of affected residents are adequately protected in instances where non-compliant cladding has been detected and yet to be remediated.

[1] NSW Department of Customer Service, Project Remediate, 'Key dates for Project Remediate', updated 16 September 2021.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Adverse impact on business community – Availability of insurance

7. As noted, the Regulation extends the date, by 12 months, which a professional indemnity policy may provide that it does not apply to certain claims. These claims include cladding that does not comply with the requirements of the *Building Code of Australia*, an Australian Standard or an Act or other law of the Commonwealth, this State or any other State or Territory.

8. Under the *Building and Development Certifiers Act 2018*, a registered certifier must not carry out certification work unless they are adequately insured (section 26).

The Regulation extends the date, by 12 months until 30 June 2021, so that a professional indemnity policy may provide that it does not apply to certain claims. Specifically, claims regarding cladding installed or applied to a building that does not comply with the relevant building codes and legal requirements.

As noted above, the Committee understands that this amendment is in response to the timeline of a state initiative to help remove combustible cladding, which is now scheduled for remediation work to begin in early 2022.

This may impact on the business community as registered building certifiers are not able to obtain insurance for specific claims regarding cladding that is not compliant with *Building Code of Australia* or relevant law. Additionally, this may limit the type of work registered certifiers are able to perform given the legislative requirement under the *Building and Development Certifiers Act 2018* that a registered certifier must not carry out certification work unless they are adequately insured (section 26). In these circumstances, the Committee refers this issue to Parliament for its consideration of its impact on the relevant building and development industries.

2. Design and Building Practitioners Amendment (Miscellaneous) Regulation 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Date tabled	To be determined
Disallowance date	To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the Design and Building Practitioners Regulation 2021 as follows—

(a) to exempt a building practitioner who has already provided the Secretary with regulated designs and other documents in relation to building work from the requirement to provide the Secretary with the same designs and documents after the occupation certificate is issued for the building to which the building work relates,

(b) to provide that the placement of a condition on a relevant authorisation of a person may be a ground on which the Secretary may form the opinion that the person is not a suitable person to carry out work for which registration is required under the *Design and Building Practitioners Act 2020* (the Act),

(c) to shorten by 1 year, to 30 June 2022, the duration of the exemption for registered practitioners from the requirement to hold a certain level of insurance in relation to work carried out as a registered practitioner,

(d) to clarify the operation of the alternative pathways to satisfy the minimum qualifications, experience, knowledge and skills required to be granted registration as a professional engineer,

(e) to clarify the minimum qualifications, experience, knowledge and skills required to be granted registration as a design practitioner—fire systems (mechanical smoke control) or a professional engineer—fire safety,

(f) to prescribe the fees payable for an application to be registered as a registered practitioner under the Act,

(g) to provide for the waiver, reduction or refund of fees in certain circumstances,

(h) to provide transitional arrangements in relation to Crown building work,

(i) to make other minor and consequential amendments.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Right to work

2. The Regulation expands the criteria for suspension or cancellation of registration under the *Design and Building Practitioners Act 2020*.

3. Under section 46 of the *Design and Building Practitioners Act 2020* the Secretary of the Department of Customer Service may, in certain circumstances, form an opinion that a person is not a suitable person to carry out the work for which the person is seeking registration or is registered. If a finding is made under section 46 that a person is not suitable, that person's registration may be cancelled under section 52(1)(c) of the Act.

4. Section 46(e) of the Act allows the regulations to specify additional criteria for the formation of an opinion under section 46. These additional criteria are set out in Clause 33(1) of the Design and Building Practitioners Regulation 2021. The Regulation amends Clause 33(1) by adding a new sub clause (1)(f1) which adds "a condition on a relevant authorisation" as a ground for finding that a person is not a suitable for the purposes of section 46(e) of the Act.

5. Conditions on the registration of a practitioner may be imposed under either Section 66(1)(d) or 49(2) of the Act. Section 66(1)(d) allows the Secretary to impose a condition on registration if satisfied that one or more grounds has been established. Grounds for imposing conditions are set down in section 64 of the Act and include (but not limited to):

- carrying out building work that has fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent practitioner
- the practitioner has contravened this Act or a regulation made under this Act, whether or not the practitioner is prosecuted or convicted for the contravention
- the practitioner has contravened a law of this or another Australian jurisdiction in regards to the carrying out of building work, fraud or dishonesty
- Failure to comply with a statutory duty or contractual obligation regarding the carrying out of building work
- Failure to comply with a condition of the registration
- Wilful disregard to matters the practitioner is required to have regard to when carrying out building work

6. The Act includes provisions that protect the rights of practitioners whose registration is subject to conditions, suspension or cancellation. Specifically, section 63(b) of the Act states that a person aggrieved by decision to suspend or cancel registration may apply for

review under the *Admin Decisions Review Act 1997*. Section 63(d) of the Act states that a person aggrieved by decision to impose a condition on registration may apply for review under the *ADR Act 1997*. Under section 66(4) the Secretary is required to specify the grounds for a decision when providing written statements of decisions.

7. The Regulation also inserts a new Clause 43(1A), which requires that any application for a condition on a registration must be accompanied by evidence.

The Regulation expands the criteria for suspension or cancellation of a design or building practitioner's registration under the *Design and Building Practitioners Act 2020*. Specifically, the regulation allows that a 'condition on a relevant authorisation' may be applied to the practitioner's registration. Under section 46 of the Act, the Secretary may form the opinion that a person is not a suitable person to carry out the work for which the person is seeking registration or is registered. This Regulation allows those registrations to be cancelled if that condition is not met. This may restrict a practitioner's ability to work and earn a living.

However, the Committee notes that the regulation is intended to prevent only those practitioners that have a record of failing to comply with relevant building codes, legislative requirements, statutory duty or contractual obligations. In effect the regulation protects consumers from risks associated with the construction of buildings that do not meet minimum standards.

Additionally, the *Design and Building Practitioners Act 2020* Act and the *Design and Building Practitioners Act 2020* include provisions that protect the rights of practitioners whose registration is subject to conditions, suspension or cancellation. This includes avenues for administrative review and requirements that the Secretary provide evidence or reasons for their decision. In these circumstances, the Committee makes no further comment.

3. Firearms Amendment Regulation 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Date tabled	To be determined
Disallowance date	To be determined
Minister responsible	The Hon David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the Firearms Regulation 2017 as follows—

(a) to ensure that the authority conferred by a licence to sight in a firearm does not include the use of a pistol in a way that is not otherwise authorised by or under the Firearms Act 1996 (the Act),

(b) to prescribe requirements for the storage of firearms,

(c) to enable the holder of an RSL display permit to also acquire and possess an ammunition collection,

(d) to update the list of associations with which a shooting club can be affiliated in order to be approved by the Commissioner of Police,

(e) to re-establish, on an ongoing basis, expired amnesties in connection with the surrender, transfer and registration of firearms, and to make further provision in relation to the amnesties,

(f) to provide that a person subject to a firearms prohibition order is prohibited from attending an arms fair,

(g) to remove an exemption from requirements of the Act for persons posted to New South Wales from other jurisdictions,

(h) to prescribe federal family violence orders as a kind of apprehended violence order for the purposes of the Act,

(i) to revise a reference to legislative provisions of the Commonwealth,

(j) to create an exemption from requirements of the Act for current category D licence holders in whose name military self-loading centre-fire rifles are registered,

(k) to make minor amendments in the nature of statute law revision.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Freedom of movement

2. The Regulation inserts a new Clause 141B into the Firearms Regulation 2017, which prescribes the premises on which an arms fair is taking place for the purposes of section 74(8)(d) of the *Firearms Act 1996.*

3. Section 74(8)(d) prohibits individuals subject to a firearms prohibition order from attending certain premises as prescribed in the Firearms Regulation 2017. A firearms prohibition order can be issued under section 73 of the Act, if the Commissioner is of the opinion that a person is not fit to have possession of a firearm.

4. The effect of the new Clause 141B inserted by the Regulation is to prohibit a person from attending an arms fair if that person is the subject of a firearms prohibition order.

5. Where a firearms prohibition order has been made against a person, that person has the right to apply to the Civil and Administrative Tribunal for review under section 75(1)(f) of the Act.

> **The Regulation provides that a person subject to a firearms prohibition order is prohibited from attending an arms fair. An individual who attends an arms fair may do so for the purposes of obtaining firearms, parts of firearms, or ammunition. This may impact a person's freedom of movement by limiting areas and events that they may attend.**
>
> **However, the Committee recognises that the right of an individual to attend an arms fair must be balanced against the interests of public safety where a person has been assessed as posing a risk in relation to possessing or handling firearms. Where a person who is the subject of a firearms prohibition order is able to obtain weapons, that person may be regarded as a potential threat to public safety.**
>
> **The Committee also recognises that individuals who are subject to a firearms prohibition order have a right to seek review of the order under 75(1)(f) of the *Firearms Act 1996*. Under these circumstances, the Committee makes no further comment.**

Property rights

6. The Regulation inserts a new Clause 143(1)(a) into the Firearms Regulation 2017, which expands the definition of "apprehended violence order" for the purposes of the *Firearms Act 1996* to include "federal family violence orders" (Schedule 1, Clause 44).

7. Sections 11, 23, 24, 29 and 44A of the *Firearms Act 1996* prevent individuals who are or have been the subject of apprehended violence orders within the previous ten years from holding a firearms licence or a permit under the Act.

> **The Regulation amends Clause 143 of the Firearms Regulation 2017 to expand the definition of apprehended violence orders. This amended definition**

effectively removes the right of an individual to hold a firearms licence if they are or have been the subject of a federal family violence order within the previous 10 year period. This may impact on a person's property rights in relation to the possession of a firearm.

However, the Committee recognises that the right of an individual to possess a weapon must be balanced against the community's right to be protected from violence. The inclusion of federal family violence orders in the definition of apprehended violence orders removes the necessity to apply to a NSW court to make additional orders where federal family violence orders are in already in place. Under the circumstances, the Committee makes no further comment.

4. Education and Care Services National Amendment Regulations 2021

Date published	16 July 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Sarah Mitchell MP
Portfolio	Education and Early Childhood Learning

PURPOSE AND DESCRIPTION

1. In July 2021 Education Ministers across Australia agreed to a number of amendments to the Education and Care Services National Regulations (National Regulations) regarding display of quality ratings by education and care services, transportation of children and extension of workforce transitional provisions in certain jurisdictions, set out in the Education and Care Services National Amendment Regulations 2021 (Amending Regulation).

2. The Amending Regulation is made under sections 301 and 324 of the Education and Care Services National Law (National Law).

3. Regarding the display of quality ratings by education and care services:

    I. section 172 of the National Law provides that an approved provider of an education and care service must display certain information by positioning it so that it is clearly visible to anyone from the main entrance to the premises, with contravention resulting in a maximum penalty of $3000 in the case of an individual and $15 000 in any other case,

    II. clause 173 of the National Regulations prescribes information to be displayed for the purposes of section 172, and

    III. the Amending Regulation amends clause 173 of the National Regulations to include that an approved provider of an education and care service must display, in relation to the rating of the service, a certificate issued to the approved provider by the Regulatory Authority or, where applicable, the National Authority. It includes a penalty of $2000 for non-compliance.

4. The National Law is adopted in New South Wales under section 4 of the *Children (Education and Care Services National Law Application) Act 2010*.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offence

5. The Amending Regulation amends clause 173 of the National Regulations to include a new strict liability offence. Specifically, failure to display the requisite rating certificate results in a penalty of $2000.

> **The Amending Regulation includes a new strict liability offence for failure to display the requisite rating certificate, with a penalty of $2000. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.**
>
> **However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance and that the intent of this amendment is to provide clarity for the families utilising the services of an approved provider, the community and the sector. In these circumstances, the Committee makes no further comment.**

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Significant matters in subordinate legislation – creation of offences

6. Section 172 of the National Law includes maximum penalties for failure by an approved provider of an education and care service to display certain information, with a penalty of $3000 applying in the case of an individual and $15 000 in any other case.

7. The Amending Regulation amends clause 173 of the National Regulations to include that a rating certificate must also be displayed. It includes a penalty of $2000 for non-compliance.

> **The Amending Regulation includes a new offence for failure to display the requisite rating certificate, with a penalty of $2000. The Committee generally prefers significant matters, including offences with penalties, to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. In this case, the penalty prescribed in the Amending Regulation appears to be in addition to the penalties included in the National Law ($3000 for an individual and $15 000 in any other case).**
>
> **However, the Committee notes the regulatory context of National Law to regulate education and care services for children, and that the additional penalty supports industry compliance. Also, that clause 173 of the National Regulations prescribes matters relating to section 172 of the National Law with specificity. The Committee refers this issue to Parliament for its consideration.**

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Application of penalties

8. Section 172 of the National Law includes maximum penalties for failure by an approved provider of an education and care service to display certain information, including the rating of the service section 172(d), with a penalty of $3000 applying in the case of an individual and $15 000 in any other case.

9. Section 291 of the National Law allows an infringement notice to be served on a person for a contravention of section 172. An infringement penalty is 10 per cent of the maximum penalty that could be imposed on the person for that offence.

10. The Amending Regulation amends clause 173 of the National Regulations to include that a rating certificate must also be displayed. It includes a penalty of $2000 for non-compliance.

11. Clause 190 of the National Regulations, which sets out offences against regulations in respect of which infringement notices may be served, does not include clause 173.

The Committee considers that the applicable penalty for a contravention of section 172(d) of the National Law, regarding the rating of an education or care service, may be unclear. It appears than an infringement notice may be served for contravention of section 172(d) of the National Law, but may not be served for a failure to display the requisite rating certificate in accordance with clause 173 under the Amending Regulation.

The Committee generally comments where provisions appear unclear in their application, particularly where penalties are attached to strict liability offences (discussed above), as it may impact a person's ability to know the law to which they are subject at a given time. The Committee refers this issue of clarity to Parliament for its consideration.

5. Poisons and Therapeutic Goods Amendment (Cosmetic Use) Regulation 2021

Date published	9 July 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Poisons and Therapeutic Goods Amendment (Cosmetic Use) Regulation 2021* (the Regulation) is to prescribe additional requirements for the administration, storage and record-keeping of certain relevant substances commonly used for cosmetic purposes, such as anti-wrinkle injections and dermal fillers. It also makes other law revision amendments to the *Poisons and Therapeutic Goods Regulation 2008*.

2. This Regulation is made under the *Poisons and Therapeutic Goods Act 1966*, including sections 18D(1) and 45C (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offences

3. Clause 68I of the Regulation sets out category 1 and category 2 requirements which, if contravened, constitutes an offence under section 18D(2) of the *Poisons and Therapeutic Goods Act 1966*. These requirements relate to (without limitation) nurses administering relevant substances, the giving of directions to nurses by medical practitioners and nurse practitioners, record-keeping, storage of relevant substances and the duties of responsible providers.

4. Section 18D(2) provides that the maximum penalty for contravention of a:

    I. category 1 requirement is 1000 penalty units ($110 000) for a body corporate or 200 penalty units ($22 000) or imprisonment for 6 months, or both, for an individual, or

    II. category 2 requirement is 250 penalty units ($27 500) for a body corporate or 50 penalty units ($5500) in any other case.

5. The contravention of a category 1 or category 2 requirement is a strict liability offence.

6. The offences were introduced into the *Poisons and Therapeutic Goods Act 1966* following a report by the Ministry of Health reviewing whether the NSW regulation of cosmetic procedures ensured patient safety,[2] directed by the Hon Brad Hazzard MP following the death of a NSW woman who underwent non-surgical breast augmentation. The Discussion Paper published in advance of this Regulation[3] (Discussion Paper) also indicates that patient safety underpins the requirements set out in the Regulation.

> **The Regulation imposes requirements on nurses, medical practitioners, nurse practitioners, the person who occupies or controls the premises and responsible providers regarding the administration of relevant substances for cosmetic purposes, with penalties for non-compliance set out in the *Poisons and Therapeutic Goods Act 1966*. The maximum penalties which apply for contravention of a category 1 or category 2 requirement are between $5500 to $22 000 and/or imprisonment for an individual, and between $27 500 and $110 000 for a body corporate.**
>
> **The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. The Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance, and the patient safety concerns underpinning the inclusion of these offences.**
>
> **The Committee considers that the penalties applying to an individual are significant, and that adequate safeguards to ensure that a penalty is not unnecessarily applied would be beneficial. The Committee refers to Parliament the question of whether there are adequate safeguards in place to protect individuals and bodies corporate in this context.**

Right to privacy

7. The Regulation requires nurses to make a record of administration of the relevant substance under clause 68C(3), and medical practitioners and nurse practitioners to make a record of a direction given to a nurse under clause 68F. Each must give a copy of the record to the relevant provider, which must keep a copy of it in accordance with clause 68H(4).

8. These records include a patient's personal information and health information.

> **The Regulation requires the collection, use and storage of a patient's personal and health information. This may impact on a person's privacy of their personal and medical information. However the Committee notes that the protection of this information, including the length of time records must be kept, appears to be covered by privacy legislation, including (without limitation) the *Health Records and Information Privacy Act 2002*. The Committee notes the specificity of the information that the Regulation requires be collected, used and stored. Additionally, that this information appears to be necessary to safely administer**

[2] NSW Ministry of Health, Report on the Review of the Regulation of Cosmetic Procedures, April 2018.

[3] NSW Ministry of Health, Discussion Paper H19/115415: Poisons and Therapeutic Goods Regulation 2008 – Regulation of products commonly used in cosmetic procedures, January 2020.

the relevant substance. In these circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Increased regulation of industry: limitation on who can administer a relevant substance

9. The Regulation prohibits a person other than an authorised practitioner (including a medical practitioner, nurse practitioner or dentist), a hospital employee acting in accordance with the direction of an authorised practitioner (other than a veterinary practitioner) or a nurse acting in accordance with a direction from a medical practitioner or a nurse practitioner from administering relevant substances.

10. In effect, this Regulation restricts the ability of cosmetic nurses to administer substances including (without limitation) botulinum toxins (commonly referred to as 'botox'), collagen and hyaluronic acid and its polymers in the course of cosmetic procedures.

11. As stated above, increased regulation of the administration of cosmetic medicines responds to patient safety concerns and follows public consultation by the Ministry of Health about proposed regulations to be made in relation to the regulation of the administration of cosmetic medicines in late-2018 and January 2020.

12. The Regulation also imposes category 1 and category 2 requirements to regulate the conduct of individuals and businesses in relation to the administration of relevant substances, with penalties for non-compliance.

The Regulations places increased controls and penalties on the conduct of cosmetic nurses and medicines, which may have an adverse impact on the business community. As noted above, the Regulation imposes penalties on businesses and individuals for non-compliance with category 1 and category 2 requirements. However, the Committee notes the patient safety purpose of this Regulation and that the Ministry of Health has consulted with industry stakeholders regarding the increased regulation. In the circumstances, the Committee makes no further comment.

Increased regulation of industry: clarity on who can issue a direction

13. Dentists may use botulinum toxin or dermal fillers in their practice. The Dental Board of Australia provides that dentists may delegate the administration of these substances where they adequately consult and review patients and ensure that people with the requisite authority administer these substances under adequate supervision. [4]

14. Clause 68D(1) provides that a medical practitioner or nurse practitioner may give a direction to a nurse for the administration of a relevant substance, including botulinum toxin or dermal fillers.

15. The terms 'medical practitioner' and 'nurse practitioner' are not defined, although are used through the *Poisons and Therapeutic Goods Act 1966* and the *Poisons and*

[4] Dental Board of Australia, Fact Sheet: The use of botulinum toxin and dermal fillers by dentists, 11 December 2015.

Therapeutic Goods Regulation 2008. The term 'dentist' is also used throughout the legislation and is not defined.

16. The Discussion Paper indicates that the draft regulation would allow an authorised practitioner, which is defined in the *Poisons and Therapeutic Goods Regulation 2008* to include (among others) a medical practitioner, nurse authorised under section 17A of the Act and a dentist, to direct a nurse in relation to the administration of a relevant substance.

> **The Regulation provides that a medical practitioner or nurse practitioner may direct a nurse to administer a relevant substance under the Regulation. However, it is unclear whether a dentist can give such a direction as the term 'dentist' appears to be distinct from (and therefore may not be captured) by the terms 'medical practitioner' or 'nurse practitioner' in the *Poisons and Therapeutic Goods Act 1966* and *Poisons and Therapeutic Goods Regulation 2008*.**
>
> **The Committee notes that the Discussion Paper appears to contemplate a dentist being able to issue such direction. Additionally, that if dentists are not able to issue directions under the Regulation, the Regulation may limit their scope of practice and adversely impact this section of the business community. The Committee refers this issue of clarity to Parliament.**

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Significant matters in subordinate legislation

17. Section 18D(2) of the *Poisons and Therapeutic Goods Act 1966* provides that a person who contravenes a category 1 or category 2 requirement is guilty of an offence. These requirements are prescribed by the Regulation in accordance with section 18D(1). The maximum penalties for contravening a category 1 or category 2 requirement are set out above.

18. Clause 68I of the Regulation sets out the category 1 and 2 requirements relating to the administration and storage of substances commonly used for cosmetic purposes, and associated record-keeping.

19. As stated above, the Regulation responds to patient safety concerns and has been subject to public consultation.

> **As outlined above, the Regulation includes category 1 and category 2 requirements, with penalties for non-compliance set out in the *Poisons and Therapeutic Goods Act 1966*. The Committee considers that the penalties applying to an individual (between $5500 to $22 000 and/or imprisonment) are significant.**
>
> **The Committee generally prefers offences with significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. However, the Committee notes the regulatory context of the Regulation to regulate, control and prohibit the supply and use of cosmetic medicines, the patient safety purpose of this Regulation and that public consultation has been undertaken regarding this Regulation.**

Additionally, that section 18D of the *Poisons and Therapeutic Goods Act 1966* envisages the prescription of the category 1 and 2 requirements by regulation, despite their contravention attaching significant penalties and custodial sentences (for an individual). In the circumstances, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Requirements relating to offences

20. As stated above, section 18D(2) of the *Poisons and Therapeutic Goods Act 1966* sets out the maximum penalties for contravening a category 1 or category 2 requirement. These requirements are included in clause 68I of the Regulation.

21. Clause 68C(2) is a category 1 requirement. Clause 68C(2) states that '[a] nurse must not administer a relevant substance unless satisfied there is appropriate equipment available for use in a patient medical emergency'. The term 'patient medical emergency' is not defined.

22. Clause 68D(2) is a category 2 requirement. Clause 68D(2) provides that a direction must be written, signed by the medical practitioner or nurse practitioner and given to the nurse in person or by the stated electronic means. Clause 68D(3) provides an exception to the requirement under clause 68D(2), stating that a direction may be given orally if a medical practitioner or nurse practitioner is present when the relevant substance is administered by the nurse to whom the direction is given. The wording of clause 68D(2) does not indicate that the requirements for written directions are subject to clause 68D(3).

23. Clause 68E(1) is a category 2 requirement. Clause 68E(1) provides the content of a direction. Clause 68E(2) provides an exception to the content requirements of a direction if it is given orally. The wording of clause 68E(1) does not indicate that the requirements for a written direction are subject to clause 68E(2). Additionally, it may also be unclear whether the exception also applies to the information a nurse must record under clause 68C(3), which is also a category 2 requirement, based on the wording of that clause.

Certain category 1 and category 2 requirements included in the Regulation to which penalties attach for non-compliance may be unclear. Specifically, the term 'patient medical emergency' appears undefined despite being a key definition in these category 1 and 2 requirements that carry penalties. Additionally, the application of provisions regarding giving directions and taking records may create confusion over the requirements for written and oral directions, and exceptions to information that must be recorded.

The Committee prefers that requirements giving rise to offences resulting in significant fines or custodial sentences to be drafted with sufficient precision so that their scope and content is clear. The Committee refers to Parliament the question of whether the wording of the noted category 1 and category 2 requirements set out in the Regulation are drafted with adequate specificity given that individuals and bodies corporate will be held strictly liable for a contravention as well as the gravity of the penalties.

Clarification regarding ongoing treatment

24. Clause 68D(4) provides that a written direction has effect for the period specified in the direction, not exceeding six months from the date that the patient was reviewed by the nurse practitioner or medical practitioner in person or by audio visual link, in accordance with clause 68D(1). That clause also provides that an oral direction has effect for the particular administration of the relevant substance to which the direction applies.

25. A written direction must include the number of times, and intervals at which, the relevant substance is to be administered under clause 68E(i).

26. The Discussion Paper provides that, in relation to written directions, the draft Regulation aimed to:

    I. formalise and standardise procedures already adopted by many cosmetic health service providers,

    II. bring those service providers into line with other health service providers that administer medicines, such as hospitals, and

    III. set the minimum standard of oversight by practitioners directing nurses and communication between those practitioners and nurses.

27. Additionally, the Discussion Paper sought industry input about the content of written and oral directions and whether the maximum six month validity for written directions is appropriate.

The Regulation appears to contemplate a nurse practitioner or medical practitioner giving a written direction to administer a relevant substance a number of times at specific intervals, for a period not exceeding six months. It is unclear whether the nurse practitioner or medical practitioner must regularly monitor the patient's condition between intervals or at any time after reviewing the patient in person or by audio visual link. The Committee considers that safeguards to ensure patient safety during ongoing treatment would be beneficial in this context. The Committee also notes that public consultation was undertaken in relation to the written direction requirements to be included in the Regulation, contextualised by the intent to formalise and standardise procedure and set the minimum standard of oversight. The Committee refers this issue to Parliament.

6. Private Health Facilities Amendment (Reportable Incidents) Regulation 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Date tabled	To be determined
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend *Private Health Facilities Regulation 2017* (the Regulation) to—

   (a) update references in the Regulation as a consequence of amendments made by the *Health Legislation Amendment Act (No 3) 2018*, Schedule 6, and

   (b) prescribe a type of review that is a serious adverse event review and a type of incident that is a reportable incident for the purposes of the *Private Health Facilities Act 2007* by reference to documents adopted by the Regulation, and

   (c) prescribe the manner in which a relevant health services organisation may disclose advice of an assessor or information obtained from the advice for the purposes of the *Private Health Facilities Act 2007*, and

   (d) allow the licensee of a facility to notify, or exchange information with, other facilities or relevant health services organisations required to exercise functions under the *Private Health Facilities Act 2007*, Part 4 or the *Health Administration Act 1982*, Part 2A.

2. The Committee previously reported on the *Health Administration Amendment (Reportable Incidents) Regulation 2021* in Legislation Review Digest 33/57.[5] The Regulation is the equivalent regulation to the *Private Health Facilities Amendment (Reportable Incidents) Regulation 2021*, that allows the relevant health services organisations to notify, or exchange information, with other relevant health service organisations or private health facilities as required to exercise their functions under *Health Administration Act 1982*, Part 2A, or the *Private Health Facilities Act 2007*, Part 4.

[5] Legislation Review Committee, Legislation Review Digest 33/57 – 7 September 2021, pp 42-44.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Privacy of personal information and medical records

3. Schedule 1[7] inserts sections 18C and 18D into the *Private Health Facilities Regulation 2017*, which allow private health facilities to notify and exchange information with other private facilities when responding to incidents under *Private Health Facilities Act 2007* (PHF Act) Part 4 and the *Health Administration Act 1982* (HA Act), Part 2A.

4. These Acts require an assessor to carry out a preliminary risk assessment of a reportable incident and provide written advice to assist private health facilities to understand the events leading up to and after the incident and the measures required to appropriately manage the incident and remove or mitigate any risks.

5. The PHF Act places limits on the disclosure of information. Subsection 18B of the Regulation provides that an incident reviewer may disclose information if information divulged or communicated to the committee for the purposes of any research or investigation authorised under the HA Act, section 23(1).

6. The committee is defined as a council, committee or advisory board appointed under section 20 of the HA Act. The committees include the Special Committee Investigating Deaths under Anaesthesia (SCIDUA), Collaborating Hospitals Audit of Surgical Mortality Committee (CHASM), and the NSW Maternal and Perinatal Mortality Review Committee.

7. In addition, the PHF Act contains penalties for the improper release of information. For example, section 49D of the PHF Act provides that an incident reviewer must not make a record of, or divulge information unless it is exercising the functions of an incident reviewer. A person that fails to comply is subject to a maximum penalty of 50 penalty units ($5 550)

8. However, an incident reviewer would not be liable for any action, claim or demand, if they acted in good faith for the purposes of exercising their functions as an incident reviewer.

> **The Regulation allows private health facilities to notify and exchange information with other relevant private health facilities or health service organisation about a reportable incident if it assists in performing their functions under *Health Administration Act 1982* (HA Act), Part 2A or the *Private Health Facilities Act 2007* (PHF Act), Part 4.**
>
> **The information exchanged relates to the response and the investigation of incidents. An incident is defined as an unplanned event that results in, or has the potential for, injury, damage or loss. The sharing of such information may infringe on a person's privacy and confidentiality of personal or medical records.**
>
> **However, the Committee recognises that the sharing information to health organisations is intended to assist in learning from incidents and provide a consistent and effective response to similar incidents in the future. The Committee notes that the PHF Act provides limits on sharing information, including that incident reviewers may only share information to specific committees for purposes of research and investigation authorised under section**

23(1) of the HA Act. The Committee also notes that the PHF Act imposes monetary penalties for a person if they record or divulge information outside exercising the function of an incident reviewer. However, an incident reviewer would not be liable to any action, claim or demand, if they acted in good faith in exercising their role as an incident reviewer. In these circumstances, the Committee makes no further comment.

7. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 3) 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction to wear a face covering given in an order made under section 7 of that Act.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Personal liberty

3. The Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction.

4. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*.

5. Under that Order, the Minister may direct that persons wear a fitted face mask in certain indoor settings, such as airports and aircraft, public transport, retail premises and hospitality and business settings.

6. However, the Order provides that these requirements do not apply to persons under 12 or to a person with a physical or mental health illness or condition, or disability, that makes wearing a fitted face covering unsuitable including, for example, a skin condition, an intellectual disability, autism or trauma.

7. The Order also provides exceptions to the requirement to wearing a fitted face mask, including when a person is eating or drinking, when communicating with another person who is deaf or hard of hearing, when it interferes with the nature of their work, where

they are asked to remove it to ascertain their identity, because of an emergency or where it is necessary for the proper provision of goods or services.

8. Under the Regulation, the penalty for this offence is $200 for an individual or $1000 for a corporation.

9. The Committee notes that the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2)* has since been repealed and replaced with the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3),* due to the changing circumstances of the current COVID-19 outbreak in NSW.

10. The Committee previously commented on earlier renditions of this regulation in Digest No. 27 (16 March 2021)[6] and No. 32 (22 June 2021).[7]

> **The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.**
>
> **However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.**

Right to fair trial – penalty notice offences

11. As noted, the Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*.

12. This public health order is made under section 7 of the *Public Health Act 2010,* which provides the Ministerial power to deal with public health risks. Under this section, public health orders may be issued by the Minister that expire after a period of 90 days unless earlier revoked.

> **The Regulation allows penalty notices to be issued for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021.**
>
> **The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter**

[6] Legislation Review Committee, Legislation Review Digest No. 27/57, 16 March 2021

[7] Legislation Review Committee, Legislation Review Digest No. 33/27, 22 June 2021

heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

8. Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021

Date published	14 July 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021 (the Regulation) is to exempt tenants who are financially impacted by the COVID-19 pandemic from the operation of provisions of the *Residential Tenancies Act 2010* (the Act) or the regulations made under that Act that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of non-payment of rent or charges if the tenants continue to pay at least 25 per cent of the rent payable under the agreement. The exemption will end at the end of 11 September 2021.

2. The Regulation is made under section 12 of the Act.

3. The Committee published reports on previous versions of Part 6A of the Residential Tenancies Regulation 2010. Specifically, the Committee commented on the Residential Tenancies Amendment (COVID-19) Regulation 2020 in Digest No. 14/57[8] and the Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020 in Digest No. 25/57.[9]

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity, property rights and freedom of contract

4. Section 12 of the Act provides that the regulations may exempt any specified person, agreement or premises from the operation of the Act or regulations.

[8] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 14/57, 12 May 2020.

[9] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 25/57, 16 February 2021.

5. For the purposes of section 12, clause 41C of the Regulation amends the *Residential Tenancies Regulation 2019* to provide an exemption to a tenant if the tenant:

    I. is an 'impacted tenant', being a tenant who is a member of a household impacted by the COVID-19 pandemic,

    II. gives the landlord notice of he or she is an impacted tenant, and

    III. continues to pay the landlord at least 25 per cent of the rent payable under the residential tenancy agreement.

6. Clause 41B of the Regulation provides, broadly, that a household is impacted by the COVID-19 pandemic if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working or materially reduce work hours because of a COVID-19 illness. The household income must have, as a result of the COVID-19 illness, been reduced by at least 25 per cent compared to the average weekly household income for the four weeks immediately preceding 26 June 2021.

7. Specifically, clause 41C of the Regulation provides that during the moratorium period, the tenant is exempt from the operation of any provision of the Act or regulations that would result in the termination of the residential tenancy agreement or recovery of possession of the premises from the tenant for:

    I. a termination notice given by the landlord under section 87 (breach of agreement) for non-payment of rent or charges under section 88,

    II. an application by a landlord for a termination order under section 83(2) in relation to a termination notice given by the landlord for non-payment of rent or charges under section 88, or

    III. an application by a landlord for a termination order for non-payment of rent or charges under section 88 without the landlord having given the tenant a termination notice.

8. The 'moratorium period' means the period starting on the commencement of the Regulation, being the day on which it was published on the NSW legislation website (14 July 2021), and ending at the end of 11 September 2021.

The Regulation reinstates, with amendments, Part 6A of the Residential Tenancies Regulation 2019 to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it exempts financially impacted tenants from provisions that would ordinarily terminate their residential tenancy agreement or allow the recovery of possession of the property. This exemption applies where rent or charges have not been paid, and where that tenant gives notice and continues to pay at least 25 per cent of the rent payable under the agreement.

The exemption limits landlord's rights in response to the pandemic. For example, during the moratorium period from 14 July 2021 to the end of 11 September 2021, a landlord generally cannot give a tenant who is financially impacted by COVID-19 a termination notice under the Act for non-payment of rent. A landlord

may continue to seek termination in other circumstances including (without limitation) to sell the premises, for illegal use of the premises or hardship to the landlord.

By altering the terms of the existing agreement already entered into by the tenant and the landlord, this Regulation retrospectively limits landlords' rights under such tenancy agreements. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact the rule of law principle that a person is entitled to know the law to which they are subject to at any given time.

Similarly, by limiting the ability of the landlord to exercise his/her rights under an existing agreement and specifically limiting the landlord's right to terminate for breach of contract resulting from non-payment of rent or charges, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited to last for the period from 14 July 2021 to 11 September 2021. The Committee notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

9. Road Transport Amendment (Vehicle Registration) Regulation 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	To be determined
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Road Transport (Vehicle Registration) Regulation 2017* (the Regulation) as follows—

   (a) to apply recent amendments to the national uniform legislation relating to light vehicles to New South Wales by amending the *Light Vehicle Standards Rules* set out in the Regulation, Schedule 2,

   (b) to make amendments consequent on the repeal of the *Motor Vehicle Standards Act 1989* of the Commonwealth and the commencement of the *Road Vehicle Standards Act 2018* of the Commonwealth,

   (c) to enable Transport for NSW to refuse, cancel or suspend the registration of a registrable vehicle if satisfied that the vehicle is subject to a recall notice under the *Road Vehicle Standards Act 2018* of the Commonwealth.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property rights

2. The Regulation provides that Transport for NSW (TfNSW) may refuse, cancel or suspend the registration of a registrable vehicle if the vehicle is subject to a recall notice under the Australian Consumer Law (section 122) or the *Road Vehicle Standards Rules 2018* (section 206).

3. Under section 122 of the Australian Consumer Law, the responsible Minister may issue a recall notice for consumer goods if it appears to the Minister that one or more suppliers of the goods have not taken satisfactory action to prevent those goods causing injury to any person.

4. Under section 206 of the *Road Vehicle Standards Rules 2018*, the Minister may by legislative instrument, issue a recall notice for road vehicles or approved road vehicle components of a particular kind if it appears to the Minister that one or more suppliers

of such vehicles, or such components, have not taken satisfactory action to prevent those vehicles or components causing injury to any person, or rectify the non-compliance.

The Regulation allows Transport for NSW (TfNSW) to refuse to register or cancel the registration of a vehicle if the vehicle is subject to a recall notice. This may impact individuals' property rights to their vehicle under registrations that have previously been granted. However, the Committee notes that this may only be done where there has been a recall notice issued under the federal Australian Consumer Law or Road Vehicle Standards Rules if it appears that the suppliers have not taken satisfactory action to prevent the vehicle or its components from causing injury to any person. Given the safety objectives behind these provisions, the Committee makes no further comment.

10. Strata Schemes Management Amendment (COVID-19) Regulation 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Kevin Anderson, MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation 2021* (the **Regulation**) is to provide for the following matters in response to the public health emergency caused by the COVID-19 pandemic:

    I. altered arrangements for convening meetings of an owners corporation or a strata committee, and

    II. allowing instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

2. The Regulation is made under sections 271 (general regulation-making power) and section 271A of the *Strata Schemes Management Act 2015*.

3. The Committee has published reports on predecessors to this Regulation. Specifically, the Committee commented on the Strata Schemes Management Amendment (COVID-19) Regulation 2020 in Digest No. 17/57[10] and the Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020 in Digest No. 28/57.[11]

ISSUES CONSIDERED BY COMMITTEE

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

4. The *Strata Schemes Management Act 2015* (the **Act**) sets out the legislative framework for the management of strata schemes and disputes related to strata schemes. The Act

[10] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 17/57, 4 August 2020.

[11] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 28/57, 23 March 2021.

and the Strata Schemes Management Regulation 2016 made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.

5. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including (without limitation) altered arrangements for convening a relevant strata meeting and an alternative to affixing the seal of the owners corporation.

6. Subsections 271A(3) and (4) of the Act further provide that regulations made under the section:

    I. can override a provision of the Act, and

    II. expire on the day that is six months after their commencement, or the earlier day decided by Parliament by resolution of either House.

7. Subsection 271A(5) provides that section 271A is repealed on 31 March 2022.

8. The Regulation is made under section 271A and section 271 (the general regulation-making power) and amends the Strata Schemes Management Regulation 2016 to insert a new Part 11, which provides for altered arrangements for certain matters set out in section 271A(1) of the Act.

9. Specifically, the Regulation provides:

    I. under clause 69, that notice of or another document in relation to a strata meeting may be served by email. Clause 71 provides that the previous Part 11 (in force immediately before the commencement of the Regulation) continues to apply if, at the commencement of the Regulation, notice of a relevant strata meeting was given in accordance with the Act but the meeting has not yet been held, and

    II. under clause 70, that an instrument or document may, instead of being affixed with the seal of an owners corporation in the presence of certain persons, may be signed, and the signatures witnessed, by those persons. Clause 70(4) provides that a signatory or witness can be present by audio visual link.

The *Strata Schemes Management Amendment (COVID-19) Regulation 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of, and documents relating to, a strata meeting may be served by email and instruments. It also provides that documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19

pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

11. Uniform Civil Procedure (Amendment No 97) Rule 2021

Date tabled	LA: 22 June 2021 LC: 22 June 2021
Disallowance date	To be determined
Secretary responsible	Rebel Kenna, Secretary of the Uniform Rules Committee

PURPOSE AND DESCRIPTION

1. The object of this Rule is to amend the *Uniform Civil Procedure Rules 2005* to increase, from 10 to 12, the age at which a child is deemed to be a defendant in an appeal to the District Court against a decision in relation to the care of the child.

2. This amendment will achieve consistency with the rebuttable presumptions in the *Children and Young Persons (Care and Protection) Act 1998*, sections 99B and 99C.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Rights of the child

3. The Rule amends the *Uniform Civil Procedure Rules 2005* to increase, from 10 to 12, the age at which a child is deemed to be a defendant in an appeal to the District Court against a decision in relation to the care of the child.

4. This amendment will achieve consistency with the rebuttable presumptions in the *Children and Young Persons (Care and Protection) Act 1998*, sections 99B and 99C. Those sections were introduced by the *Children and Young Persons (Care and Protection) Miscellaneous Amendments Act 2006*.

5. Specifically, section 99B provides that a child under 12 is presumed incapable of giving proper instructions. This presumption is not rebutted merely because the child or young person has a disability. However, the Children's Court may, on the application of a legal representative for a child who is less than 12 years of age, make a declaration that the child is capable of giving proper instructions.

6. Similarly, section 99C provides that a child over 12 is capable of giving proper instructions to his or her legal representative. The Children's Court may also, on the application of a legal representative for a child over 12 years, make a declaration that the child or young person is not capable of giving proper instructions.

7. In the second reading speech to *Children and Young Persons (Care and Protection) Miscellaneous Amendments Act 2006*, the Minister provided reasons for setting the age to 12. Notably, because of evidence based on child development that most 10 and 11 year

olds are not able to understand the legal ramifications of their instructions, the intricacies of legal procedure or issues and are unable to provide adequate instructions on legal, procedural and jurisdictional issues:

> The bill also raises the age at which a child is presumed capable of giving proper legal instructions to his or her legal representative from 10 to 12 years. It is accepted that children of any age are capable of holding and expressing strong views as to the outcome they desire in care proceedings. However, there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise. These children are unable to provide adequate instructions on these issues, placing legal representatives acting on direct instructions from a child in a difficult position.
>
> The bill therefore establishes a presumption that a child who is 12 years of age or less is not capable of giving proper instructions to his or her legal representative and, in such circumstances, an independent legal representative may be appointed for the child. However, the Children's Court may make an order to the contrary, appointing a direct legal representative, if evidence is adduced that the child is capable of giving proper instructions.

The Rule amends the age at which a child can be named as a defendant in District Court proceedings, from 10 to 12 years old, in relation to child care orders made under the *Children and Young Persons (Care and Protection) Act 1998*. This amendment aims to provide consistency with that Act, which provides that there is a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative. This may impact on those children under the age of 12 by removing the assumption that they are able to provide instructions regarding an appeal of a child care order to which they are subject.

However, the Committee notes that the decision to specify an age of 12 years old in the Act was based on child development evidence that indicated most 10 and 11 year olds are not able to understand the legal ramifications of their instructions. Additionally, while a child may be the named defendant in legal proceedings, the requirement that they are able to give legal instructions is a rebuttable presumption. This means that, where appropriate, the legal representative of the child may apply to the Court to make a declaration that the child either is capable (if under 12 years) or not capable (if over 12 years) of giving proper instructions.

Therefore, noting that the amendment seeks to align the Uniform Civil Procedure Rules with the provisions in the *Children and Young Persons (Care and Protection) Act 1998* regarding District Court appeals for care orders made under that Act, and that it is a rebuttable presumption, the Committee makes no further comment.

12. Weapons Prohibition Amendment Regulation 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	To be determined
Minister responsible	The Hon. David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe a bump stock as a prohibited weapon for the purposes of the *Weapons Prohibition Act 1998* so that the possession or use of a bump stock without a permit under that Act is unlawful.

2. This Regulation also amends the Weapons Prohibition Regulation 2017 as follows—

   (a) to re-establish, on an ongoing basis, an expired amnesty in connection with the surrender of prohibited weapons, and to make further provision in relation to the amnesty,

   (b) to prescribe federal family violence orders as a kind of apprehended violence order for the purposes of the Weapons Prohibition Act 1998,

   (c) to revise a reference to legislative provisions of the Commonwealth,

   (d) to make minor amendments in the nature of statute law revision.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property right

3. The Regulation expands the definition of "apprehended violence order" for purposes of the *Weapons Prohibition Act 1998* to include "federal family violence orders" (Schedule 1, clause [3] of the Regulation amends Clause 46 of the Weapons Prohibition Regulation 2017).

4. Section 10(3)(b) of the *Weapons Prohibition Act 1998* prevents the issuing of a permit to any person who is or has been subject to an apprehended violence order within the previous ten years. Under Section 17 of the *Weapons Prohibition Act 1998*, a permit to possess or use a prohibited weapon is automatically suspended on the making of an interim apprehended violence order against the holder.

5. This provision restricts the right of an individual to obtain a permit to possess or use a prohibited weapon if they have previously been the subject of a family violence order.

However, this would only be the case if they were not also subject to an apprehended violence order in NSW.

Schedule 1, clause 3 of the Regulation amends Clause 46 of the Weapons Prohibition Regulation 2017 to expand the definition of apprehended violence orders. This amended definition effectively prevents an individual from obtaining a permit to possess or use a prohibited weapon if they are or have been the subject of a family violence order within the previous 10 year period. This may impact on a person's property rights by restricting firearm ownership.

However, the Committee recognises that a person's property rights regarding firearm ownership must be balanced against public safety concerns. This is especially where a person has been subject to an apprehended violence order. The Committee also recognises the administrative intention of the regulation. Specifically, that the inclusion of federal family violence orders in the definition of apprehended violence orders removes the necessity to reapply to a NSW court for additional orders where federal orders are in already in place. Under the circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Restriction on ability to sell attachments for firearms

6. Clause 3 of the Regulation amends the Weapons Prohibition Regulation 2021 to include bump stocks, or any other gunstock designed to enable the rapid and repeated firing of a self-loading firearm, in the list of prohibited firearms.

7. The importation of bump stocks into Australia has been prohibited by the federal government since 2020.[12]

8. Where there is a genuine reason for possessing a bump stock, a permit can be sought under section 11 of the *Weapons Prohibition Act 1998*.

The Regulation prohibits the possession or use of bump stocks in NSW (Clause 3). The prohibition may curtail the ability of arms dealers to sell bump stocks. The federal government prohibited the import into Australia of bump stocks in 2020. Where there is a genuine reason for possessing a bump stock, a permit can be sought under section 11 of the *Weapons Prohibition Act 1998*. Consequently, any impact on arms dealers is likely to be negligible.

The Committee also recognises that the right of individuals to use, possess or sell items such as weapons and attachments to weapons must be balanced against the right of the community to be protected against violence. Under the circumstances, the Committee makes no further comment.

[12] See the Customs (Prohibited Imports) Amendment (Firearms) Regulations 2020 (Cth)

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

1 The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

i trespasses unduly on personal rights and liberties, or

ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

1 The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

i that the regulation trespasses unduly on personal rights and liberties,

ii that the regulation may have an adverse impact on the business community,

iii that the regulation may not have been within the general objects of the legislation under which it was made,

iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

v that the objective of the regulation could have been achieved by alternative and more effective means,

vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

vii that the form or intention of the regulation calls for elucidation, or

viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.