

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

SCRUTINY REPORT 2

24 MARCH 2021

THE COMMITTEE

COMMITTEE MEMBERSHIP

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 Dr Marisa Paterson (Deputy Chair)
 Ms Jo Clay MLA

SECRETARIAT

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

The 10th ACT Legislative Assembly appointed the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 2 December 2020.

Specifically, the resolution of 2 December 2020 establishing the Standing Committees of the 10th Assembly as it relates to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) states:

- “(10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:
- (a) considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
 - (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;
 - (b) reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
 - (c) considering whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and
 - (d) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly;”

TABLE OF CONTENTS

BILLS.....	4
Bills—No comment	4
APPROPRIATION BILL 2020-2021	4
APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2020-2021.....	4
PLANNING AND DEVELOPMENT AMENDMENT BILL 2021	4
Bill—Comment.....	4
DRUGS OF DEPENDENCE (PERSONAL USE) AMENDMENT BILL 2021.....	4
Proposed amendments	6
CRIMES LEGISLATION AMENDMENT BILL 2020	6
SUBORDINATE LEGISLATION	9
Disallowable Instruments—No comment	9
Disallowable Instruments—Comment	10
RESPONSES	14
Government responses	14

BILLS

BILLS—NO COMMENT

The Committee has examined the following bills and offers no comment on them:

APPROPRIATION BILL 2020-2021

This Bill appropriates money for the purposes of the Territory for the financial year beginning on 1 July 2020.

APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2020-2021

This Bill appropriates money for expenditure in relation to the Office of the Legislative Assembly and officers of the Assembly for the financial year beginning on 1 July 2020.

PLANNING AND DEVELOPMENT AMENDMENT BILL 2021

This Bill amends the *Planning and Development Act 2007* to prohibit the approval of applications for the development of new waste facilities, or developments which would increase the amount of waste handled on the land each year, in the division of Fyshwick.

BILL—COMMENT

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

DRUGS OF DEPENDENCE (PERSONAL USE) AMENDMENT BILL 2021

This Private Member's Bill will amend the *Drugs of Dependence Act 1989* to introduce offences relating to the possession of less than prescribed amounts of drugs of dependence and prohibited substances and amend the simple cannabis offence notices scheme to include these simple drug offences.

Whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee—Committee Resolution of Appointment paragraphs (10)(a)(vi) and (10)(d)

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

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

Right to recognition and equality before the law (section 8 HRA)

Under the *Drugs of Dependence Act* possessing a drug of dependence or a prohibited substance, unless you are authorised to do so under the *Medicines, Poisons and Therapeutic Goods Act 2008*, is

an offence, each with a maximum penalty of 50 penalty units¹ or imprisonment up to two years. Drugs of dependence and prohibited substances are prescribed by regulations.² However, due to amendments introduced by the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019* ('Amendment Act'), cannabis is excluded from the definition of prohibited substances. Instead, that amendment created new cannabis offences, including possessing more than 50g of only dried cannabis or more than 150g of harvested cannabis (subject to the same penalties of 50 penalty units or two years imprisonment), along with new offences relating to cultivation of more than four cannabis plants, storing harvested cannabis within reach of children and smoking cannabis in a public place near a child.

The amendment also introduced or amended two 'simple cannabis offences' that applied to persons under 18 years of age - possessing less than the 50g or 150g of cannabis, or cultivating one or two cannabis plants - with each having a maximum penalty of one penalty unit. These offences are the basis of the simple cannabis offence notice scheme. Where a police officer reasonably believes a person has committed a simple cannabis offence, they or their parents or guardians can be served with an offence notice with a penalty of \$100 rather than being prosecuted and convicted of the offence.

The Bill will amend the offences relating to drugs of dependence and prohibited substances by only applying a maximum penalty of one penalty unit where the person possesses less than the personal possession limit. Cannabis offences will also be defined by reference to the personal possession limits, though maintaining the current limits of 50g of dried cannabis and 150g of other harvested cannabis. The personal possession limit for 11 substances is included in the Bill, with no provision to extend the list other than by legislative amendment. The offence notice scheme will also be extended to apply to these new offences of possessing less than the personal possession limit of drugs of dependence and prohibited substances.

As the Bill will maintain and amend provisions in the Act which draw a distinction based on the age of the person, the Bill may potentially limit the right to equality before the law protected by section 8 of the HRA. Persons over 18 will continue to not be subject to the offence of possessing less than the personal possession limit of dried or harvested cannabis. The Committee notes that this distinction was originally introduced in the Amendment Act. As with the *Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2019*, the explanatory statement accompanying this Bill refers to this distinction by stating that the health consequences and vulnerability of children and young people as compared to adults justifies the preservation of the prohibition on cannabis possession for people under the age of 18. The Committee refers this statement to the Assembly.

However, the Committee is concerned that the explanatory statement contains limited justification for the range of substances and amounts included in the personal possession limits and the distinction between the treatment of these substances and cannabis. The explanatory statement states:

¹ Currently the value of a penalty unit for an offence is \$160 for an individual and \$810 for a corporation (see *Legislation Act 2001*, s 133).

² See Schedule 1 of the [Criminal Code Regulation 2005](#), as incorporation by the [Drugs of Dependence Regulation 2009](#), ss 4 and 5.

This Bill will reduce interaction with the criminal justice system and support people impacted by drug addiction to access treatment. The drugs listed in [the table setting out the personal possession limits] ... have been identified for inclusion in the Simple Drug Offence Notice scheme because they are common sources of interaction with the justice system for individuals and some of the most commonly used. Bringing a diversionary, health-focused approach to the legal classification of these drugs is important.

The Committee is not clear how reference to the most common sources of interaction with the justice system or common usage relates to a health-focused approach and requests further information from the Member as to how the substances were selected and what evidence is available that the amounts set out in the Bill correspond to health effects, particularly in relation to young persons.

The Committee is also concerned that the explanatory statement does not contain an outline of the provisions of the Bill, describing the purpose of the Bill and its operation only in very broad terms. As set out in the Committee's *Guide to writing an explanatory statement*,³ an outline of provisions usually amounts to the bulk of an explanatory statement, setting out the purpose of the provisions, their relationship with other provisions in the Bill and Act being amended, and how they are intended to operate.

The Committee also notes that the explanatory statement refers to the preservation of the simple cannabis offence notice scheme for cultivation of not more than four cannabis plants. However, as described above, the offence notice applies to simple cannabis offences including the cultivation of one or two cannabis plants. The explanatory statement also refers to the Bill including a new section 171BA which will create a new offence of smoking near children in public places. This seems to replicate a statement in the explanatory statement accompanying the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2019. The explanatory statement for this Bill should make clear that section 171AB, introduced by the Amendment Act, currently provides for that offence.

While the Committee recognises the limited resources of a private member in producing explanatory statements, some detail of the operation of the different provisions of the Bill and an accurate description of the interaction with other legislative provisions is expected. The Committee therefore requests that an amended explanatory statement be provided.

The Committee draws these matters to the attention of the Assembly, and asks the Member to respond.

PROPOSED AMENDMENTS

CRIMES LEGISLATION AMENDMENT BILL 2020

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

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

³ Available on the Committee's website at https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny#tab1665319-5id

Right to liberty and the security of person (section 18 HRA)

Right to a fair trial (section 21 HRA).

Rights in criminal proceedings (section 22 of the HRA)

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

In a letter sent to the Committee dated 16 March 2021, the Government has proposed amendments to the Crimes Legislation Amendment Bill 2020. The amendments will amend subsection 34(4) of the *Bail Act 1992* in relation to the notice requirements when a court is continuing bail on an adjournment or a postponement of a proceeding. Subsection 34(4) presently requires a court to immediately give, or cause to be given, to the accused person a written notice setting out various details, including the time to which the proceedings are adjourned or postponed or that the time will be provided in a notice given or sent to the accused person as prescribed by regulation. Section 4 of the *Bail Regulation 1992* states that such a notice:

must be given or sent to the accused person by giving the notice to him or her or by leaving the notice at his or her last-known or usual place of residence or business with a person who is apparently resident or employed at that place and apparently over 16 years old.

The proposed amendment will amend subsection 34(4) of the *Bail Act* to replace the requirement that notice be provided immediately with the need to provide notice as soon as practicable after deciding to continue bail or, in providing an additional notice setting out the time for the resumption of proceedings, as soon as practicable once that time is determined. The notice must be given in the way prescribed by regulation.

The granting of Bail represents an undertaking by the accused to appear before the court in the future. A failure to comply with that undertaking is an offence under subsection 49(1) of the *Bail Act*, which enables the issuing of a warrant to arrest the person and bring them before the court. An offence under subsection 49(1) is subject to the defence of having a reasonable excuse. Under section 33 of the *Bail Act*, where the undertaking to appear has been given in relation to proceedings which can be deferred to a later time, the court can continue the bail already granted whether or not the person is present in court. Where an accused is unable to appear in person due to illness or other sufficient cause the court may still order the person be remanded to appear at a future time and the undertaking to appear continued to every time at which the proceeding is deferred (subsection 33(7)). The provision of notice therefore represents an essential element of the operation of the bail provisions, enabling an individual to learn of the changed content of their undertaking to appear, and the time at which they are to appear so as to avoid the commission of an offence and potentially be subject to imprisonment.

As the granting and continuance of bail relates to the condition on which accused are able to secure their liberty until such time as their guilt can be adjudged and sentencing imposed, and imposes the risk of further imprisonment, the proposed amendments potentially limit the right to liberty and the security of person protected by section 18 of the HRA. By amending the circumstances in which court orders may take effect in the absence of adequate notice the amendments may also limit the right to a fair trial protected by section 21 of the HRA. Rights in criminal proceedings protected by section 22 of the HRA, including the right to be tried in person, may also be limited.

The Committee was not provided with an explanatory statement identifying potential limitations of rights protected under the HRA and why any such limitations should be considered reasonable under

the framework in section 28 of the HRA. In providing the proposed amendments to the Committee, the Attorney General indicated that relevant explanatory statements were still being finalised. However, the Attorney General did provide some information on the background and operation of the proposed amendments.

The Attorney-General indicated that the amendments follow consideration of the relevant provisions in light of a decision of the Chief Magistrate in *Elder v Metyang* [2020] ACTMC 24. That case is claimed to highlight the potential inconsistency between the need to ‘immediately’ serve notices to continue bail personally and the established practice of the Law Courts Registry to post notices in circumstances including where they are absent due to illness or accident. The case also highlighted that the methods of service available for such notices are unduly limited and do not reflect contemporary methods of communication.

It was therefore anticipated that amendments will be made to section 4 of the Regulations to provide certainty on the service requirements for notices to continue bail, and to provide more flexibility in the use of contemporary methods of service. No details of those proposed amendments to the Regulations were provided to the Committee.

The Attorney General also reflected that section 30 of the HRA requires laws to be interpreted in a way that is compatible with human rights, affecting the choice of any service method for giving notice. The defence of reasonable excuse for failing to comply with an undertaking to appear may also raise non-receipt of a bail continuation notice. The Committee also notes that a court in making orders in relation to bail is acting in an administrative capacity and hence must act consistently with human rights under the HRA.⁴

In the absence of an explanatory statement the Committee is concerned that the proposed amendments may not be compatible with the HRA. In the Committee’s view, the decision in *Elder v Metyang* was based on the requirement in subsection 34(4) and section 4 of the Regulations to provide notice in person. Her Honour did not consider that a requirement to immediately give, or cause to be given, notice was inconsistent with the ability of the Court to continue bail in circumstances where an accused was not in attendance in the court provided by subsection 33(7) of the Bail Act. Her Honour also did not consider the role, if any, which human rights concerns may have played in interpreting the provisions.

The Committee is concerned that any dilution of the current requirement to provide notice in person may give rise to significant human rights concerns. The proposed amendments leave the method of providing notice to the Regulations with no explicit restrictions. Reliance on section 30 of the HRA will only increase the uncertainty over whether any Regulations will comply with the requirements of the Bail Act, and whether any decision on the method of service will in turn be consistent with the Regulations. The Committee recognises that elements of the method of service may involve technical details suitable for inclusion in regulations, and that any regulations will be subject to scrutiny by the Committee and the Assembly. However, in the Committee’s view, the significant human rights concerns raised by the potential amendments make it appropriate for explicit restrictions on possible methods of service to be included in amendments to the Bail Act.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

⁴ See sections 40 and 40B; *Brown v Australian Capital Territory* [2020] ACTSC 70 at [79].

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2020-262 being the Territory Records (Advisory Council) Appointment 2020 (No 2) made under section 44 of the *Territory Records Act 2002* appoints a specified person as a member of the Territory Records Advisory Council, representing professional organisations interested in records management and archives.

Disallowable Instrument DI2020-263 being the Territory Records (Advisory Council) Appointment 2020 (No 3) made under section 44 of the *Territory Records Act 2002* appoints a specified person as a member of the Territory Records Advisory Council, representing organisations interested in public administration, governance or public accountability.

Disallowable Instrument DI2020-264 being the Territory Records (Advisory Council) Appointment 2020 (No 4) made under section 44 of the *Territory Records Act 2002* appoints a specified person as a member of the Territory Records Advisory Council, representing organisations interested in public administration, governance or public accountability.

Disallowable Instrument DI2020-265 being the Territory Records (Advisory Council) Appointment 2020 (No 5) made under section 44 of the *Territory Records Act 2002* appoints a specified person as chairperson of the Territory Records Advisory Council.

Disallowable Instrument DI2020-266 being the Territory Records (Advisory Council) Appointment 2020 (No 6) made under section 44 of the *Territory Records Act 2002* appoints a specified person as deputy chairperson of the Territory Records Advisory Council.

Disallowable Instrument DI2020-290 being the Medicines, Poisons and Therapeutic Goods (Nurse and Midwife Immunisers) Direction 2020 (No 1) made under section 353 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* authorises a nurse or midwife to administer a vaccine without a supply authority if the nurse or midwife administers the vaccine in accordance with the ACT Registered Nurse and Midwife Vaccination Standards.

Disallowable Instrument DI2020-291 being the Pest Plants and Animals (Pest Plant) Declaration 2020 made under section 7 of the *Pest Plants and Animals Act 2005* declares a specified plant to be a pest plant in the ACT.

Disallowable Instrument DI2020-293 being the Motor Accident Injuries (Premiums) Guidelines 2020 (No 1) made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2019-245 and makes the MAI Premium Guidelines 2020.

Disallowable Instrument DI2020-294 being the Road Transport (Driver Licensing) Instructor Code of Practice 2020 (No 1) made under section 118 of the *Road Transport (Driver Licensing) Regulation 2000* revokes DI2016-237 and approves a Code of Practice for driving instructors undertaking driver assessment and/or driver instruction.

DISALLOWABLE INSTRUMENTS—COMMENT

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

Human rights issues

Disallowable Instrument DI2020-287 being the Litter (Amenity Impact) Code of Practice 2020 (No 1) made under section 24ZA of the *Litter Act 2004* makes a Code of Practice which sets out guidelines for dealing with amenity impacts caused by hoarding on residential properties.

This instrument, made under section 24ZA of the *Litter Act 2004*, makes a Code of Practice that deals, specifically, with “amenity impacts caused by hoarding” at an “open private place (property)”. The introduction to the Code explains:

The objects of the Litter Act include to protect and enhance the amenity of the ACT, including the wellbeing of its people. This recognises that the build-up of litter on a property can have a significant impact on both the people residing at the property and those living at adjoining properties.

The Code contains the following references to the human rights implications of the Code and to the *Human Rights Act 2004*:

This Code provides a flexible pathway of social and regulatory approaches to ensure that cases of amenity impact are managed in the least restrictive way in accordance with the *Human Rights Act 2004*.

.....

This Code is made under section 24ZA of the Litter Act and provides general guidance to the Director-General of TCCS or a delegate (DG or delegate) in relation to the management of amenity impact circumstances, caused by hoarding, in a manner that recognises all parties’ fundamental human rights.

.....

3 List of Key Principles

When managing cases of amenity impact, the following principles must be taken into account:

- a. a person with a mental disorder or mental illness has the same rights and responsibilities as other members of the community and is to be supported to exercise those rights and responsibilities without discrimination;
- b. a person with a mental disorder or mental illness has the right to be assumed to have decision making capacity, unless it is established by a professional that the person does not have decision making capacity;
- c. a person’s will should be considered when determining the best course of action;
- d. the human rights of individuals are respected, and cases of amenity impact are treated in the least restrictive way; and
- e. amenity impact caused by the build-up of significant amounts of litter on a property can have an impact on the mental health and wellbeing of neighbours.

Appendix A to the Code also refers to the Human Rights Act, in a list of “Legislation Relating to Hoarding”.

The Committee notes that, despite the evident relevance of the Human Rights Act to the Code, the explanatory statement for the instrument does not substantively address human rights issues. The only reference to “human rights” is in the following paragraph of the explanatory statement:

This instrument provides guidance concerning the procedure that the Director-General and authorised persons under the Act must follow when investigating and regulating an amenity impact. The guidance provided in the code is flexible to allow each case of amenity impact to be managed in an appropriate manner. The code ensures that regulatory action is not taken in isolation and that consultation with other government agencies or social services occurs. It also ensures that the human rights of all parties involved are respected and that when regulatory action is taken, it only occurs when other attempts to remove the amenity impact have failed.

While the Committee acknowledges that under section 38 of the Human Rights Act, the Committee only has express jurisdiction in relation to “human rights issues raised by bills presented to the Assembly”, the Committee also notes that, in recent years, despite this limitation, explanatory statements for subordinate legislation increasingly (and expressly) address human rights issues arising from subordinate legislation. The Committee has welcomed this development, which has assisted the Committee in its scrutiny of subordinate legislation, including by reference to the Committee’s consideration as to whether subordinate legislation “unduly trespasses on rights previously established by law”, for principle (10)(c)(ii) of the Committee’s terms of reference.

Given the clear indication that this instrument engages (unspecified) human rights, the Committee considers that (despite the absence of any express Human Rights Act jurisdiction, for the Committee, in this instance) the explanatory statement for this instrument ought to have substantively addressed the human rights issues engaged by the Code.

The Committee draws the attention of the Legislative Assembly to this instrument, under principle (10)(c)(ii) of the Committee’s terms of reference, on the basis that the instrument may unduly trespass on rights previously established by law.

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

This comment requires a response from the Minister.

Human rights issues

Disallowable Instrument DI2020-288 being the Public Place Names (Taylor) Determination 2020 (No 4) made under section 3 of the *Public Place Names Act 1989* determines the names of seven roads in the Division of Taylor.

Disallowable Instrument DI2020-289 being the Public Place Names (Taylor) Determination 2020 (No 5) made under section 3 of the *Public Place Names Act 1989* determines the name of a park in the Division of Taylor.

Disallowable Instrument DI2020-292 being the Public Place Names (Strathnairn) Determination 2020 (No 3) made under section 3 of the *Public Place Names Act 1989* determines the name of a park in the Division of Strathnairn.

Each of the instruments mentioned above determines place names, under section 3 of the *Public Place Names Act 1989*. The Committee notes that the explanatory statement for each of the instruments discusses the human rights issues. For example, the explanatory statement for the first instrument mentioned above states:

Human Rights

Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation.

Conceivably, the naming of a place has the potential to infringe the right to privacy and reputation of a person after whom a place is named. In this case the process through which places are named ensures that this right is not infringed and that only appropriate information is included in a determination. This process includes the consultation described above. Additionally, in relation to places named after people, only the names of deceased persons are determined.

Similar statements appear in the explanatory statements for the second and third instruments mentioned above.

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

This comment does not require a response from the Minister.

COVID-19-related instruments / Retrospectivity / Human rights issues

Disallowable Instrument DI2021-10 being the Taxation Administration (Payroll Tax—Businesses Not Permitted to Operate) COVID-19 Exemption Scheme Determination 2021 made under section 137E of the *Taxation Administration Act 1999* determines a scheme to exempt from the requirement to pay payroll tax by eligible employers whose businesses are not permitted to operate due to ACT Government restrictions during a specified period.

Disallowable Instrument DI2021-11 being the Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2021 made under section 137E of the *Taxation Administration Act 1999* revokes DI2020-276 and extends a scheme to exempt payroll tax on wages paid or payable to eligible apprentices or trainees.

The instruments mentioned above are made under section 137E of the *Taxation Administration Act 1999*, which allows the Minister to determine a scheme to exempt a person who is required to pay tax under a tax law from the requirement to pay the tax, referred to as “a COVID-19 exemption scheme”. The effect of the first instrument is to extend to 30 June 2021 the operation of a previous exemption of eligible employers from the requirement to pay payroll tax.

Section 2 of the instrument provides that it is taken to have commenced on 1 December 2020. Given that the instrument was made on 12 January 2021 and notified on the ACT Legislation Register on 20 January 2021, this means that the instrument has a retrospective effect. The Committee notes, with approval, that the explanatory statement for the instrument addresses the retrospectivity issue:

Retrospectivity

This instrument commences retrospectively on 1 December 2020 to ensure application to wages paid during December 2020 and follow from the operation of *Taxation Administration*

(Payroll Tax—Businesses Not Permitted to Operate) COVID-19 Exemption Scheme Determination 2020, DI2020-279.

Section 76(1) of the *Legislation Act 2001* provides that a statutory instrument may commence retrospectively provided it is non-prejudicial, that it does not operate to the disadvantage of a person by adversely affecting the person's rights or imposing liabilities on the person. This instrument provides a concession on the payroll tax payable for businesses affected by COVID-19 restrictions and supports economic recovery. It promotes a purpose which will be of overall benefit to the ACT community.

The Committee also notes that the explanatory statement for the instrument also addresses human rights issues:

Human Rights Act 2004

This instrument provides an exemption to payroll tax and does not limit, and is consistent with, human rights. By providing exemption to wages paid or payable by eligible employers, it promotes the right to work (section 27B of the *Human Rights Act 2004*) by supporting jobs for those in ACT community affected by the COVID-19 pandemic.

In accordance with the legislation, the Determination includes a statement about whether the scheme is consistent with human rights.

The ACT Human Rights Commission has been consulted on the Determination.

The Committee notes that, in addition, section 7 of the instrument itself provides:

7 Human Rights Act 2004

In my opinion, as the Minister, this instrument is consistent with human rights. This instrument is non-prejudicial because it does not limit existing rights.

The second instrument mentioned above, similarly, extends to 30 June 2021 the operation of a previous exemption of eligible employers from the requirement to pay payroll tax in relation to eligible apprentices and trainees. However, it is not given retrospective effect. Instead, section 2 of the instrument provides that it commences from the day after notification on the ACT Legislation Register – 20 January 2021.

The Committee notes that, despite the lack of any express retrospective effect, the definition of **eligible employee**, in section 3 of the instrument, and the substantive determination, in section 4, indicate that the determination is intended to operate from 1 August 2020. The explanatory statement also states:

The exemption applies to wages paid or payable to eligible employees for the period 1 August 2020 to 30 June 2021.

This being so, it is not clear why the first instrument mentioned above is given a retrospective effect and the second instrument is not.

The Committee seeks the Minister's assistance on the issue of why it is not necessary for the second instrument mentioned above to be expressly given a retrospective commencement.

This comment requires a response from the Minister.

The commencement issue aside, the Committee notes that the explanatory statement for the second instrument mentioned above addresses human rights issues and that section 7 of the instrument itself is in similar terms to section 7 of the first instrument.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for these instruments and to the statement in section 7 of each instrument.

The comment immediately above does not require a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Transport and City Services, in relation to comments made in Scrutiny Report 1 concerning the Plastic Reduction Bill 2020.

[This response⁵](#) can be viewed online.

- Minister for Skills, dated 1 March 2021, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2020-241—Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 4).
- The Treasurer, dated 23 February 2021, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2020-273—Financial Management (Territory Authorities) Guidelines 2020 (No 2).
- The Minister for the Environment, dated 15 February 2021, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2020-284—Commissioner for Sustainability and the Environment Appointment 2020 (No 3) (received via email 17 February 2021).

[These responses⁶](#) can be viewed online.

The Committee wishes to thank the Minister for Skills, the Treasurer, and the Minister for the Environment for their helpful responses.

Jeremy Hanson MLA
Chair

24 MARCH 2021

⁵ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-bills>.

⁶ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.