



## **Legislative Assembly for the Australian Capital Territory**

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

# **Scrutiny Report 19**

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

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Approved for publication

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10th Assembly  
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# About the committee

## Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 2 December 2020.

The Committee is responsible for the following areas:

- (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;

You can read the full establishing resolution [on our website](#).

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Julia Agostino, Committee Secretary

Kathleen de Kleuver, Assistant Committee Secretary

Emma Weaver, Administration Assistant

Daniel Stewart, Legal Adviser (Bills)

## Contact us

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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.

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# 1. Bills - Proposed Amendments

## Drugs of Dependence (Personal Use) Amendment Bill 2021

- 1.1. The Committee has received proposed government amendments to the Drugs of Dependence (Personal Use) Amendment Bill 2021 along with a supplementary explanatory statement. The amendments will:
- delay commencement of the legislation for 12 months from notification;
  - change terminology, including changing ‘personal possession limit’ to ‘small quantity’;
  - provide for an offence of possessing multiple small quantities of different kinds of illicit substances;
  - allow for offence notices to provide for attendance at a drug diversion program as an alternative to payment of a penalty to discharge the liability for simple drug offences;
  - reduce the maximum prison sentence for person possession offences for all illicit drugs;
  - provide for a review of the amendments after 2 years of operation; and
  - allow for the list of drugs and quantities eligible for reduced penalties to be prescribed in regulations rather than listed in the Drugs of Dependence Act.

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

- 1.2. The Committee notes that the Amendment will revise the proposed amendments to the offence in subsection 171(1) relating to the possession of cannabis. The proposed amendments will generally continue the offence for a person to possess not more than a small quantity of cannabis, though what constitutes a small amount will be prescribed in regulations. The proposed amendments, like the Bill, will continue to apply this offence only to persons who are under 18 years of age.

- 1.3. This Committee, in Scrutiny Report 2, in commenting on the Bill stated:

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 [*Human Rights Act 2004*]. 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.

- 1.4. Limiting the offence of possessing a small quantity of cannabis to persons under 18 years of age has a flow on effect in the proposed amendments for the proposed offence of possessing multiple small quantities of different kinds of relevant substances. A relevant substance for the purpose of that multiple small quantities offence only includes cannabis for a person who is under 18 years of age. The supplementary explanatory statement accompanying the proposed amendments describes this distinction as resulting from the absence of criminal penalties for possession of small quantities of cannabis by persons over 18 years of age. The same justification for why a person under 18, but not over 18, should continue to be exposed to offences relating to small quantities of cannabis possession would therefore presumably apply.
- 1.5. The justification for differential treatment of persons under 18 in respect of cannabis possession but not in relation to other prescribed drugs of dependence or prohibited substances therefore relies on the health effects on children and young people of cannabis and vulnerability of children to those effects in the absence of a prohibition. This is consistent with a general description in the explanatory statement accompanying the Bill of the Bill's purpose being to prioritise a health-focused response to illicit drug use and diversion away from the criminal justice system. This purpose is also reflected in the supplementary explanatory statement accompanying the proposed amendments.
- 1.6. However, the Committee is concerned that this focus on health effects is not reflected in the proposed amendments in the establishment of what constitutes a small quantity. The proposed amendments do not set any basis for selection of the drug or substance nor the quantity which will be considered small. The proposed amendments may therefore insufficiently limit the factors which may be taken into consideration in prescribing what constitutes a small amount for the purpose of the new provisions.
- 1.7. The supplementary explanatory statement, in the overview of amendments, suggests the shift to prescribing small amounts in regulation is to allow the list of drugs and amounts to "be more easily amended to take into account changing trends in the future". The clause notes describe the shift to regulations as "for consistency with other areas of legislation. This will also facilitate any future changes to the list as required". The reference to consistency with legislation is taken up later in the clause notes:

A small quantity has been defined as an amount not more than the prescribed small quantity limit, rather than only for possession of amounts below that limit (as set out in the Private Member's Bill), for consistency with limits in other areas of legislation.
- 1.8. The Committee is concerned that there is inadequate justification for the definition of what constitutes a small amount of an illicit substance to be left to regulations without limitation on what factors may be taken into consideration in the selection of substances and amounts to be prescribed. The Committee notes that, in their letter to the Committee, the Minister refers to proposed regulations being circulated to fully inform members of the



government's intentions under the reform. However, this would not limit future changes to the regulations, nor necessarily provide the basis on which the drugs and amounts included in proposed regulations were selected.

- 1.9. The Committee therefore requests that the Minister provide further justification for why it is considered necessary for small amounts to be as prescribed in regulations, and consider amending the supplementary explanatory statement to include this justification.

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

- 1.10. The Committee has also received proposed amendment to the Drugs of Dependence (Personal Use) Amendment Bill from Mr Davis. These amendments will further amend the government's proposed amendments by altering the definition of attendance requirements for an approved drug diversion program. The Committee has no comments on this proposed amendment.

Peter Cain MLA

Chair

August 2022