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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

SUPPLEMENTARY EXPLANATORY STATEMENT

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JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

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JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

Government Amendment

The Bill, including the Government amendment, is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HRA).

Outline of Government Amendment

On 9 November 2021 the Justice and Community Safety Legislation Amendment Bill 2021 (the Bill) was introduced to the Legislative Assembly. The Bill makes amendments to improve and clarify legislation administered by the Justice and Community Safety Directorate.

The Government amendment (the Amendment) to the Bill is required to urgently address an issue with the defence of mental impairment, which is described in the *Criminal Code 2002* (the Code).

The purpose of the Amendment is to confirm that an accused claiming the defence of mental impairment has a legal burden to prove, not only that they had a mental impairment, but that the impairment had one of the effects listed in subsection 28 (1) of the Code (the s 28 (1) effects).¹

In a recent decision of the ACT Supreme Court (*R v Yeaman* [2021] ACTSC 252) the Court found that although it had been previously accepted that the accused bore a legal burden to prove both aspects of the defence, and although this was the apparent intention of the legislature, the wording of section 28 of the Code failed to give effect to this intention.² The Court held the Code does not explicitly state that the accused has a legal burden of proof to establish that the mental impairment had one of the s 28 (1) effects.³ Therefore:

- The accused only has an evidential burden of proof to establish that their mental impairment had one of the s 28 (1) effects.⁴ An evidential burden of proof on the accused only requires the accused to raise the matter as a reasonable possibility.⁵
- The burden of proof then shifts to the prosecution to establish, beyond reasonable doubt, that the mental impairment did not have one of the s 28 (1) effects.⁶ If the

¹ A legal burden on the accused must be discharged on the balance of probabilities: *Criminal Code 2002* s 60.

² *R v Yeaman* [2021] ACTSC 252, [122].

³ *R v Yeaman* [2021] ACTSC 252, [121].

⁴ *R v Yeaman* [2021] ACTSC 252, [120], *Criminal Code 2002* s 59.

⁵ *Criminal Code 2002* s 58 (7).

⁶ *R v Yeaman* [2021] ACTSC 252, [123], *Criminal Code 2002* s 56 (2).

prosecution cannot negate this claim beyond reasonable doubt, the accused must be found not guilty.

This creates the risk that an accused with a mental impairment will be entitled to acquittal, even in circumstances where it is highly unlikely that their mental impairment relevantly affected their offending behaviour. This raises significant concerns for community safety and justice for victims of crime.

Each Australian jurisdiction has adopted the defence of mental impairment. In each jurisdiction, where the accused raises the defence, the defence bears the burden of proving the accused had a mental impairment which had a relevant effect on their offending behaviour.⁷ Most jurisdictions have codified the principle that the standard of proof is the balance of probabilities,⁸ although Queensland, Tasmania and Western Australia rely on the common law for this principle.⁹

The Amendment aligns the approach in the ACT's legislation with that of the Model Criminal Code, the approach taken in other Australian jurisdictions, and indeed the approach that has been previously accepted practice in the ACT.

CONSULTATION ON THE PROPOSED APPROACH

The Director of Public Prosecutions raised concerns about the current wording of the provisions that set the burden of proof for the defence of mental impairment, following the decision in *R v Yeaman* [2021] ACTSC 252. The Registrar of the ACT Supreme Court also highlighted this decision, as her Honour Chief Justice Murrell noted at paragraph 122 that the relevant provisions did not appear to give effect to the legislature's intention.

The Justice and Community Safety Directorate then consulted with key government and non-government stakeholders to seek views on the proper operation of the defence of mental impairment. These views have been considered and balanced, noting the competing interests of justice stakeholders in the operation of this defence.

⁷ *Criminal Code 1995* (Cth) s 7.3 (1), *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 28 (1), *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20 (1), *Criminal Code Act 1983* (NT) s 43C, *Criminal Code Act 1899* (QLD) s 26, *Criminal Code Act Compilation Act 1913* (WA) s 27, *Criminal Law Consolidation Act 1935* (SA) s 269C and *Criminal Code Act 1924* (Tas) s 16.

⁸ *Criminal Code 1995* (Cth) s 7.3 (3), *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 28 (2) and (3), *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 21, *Criminal Code Act 1983* (NT) s 43E and *Criminal Law Consolidation Act 1935* (SA) ss 269F (A) (3) and 269G (B) (3).

⁹ See eg. *The Queen v Michael John Osborne* [2020] QDC 82, *Walsh v The Queen* (1993) 22 Tas R 368 and *Western Australia v Petersen-Crofts* [2021] WASC 47.

CONSISTENCY WITH HUMAN RIGHTS

Rights Engaged

The Amendment engages section 22 (1) of the HRA (the right to be presumed innocent).

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.¹⁰

Section 28 of the HRA requires that any limitation on a human right must be authorised by a Territory law, pursue a legitimate aim based on evidence, be rationally connected to as to achieve that legitimate aim, and be proportionate. Whether a limitation is permissible can be understood and assessed as explained in *R v Oakes*¹¹. A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”¹².

¹⁰ Colvin, M & Cooper, J, 2009 *Human Rights in the Investigation and Prosecution of Crime* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *Positive obligations under the European Convention on Human Rights*, Council of Europe.

¹¹ [1986] 1 S.C.R. 103.

¹² *R v Oakes* [1986] 1 S.C.R. 103.

The Amendment's limitation on human rights is reasonably justified in the circumstances because it pursues a legitimate aim in the least restrictive manner available to appropriately test the defence of mental impairment.

Rights Limited

The Amendment engages and limits the right to the presumption of innocence (section 22 (1) of the HRA), because it requires an accused to present or point to evidence.

Detailed human rights discussion

Section 22 (1) – right to presumption of innocence

Section 22 (1) of the HRA states that:

22 Rights in criminal proceedings

(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The presumption of innocence is contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and is one of the guarantees in relation to legal proceedings contained in article 14. This right is reflected in section 22 (1) of the HRA as set out above. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

The right to the presumption of innocence is engaged whenever an accused bears a burden of proof. The degree of impact on this right will vary depending on the standard of proof imposed.

As described above, the ACT Supreme Court recently found that the existing provisions of the Code only impose an evidential burden of proof on an accused asserting that their mental impairment had a relevant effect (a s 28 (1) effect). The Amendment engages the right to the presumption of innocence by clarifying that in these circumstances the accused bears a legal burden of proof.

A legal burden of proof is a higher standard than an evidential burden. Under the Amendment, the accused must prove their mental impairment had a s 28 (1) effect on the balance of probabilities, instead of merely establishing a reasonable possibility that it had this effect.

2. Legitimate purpose (s 28 (2) (b))

The purpose of this limitation is to ensure that an accused will only be successful in claiming the defence of mental impairment if it is likely that their mental impairment relevantly affected their offending behaviour. It is in the interests of the community that a person accused of a criminal offence should have a higher burden of proof when claiming a defence of mental impairment, and by extension, reduce the risk that an accused will avoid being found guilty in circumstances where they were, in fact, criminally responsible

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

The defence of mental impairment is intended to apply where all elements of the offence have been established, but nonetheless it is likely that the accused had a mental impairment which negated their criminal responsibility. Requiring that an accused claiming this defence should establish this fact on the balance of probabilities delivers on this objective.

The presence or absence of a mental impairment is not determinative of criminal responsibility, noting the definition of “mental impairment” is deliberately very broad.¹³ The most important aspect of the defence of mental impairment is the question of whether the impairment had a relevant effect on the offending behaviour.

4. Proportionality (s 28 (2) (e))

Confirming that there is a legal burden of proof on an accused claiming this defence is proportionate, and the least restrictive means possible in the circumstances.

An evidential burden of proof would be less restrictive on the right to be presumed innocent. However, this standard of proof would not achieve the purpose of ensuring the defence of mental impairment only applies where it is likely that the mental impairment did in fact negate the accused’s criminal responsibility.

Where an evidential burden applies, an accused who had a mental impairment at the time of the offending behaviour would be able to avoid being found guilty on the basis of little or no evidence that the mental impairment had a relevant effect. Taking into account the nature of psychiatric evidence, which may be equivocal and contested, it would be effectively impossible for the prosecution to establish that a mental impairment could not have had a relevant effect.

Crucially, the prosecution will still have a duty to prove, beyond reasonable doubt, any fault elements of the offence.

¹³ *Criminal Code 2002* s 27.

Justice and Community Safety Legislation Amendment Bill 2021 – Government Amendment

Detail

Part 1 – Preliminary

Clause 2 (1)

This clause inserts a reference to the part of the Act containing the Amendment (part 7A).

Clause 1 — Commencement

This clause provides that the Amendment will commence on the day after the Act's notification day.

Clause 2 (1) — Legislation Amended

This clause lists the legislation amended by this Bill. This Amendment inserts a reference to the *Criminal Code 2002*.

Part 7A – Criminal Code 2002

Clause 15A – Mental impairment and criminal responsibility Section 28 (4) and (5)

This clause substitutes existing subsections 28 (4) and (5) with new subsections which specify that the mental impairment referred to is the type of mental impairment referred to in subsection 28 (1) (a mental impairment which had one of the effects listed in paragraphs 28 (1) (a)-(c)).

The effect of this Amendment is to confirm that there is a presumption that a person does not have a mental impairment with one or more of the effects listed in paragraphs 28 (1) (a)-(c), and to confirm that this presumption can be displaced on the balance of probabilities.