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**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**Presented by  
SHANE RATTENBURY MLA  
ATTORNEY-GENERAL  
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# JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024

This explanatory statement relates to the Justice and Community Safety Legislation Amendment Bill 2024 (the Bill) – Government amendments as presented to the Legislative Assembly.

## BACKGROUND

The Bill was introduced into the Assembly on 15 May 2024. It makes a range of minor changes to legislation administered by the Justice and Community Safety Directorate.

The Government amendments to this Bill seek to add three further minor legislative changes to allow these time-sensitive matters to be finalised before the end of the tenth Legislative Assembly.

## OVERVIEW OF GOVERNMENT AMENDMENTS

### Amendment to the *Parentage Act 2004*

This amendment will omit a requirement for independent counselling for surrogacy arrangements that was introduced into the *Parentage Act 2004* (Parentage Act) by the *Parentage Surrogacy Amendment Act 2024*, passed by the Legislative Assembly on 25 June 2024.

It will remove the requirement in section 28A(2) for counselling for birth parents and intended parents to be provided by separate counsellors, and this change will operate retrospectively, to have effect from the commencement of the *Parentage Surrogacy Amendment Act 2024*.

This amendment responds to concerns raised by stakeholders following the passage of the reforms, that the requirement for separate counsellors is not consistent with the counselling practice of the Australian and New Zealand Infertility Counsellors Association (ANZICA). Following further consultation with key stakeholders the Government is satisfied that there may be benefits from a counselling model using a single counsellor for all parties and that potential conflicting interests can be managed effectively through counsellors professional ethical frameworks.

The current requirement for independent counselling for certifying that a surrogate under 25 years old has sufficient maturity and understanding of the implications involved in surrogacy arrangements (s28C(3)) will be retained as this is considered to be an important safeguard to protect vulnerable younger people. The requirement for pre-conception counselling to be independent from the doctor, institution and other entities involved in carrying out the procedure of getting the surrogate pregnant (section 28A(5) and section 28C(4)) will also be retained.

### Amendment to the *Crimes Act 1900*

The *Crimes Legislation Amendment Act 2024*, introduced in April 2024, amended the *Juries Act 1967* (Juries Act) to establish a majority verdicts scheme. The majority verdicts scheme will commence in October 2024 and is intended to apply to all Territory offences without exception.

The majority verdicts scheme will provide that, under certain circumstances, a majority verdict will be accepted in the ACT for establishing criminal guilt instead of a unanimous verdict.

Section 56 of the *Crimes Act 1900* (Crimes Act) (Persistent sexual abuse of a child) gives effect to Recommendation 21 of the Royal Commission into Institutional Responses to Child Sexual Abuse's *Criminal Justice Report*. The Royal Commission recommended, inter alia, each State and Territory Government should introduce legislation to amend its persistent child sexual abuse offence so that:

- a. the actus reus is the maintaining of an unlawful sexual relationship;
- b. an unlawful sexual relationship is established by more than one unlawful sexual act;
- c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts.

To give effect to this, section 56 provides that:

1. the trier of fact is to be unanimously satisfied beyond reasonable doubt that the actus reus of the relationship existed (section 56(3)); and
2. if the trier of fact is a jury, there is no requirement for all members of the jury to agree on the same sexual acts committed as part of the relationship – only that the relationship existed and that it involved more than one sexual act (section 56(4)).

The amendment to section 56(3) is a technical amendment intended only to make this provision consistent with other criminal provisions in the application of the majority verdict scheme.

Under the amended section 56(3) and consistently with the Juries Act, a majority of jurors may decide that an unlawful relationship existed. Section 56(4) means that the jurors are not required to agree on the same sexual acts committed as part of the relationship.

### Amendment to the *Corrections Management Act 2007*

Section 44(2) of the Corrections Management Act (CMA) gives effect to the right in section 19(2) of the *Human Rights Act 2004* (HRA), which requires that an accused person must be segregated from convicted people, except in exceptional circumstances. The right of non-convicted people to be segregated from convicted people follows the fundamental principle that a person is innocent until proven guilty,

and so should be treated differently from someone who has been convicted of an offence.

Accordingly, section 44(2) of the CMA provides that separating convicted detainees from non-convicted detainees is the general rule for accommodation decisions made by the director-general. It requires that the director-general must ensure that convicted detainees are accommodated separately from non-convicted detainees.

Section 44(4) provides for circumstances in which the director-general may depart from this requirement by giving a direction for different accommodation arrangements in relation to an individual non-convicted detainee.

The amendment to section 44(4) provides that the director-general may make a different accommodation direction in two circumstances: to protect the safety of the non-convicted detainee or anyone else, or where different accommodation would be in the non-convicted detainee's best interests. In both circumstances, the director-general must be satisfied that it is 'reasonably necessary' to give an accommodation direction which differs from the general rule in section 44(2).

## **CONSULTATION ON THE PROPOSED APPROACH**

The Justice and Community Safety Directorate (JACS) has consulted with ANZICA representatives and other key stakeholders to inform the proposed Parentage Act amendments.

To inform the amendment to the CMA, JACS has consulted with ACT Corrective Services (ACTCS), the ACT Human Rights Commission and the ACT Director of Public Prosecutions.

## **CLIMATE IMPACT**

Nil for these proposed amendments.

## **CONSISTENCY WITH HUMAN RIGHTS**

During the development of the Government amendments to the Bill, due regard was given to their compatibility with human rights as set out in the HRA.

An assessment of the Bill against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

## **Rights engaged**

The amendments engage the following rights under the HRA:

- the right to protection of the family and children (section 11));
- the rights to a fair trial (section 21);
- the right to work (section 27B);

- the right to humane treatment when deprived of liberty (section 19); and
- the right to liberty and security of person (section 18).

### ***Rights Promoted***

#### Amendment to the *Parentage Act 2004* – protection of the family and children

The rights of the family and children, including those born through surrogacy, are enshrined in the HRA and further described in the *Convention on the Rights of the Child* (CRC), to which Australia is a party.

The amendments will remove a restriction on using a single counsellor for all parties to a surrogacy arrangement. By allowing the mandatory counselling for all parties (except when involving a surrogate under 25) to follow an independent or a single-counsellor approach, the amendment provides greater flexibility for counselling to occur in the manner chosen by the parties. This may have benefits in providing a more joined-up and collaborative approach that may encourage more open communication. This change may have positive consequences for the parties and the babies born into surrogacy.

#### Amendment to the *Parentage Act 2004* – right to work

The right to work may be promoted by the omission of section 28A(2) of the Parentage Act which provides that the intended parent or parents must receive counselling from a person who is different from the person from whom the birth parent and their partner (if any) received counselling.

Section s 27B (1) of the *Human Rights Act 2004* (Human Rights Act) provides that “Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

By removing a restriction on practice, this amendment may have a positive impact on counsellors right to work.

#### Amendment to the *Corrections Management Act 2007* – right to humane treatment when deprived of liberty

The right to humane treatment when deprived of liberty may be promoted through the amendment to the CMA. The right to humane treatment when deprived of liberty is aimed at ensuring detained people are held in conditions befitting their inherent dignity as human beings, despite the fact they may have been accused or convicted of serious offences. This amendment will allow the director-general to make an individualised assessment of the appropriate accommodation requirements based on the safety of the detainee or anyone else, or the best interests of the detainee. There may be situations where a decision not to segregate a non-convicted detainee from convicted detainees is in their best interests and promotes their basic and essential needs.

For example, the director-general may decide it is reasonably necessary for a non-convicted detainee to be housed with convicted detainees if:

- the non-convicted detainee requires medical treatment which can most appropriately be provided in a specialised area of the Alexander Maconochie Centre (AMC) which is also accessed by convicted persons; or
- the non-convicted detainee requests to be accommodated with a family member who is a convicted person.

### Right to liberty and security of person – amendment to the *Corrections Management Act 2007*

The right to liberty and security of person may be promoted through the amendment to the CMA. The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the person is detained. The right to personal security obliges government to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity from public authorities or private individuals.

This amendment promotes the right to security of person of a non-convicted detainee by allowing the director-general to make an individual assessment of the appropriate accommodation requirements based on the safety of the non-convicted detainee or anyone else. For example, the director-general may decide it is reasonably necessary for a non-convicted detainee to be housed with convicted detainees if the non-convicted detainee may be at risk of harm from other non-convicted detainees or pose a risk to other non-convicted detainees.

### ***Rights Limited***

The preamble to the HRA notes that few rights are absolute and that they may be subject to 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.

Section 28 of the HRA requires that any limitation on a human right be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R. v. Oakes* [1986] 1 S.C.R. 103 at 70. A party must show:

*“... [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”.*

#### Amendment to the *Parentage Act 2004* – no rights limited

The amendment to the *Parentage Act 2004* is not considered to limit human rights. While the requirement for independent counsellors was considered to be a potential safeguard against conflict of interest, there are existing ethical frameworks for professional counsellors to manage these issues appropriately.

There are also significant additional safeguards in the *Parentage Act 2024* which protect surrogates including a requirement for birth parents to receive independent legal advice, and additional requirements for surrogates under 25.

#### Amendment to the *Crimes Act 1900* - rights to a fair trial

The amendment to the Crimes Act is not considered to limit human rights. When the *Crimes Legislation Amendment Act 2024* introduced the majority verdicts scheme, it was assessed as limiting section 21 of the HRA (the right to a fair trial) and was considered to be for a legitimate purpose and proportionate. This amendment to the Crimes Act simply clarifies that majority verdicts provisions apply to section 56(3) of the Crimes Act.

By amending the Juries Act to only require 11 jurors out of 12 to be in agreement for a verdict, the Crimes Legislation Amendment Act 2024 was engaging and limiting the right to a fair trial by amending the requirements for the decision by a “competent, independent and impartial court or tribunal” (which permits, and in some instances requires, a trial by jury). The amendment was deemed to be proportionate and a reasonable limitation. The legitimate purpose of the limitation was to promote the effectiveness of the criminal justice system and to recognise that in a diverse community, people may not always agree, or alternatively that one or several people may be unreasonable or unrepresentative of the community. This limitation was also intended to protect victims of crime by reducing the likelihood that they would be required to provide evidence, be cross-examined and live through the potentially traumatic experience of a trial more than once in circumstances where there is evidence that the majority of the jury (11 of 12 jurors) considered that the offence was committed beyond reasonable doubt.

Further, the amendment included a requirement that a reasonable period (of at least 6 hours) to have passed, having regard to the complexity and nature of the trial, as an important safeguard for the independence and impartiality of the relevant court and the right to a fair trial before a majority verdict can be offered.

Amendment to the *Corrections Management Act 2007* – the right to humane treatment when deprived of liberty

*1. Nature of the right and the limitation (section 28 (a) and (c))*

The proposed amendment may limit the right to humane treatment when deprived of liberty set out in section 19 of the HRA. Section 44(2) of the CMA gives effect to the right in section 19(2) of the HRA, which requires that an accused person must be segregated from convicted people, except in exceptional circumstances. The segregation of convicted and non-convicted detainees will remain the general rule for accommodation decisions made by the director-general.

The amendment prescribes two circumstances where the director-general may depart from the requirement to ensure convicted detainees are accommodated separately from non-convicted detainees: to protect the safety of the non-convicted detainee or anyone else, or where different accommodation would be in the non-convicted detainee's best interests. In both circumstances, the director-general must be satisfied that it is 'reasonably necessary' to give an accommodation direction which differs from the general rule in section 44(2).

*2. Legitimate purpose (section 28 (b))*

The legitimate purpose of this amendment is to promote the safety and wellbeing of people held in correctional facilities, and to ensure the best interests of an individual non-convicted detainee are considered when determining accommodation requirements.

Safety is an important consideration for accommodation decisions within a correctional centre. The complexity of the detainee population means that the safety of a non-convicted detainee may be compromised by them remaining with other non-convicted detainees due to their specific circumstances, or that they may compromise the safety of others. Given the ACT's small population, and the need to tailor resources to the needs of detainees, the practical realities of the correctional setting and the ACT's single-facility structure means that strict implementation of segregation may, in some circumstances, have the adverse outcome of compromising the safety of detainees while remanded. While the law will require the director-general to maintain both segregation and safety where possible, the elevation of the right to safety of the non-convicted detainee and anyone else is a reasonable limitation on the right to segregation, where the two rights are in contest.

The amendment also permits the director-general to make a different accommodation direction where the director-general is satisfied that it is reasonably necessary to do so in the best interests of the non-convicted detainee. Factors in the best interests of the non-convicted detainee may include:



- facilitating accommodation necessary for the appropriate medical or mental health care of the remanded detainee, such as provided in a high-care accommodation unit where segregation is not possible in the AMC; or
- facilitating the maintenance of familial or cultural ties within the AMC, for example by allowing a remanded detainee to be accommodated with a convicted family or kinship group member.

Circumstances in which such a direction may be reasonably necessary could include where it is in the best interests for a detainee to be accommodated in one of the specialist units at the AMC to ensure their needs can be met, but where segregation is not possible. For example, the Assisted Care Unit (ACU) at the AMC is a 19-bed unit and accommodates male detainees who are presenting with a range of complexities and vulnerabilities, including all ranges of mental health conditions and disabilities. The ACU is a structured and supportive space to which both convicted and non-convicted detainees have access. Each detainee is allocated a clinician to support them with individual support plans and care coordination. This focuses on the detainees' individual goals, mental health and well-being, and promotion of accessibility to general prison life. It is not possible, within a single facility, to duplicate services such as those provided in the ACU across multiple units. The direction-making power would facilitate access to the ACU for an individual non-convicted detainee where it was in their best interests for that to occur, despite separation from convicted detainees not being possible as a result.

The speciality units have been designed and incorporated into the operations of the AMC with the individual needs and best interests of the detainee in mind, to support their needs within the correctional environment. If convicted and non-convicted detainees must be separated, without regard to their individual needs and circumstances, it may be that a detainee cannot receive the high level of specialist support that they require or are currently receiving. Access to these units where needed promotes detainees' rights to humane treatment whilst at the AMC.

### *3. Rational connection between the limitation and the purpose (section 28 (d))*

Allowing for directions to be made for the different accommodation of a non-convicted detainee in the two circumstances set out in section 44(4) is rationally connected to the legitimate purpose.

The AMC services a small jurisdiction accommodating various detainee cohorts in one prison complex, including: convicted and non-convicted detainees, minimum to maximum security classifications, male and female detainees. The correctional system generally services high risk populations, such as detainees under protective custody, detainees who are not able to interact with each other due to safety concerns or other interpersonal or inter-group conflict, and those with complex mental health, disability, or other requirements. Within these constraints, non-segregation will sometimes be required to ensure that the personal and safety needs of individual detainees can be met.

#### *4. Proportionality (section 28 (e))*

Section 44(4) requires that the director-general must be satisfied that the differing accommodation is reasonably necessary to protect the safety of the detainee or anyone else, or that it is in the best interests of the detainee based on each individual assessment. These two matters are the only factors the director-general may consider when assessing whether a direction is reasonably necessary.

The limit to two considerations reflects the nature and importance of the engaged right at section 19(2) of the HRA. The considerations reflect the right of detainees to security of person (section 18(1) HRA) and the right to be treated humanely while deprived of their liberty (section 19(1) HRA).

Constraining the circumstances in which the right may be limited to these two circumstances is a proportionate limitation on the right. It is the least rights restrictive alternative reasonably available, in the context of finite resourcing and the relatively small numbers of persons detained in the ACT's single adult corrections facility.

To ensure the limitation on the right in section 19(2) is reasonable and proportionate, the amendment requires that the director-general must be satisfied that it is 'reasonably necessary' to give an accommodation direction which differs from the general rule in section 44(2).

There is limited international human rights case law discussing where exceptional circumstances may arise in the context of this right under the International Covenant on Civil and Political Rights. 'Exceptional circumstances' may not address all circumstances in which non-segregation may be required in the ACT to promote the safety and wellbeing of people held in correctional facilities, and ensure their best interests are considered when determining accommodation requirements.

Instead, this approach provides that in reasonable and necessary circumstances, the right to segregation may be limited in accordance with section 28 of the HRA. The amendment is designed to ensure decisions about accommodation under section 44, including directions to depart from segregation, are made on the basis of the individual circumstances of a detainee. By specifically defining the two permissible purposes for which a different accommodation direction can be made, the amendment also facilitates its clear incorporation into operating procedures and policies to better achieve a proper weighing of risks and benefits in determining the placement and accommodation of remandees on a routine basis.

This legislative amendment is intended to be supported by operational changes currently being developed by ACTCS. This will include updates to various policies and procedures to facilitate greater adherence to the general rule of separation under s 44(2) of the CMA. The changes to policy and procedures will provide guidance to custodial officers when making a decision in relation to accommodation, with separation as the starting point. While ACTCS will strive for separation to the greatest extent possible, full separation based on legal status is not achievable within a single

correctional facility. Individual assessments of each detainee will therefore be central to determining where a direction for different accommodation is required to protect safety and to uphold a detainee's best interests, in accordance with the new section 44 (4).

While the starting point for accommodation decisions remains compliance with the general rule for separation of convicted and non-convicted detainees, this person-centred approach ensures that exceptions to separation only arise in circumstances that are reasonable and necessary to ensure the safety and wellbeing of non-convicted detainees, or the safety of anyone else, irrespective of whether they amount to 'exceptional circumstances'. The amendment accordingly better supports the government's compliance with its obligations under the HRA and CMA, in the context of the ACT's correctional setting.

## CLAUSE NOTES

### **Amendment 1 – Clause 2 (1)**

This amendment substitutes clause 2 (1) of the Bill to omit the reference to parts 6 and 7 of the JACS Bill and replace this with references to parts 4A, 6, 7 and 7A of the JACS Bill.

This will mean that the Act (other than Parts 4A, 6, 7 and 7A) will commence on the day after its notification day.

### **Amendment 2 – Proposed new clause 2 (1A)**

This amendment provides that Part 4A commences on the commencement of the *Crimes Legislation Amendment Act 2024*, section 14, which will commence on 19 October 2024.

### **Amendment 3 – Proposed new clause 2 (3)**

This amendment provides that Part 7A is taken to have commenced on the commencement of section 3 of the *Parentage (Surrogacy) Amendment Act 2024*, being 10 July 2024.

The retrospective commencement of these reforms will not disadvantage parties who have accessed or are in the process of accessing surrogacy under the reforms. Rather it will allow greater flexibility, coherence and uniformity providing legal clarity and consistency.

## **Amendment 4 – Clause 3, proposed new dot points**

Clause 3 lists the legislation amended by the *Justice and Community Safety Legislation Amendment Act 2024*.

This amendment inserts the *Crimes Act 1900* and the *Parentage Act 2004* to this list.

## **Amendment 5 – Proposed new Part 4A**

### **Part 4A – Crimes Act 1900**

#### Section 11A – Persistent sexual abuse of child or young person under special care – Section 56(3)

New section 11A omits the word “unanimously” from section 56(3) of the *Crimes Act 1900*, to provide that “the trier of fact must be satisfied beyond reasonable doubt that the relationship existed”.

This is a technical amendment to make the provision consistent with the Territory’s other criminal provisions in the application of the majority verdict scheme. Under the amended section 56(3), and consistently with section 38 of the Juries Act, a majority of jurors may decide that an unlawful relationship existed.

#### Clause 11B – Section 56 (3), new note

This amendment inserts a note to section 56 (3) to clarify that the amendment of section 56 (3) is simply to ensure consistency with majority verdicts under the Juries Act.

## **Amendment 6 – Proposed new part 7A**

### **Part 7A – Parentage Act 2004**

This amendment omits section 28A (2) of the *Parentage Act 2004* to remove the prohibition on a single counsellor providing mandatory counselling to birth parents and intended parents.

## **Amendment 7 – Proposed new section 44(4)**

### **Section 44(4) – Corrections Management Act 2007**

This amendment replaces the current section 44(4) of the *Corrections Management Act 2007* to clarify the circumstances under which the director-general may direct exceptions to the accommodation requirement in section 44(2).