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

TENTH ASSEMBLY

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024

SUPPLEMENTARY EXPLANATORY STATEMENT

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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 two 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.

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.

CLIMATE IMPACT

Nil for these proposed amendments.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The amendments engage:

- the right of the child to the protection they require (section 11(2), *Human Rights Act 2004*);
- the rights to a fair trial (section 21, *Human Rights Act 2004*); and
- the right to work (section 27B, *Human Rights Act 2004*)

Rights Promoted

Section 11 - 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), which Australia is a signatory to.

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.

Section 27B - 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.

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.

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 Human Rights Act (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.

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.