

## CLAUSE NOTES

### *Justice Miscellaneous (Commission of Inquiry) Bill 2024*

#### Clause 1      **Short title**

Specifies the name of the proposed Act.

#### Clause 2      **Commencement**

Provides for the Act to commence 30 days after the day on which the Act receives the Royal Assent, except Part 4 which is taken to have commenced on 1 May 2020.

#### Clause 3      **Repeal of Act**

This is a standard provision for amending legislation, repealing the amending Act one year after all amendments are incorporated into the principal Acts.

### **PART 2**

#### Clause 4      **Principal Act**

Provides that the *Annulled Convictions Act 2003* is the 'Principal Act' referred to under this Part.

#### Clause 5      **Section 3 amended (Interpretation)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence'.

### **PART 3**

#### Clause 6      **Principal Act**

Provides that the *Child and Youth Safe Organisations Act 2023* is the 'Principal Act' referred to under this Part.

#### Clause 7      **Section 7 amended (Meaning of reportable conduct)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*), and the existing crime

in section 124A, into the definition of ‘sexual offence’. The definition of ‘sexual offence’ is relevant to several sections in the Principal Act.

#### **PART 4**

**Clause 8                   Principal Act**

Provides that the *Civil Liability Act 2002* is the ‘Principal Act’ referred to under this Part.

**Clause 9                   Section 3B amended (Civil liability excluded from Act)**

Provides that Part 4, as amended, and Part 10C of the Principal Act both apply to an intentional act that is child abuse, qualifying the Principal Act’s general exemption from application to sexual assault and sexual misconduct in section 3B(1)(A).

**Clause 10               Section 6B inserted**

Inserts a new definition of apology into Part 4 of the Principal Act. Defines ‘child abuse’ and ‘organisation’ in the same way as in Part 10C of the Principal Act.

**Clause 11               Section 7 amended (Effect of apology on liability)**

Amends section 7 of the Principal Act to omit the existing definition of apology replaced by clause 10 and to confirm that section 7 does not apply to an apology in respect of child abuse.

**Clause 12               Section 7A and 7B inserted**

Inserts new sections 7A and 7B into the Principal Act. They set out how organisations are not liable on account of apologies regarding child abuse. New subsection 7A(1) lists three forms of legal protection for organisations. New subsection 7A(2) lists ways in which an apology can be, but does not have to be, made. This includes an acknowledgement of the abuse and its impact. New subsection 7A(3) states that the section does not apply to an apology made by the alleged perpetrator. New subsection 7A(4) lists matters which do not disengage the application of the section to an apology, including matters of retrospectivity and ‘historic’ abuse. New section 7B makes clear that the amendments to the Principal Act do not apply to civil proceedings determined before the Principal Act received the Royal Assent, or those which have commenced but are not determined before the Principal Act received the Royal Assent.

## PART 5

### Clause 13      Principal Act

Provides that the *Community Protection (Offender Reporting) Act 2005* is the 'Principal Act' referred to under this Part.

### Clause 14      Schedule 2 amended (Class 2 offences)

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into Schedule 2 (which contains Class 2 offences). The class of offences is relevant to the application of various sections of the Principal Act.

## PART 6

### Clause 15      Principal Act

Provides that the *Corrections Act 1997* is the 'Principal Act' referred to under this Part.

### Clause 16      Section 3 amended (Interpretation)

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence'. The definition of 'sexual offence' is relevant to whether a prisoner is considered a 'sex offender prisoner' under the Principal Act.

## PART 7

### Clause 17      Principal Act

Provides that the *Criminal Code Act 1924* is the 'Principal Act' referred to under this Part.

### Clause 18      Principal Act amended

Schedule 1 to the Principal Act is amended.

#### *Amendments to section 124A*

Clause 18(a) amends subsection (3) by inserting a 'similar age defence'. The effect of this amendment is that consent will be a defence to a charge of penetrative sexual abuse by a person in a position of authority if the age difference between the accused and the complainant is not more than 2 years.

#### *Inserting new sections 124B and 124C*

Clause 18(b) inserts two new sections. New section 124B creates a new offence of indecent act with or directed at a child [or young person] by a person in a position of authority. Consent is a defence to such a charge only where the age difference between the accused and the complainant is not more than 2 years.

New section 125C creates a new offence of indecent assault of a child [or young person] by a person in a position of authority. Consent is a defence to such a charge only where the age difference between the accused and the complainant is not more than 2 years.

These two new crimes have been collectively referred to as the new 'position of authority offences' through these clause notes.

#### *Amendments to section 125A*

Clause 18(c) inserts the three 'position of authority offences' (sections 124A, 124B and 124C of the *Criminal Code*) into subsection (1), so that each constitutes an 'unlawful sexual act' for the purposes of establishing the crime of persistent sexual abuse of a child or young person.

Clause 18(d) omits current subsection (2) and replaces it with a new provision. The substance of this amendment is to update the terminology in the offence provision, so that instead of referring to the crime being committed when an accused 'maintains a sexual relationship with a young person', it refers to the accused committing 'the persistent sexual abuse of a young person'.

Clause 18(e) – (h) makes consequential changes to the remainder of the subsections to reflect the change in terminology in subsection (2).

#### *Amendments to section 125E*

Clause 18(i) inserts the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence' in subsection (1), with such definition being relevant to the commission of the offence in subsection (2).

Clause 18(j) restricts the operation of the offence in subsection (2) to accused who are over the age of 18.

#### *Amendment to section 326A*

Clause 18(k) inserts the new 'position of authority offences' into the definition of 'sexual offence' in subsection (1), such definition being relevant to the presumption contained in subsection (2).

*Amendments to sections 355, 336, 336B, 337 and 337B*

Clause 18(l) – (p) specifies the two new ‘position of authority offences’ (sections 124B and 124C of the *Criminal Code*) to be alternative verdicts available upon indictments for the crimes of rape, penetrative sexual abuse of a child [or young person] or sexual intercourse with a young person under 17 years of age, penetrative sexual abuse of a child [or young person] by a person in a position of authority, persistent sexual abuse of a child [or young person] or maintaining a sexual relationship with a young person under the age of 17 years.

*Amendments to section 361A*

Clause 18(q) removes the existing requirement in subsection (1) for the accused to enter a plea before pre-trial legal argument can be conducted.

Clause 18(r) introduces a new subsection (3), which clarifies the circumstances in which a decision made by a judge under subsection (1) can be departed from. Those circumstances are (1) when it would not be in the interests of justice for the decision to remain in force, or (2) where the decision would be inconsistent with orders made on appeal.

*Amendment to section 371A*

Clause 18(s) extends the operation of section 371A to trials involving family violence related offending. The effect of this is that, in such trials, where there is evidence suggesting a delay in making a complaint, the trial judge is required to warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the complaint is false, and that there may be good reasons why a person may hesitate in making, or may refrain from making, a complaint.

*New section 430*

Clause 18(t) inserts a new section 430. The new section specifies that where a person is acquitted of summary sexual or family violence offences because the prosecution offered or tendered no evidence, the evidence relevant to those charges may still be used as tendency, coincidence or relationship evidence in subsequent proceedings for sexual or family violence offences involving the same defendant. This provision does not override existing provisions concerning the admissibility of such evidence, but simply provides the acquittal on that basis does not prevent the admission of the evidence for that purpose.

*Amendment to Appendix D*

Clause 18(u) ensures the subsection of section 124A containing the offence provision is referred to.

## **PART 8**

### **Clause 19      Principal Act**

Provides that the *Evidence (Children and Special Witnesses) Act 2001* is the 'Principal Act' referred to under this Part.

### **Clause 20      Section 3 amended (Interpretation)**

Makes consequential amendments to the definitions of 'affected child', 'child sexual offence', 'prescribed proceeding' and 'specified offence' to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*). These amendments ensure the protective provisions of the Principal Act apply to complainants in proceedings against sections 124B and 124C of the *Criminal Code*.

## **PART 9**

### **Clause 21      Principal Act**

Provides that the *Evidence Act 2001* is the 'Principal Act' referred to under this Part.

### **Clause 22      Section 3 amended (Interpretation)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence'. The definition of 'sexual offence' is relevant to many provisions throughout the Principal Act.

### **Clause 23      Section 19 amended (Compellability of spouses and others in certain proceedings)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the list of offences in subsection (b). This list of offences is relevant to the application of section 18 of the Principal Act, which outlines when a person may object to being required to give evidence for the prosecution in a criminal proceeding.

### **Clause 24      Section 194K amended (Publication of certain identifying particulars prohibited)**

Makes a consequential amendment to insert the two new ‘position of authority offences’ (sections 124B and 124C of the *Criminal Code*) into subsection (1)(b), with the effect that in proceedings for either of those charges, a person will not be able to publish any identifying information in respect of the complainant or any other witnesses in the proceedings (other than the defendant).

## **PART 10**

### **Clause 25      Principal Act**

Provides that the *Justices Act 1959* is the ‘Principal Act’ referred to under this Part.

### **Clause 26      Section 61 amended (Interpretation)**

Makes a consequential amendment to insert the two new ‘position of authority offences’ (sections 124B and 124C of the *Criminal Code*) into subsection (2)(a)(i), with the effect that a complainant of those crimes will be classified as an ‘affected person’ for the purpose of preliminary proceedings.

## **PART 11**

### **Clause 27      Principal Act**

Provides that the *Police Offences Act 1935* is the ‘Principal Act’ referred to under this Part.

### **Clause 28      Section 3 amended (Interpretation)**

Makes a consequential amendment to insert the two new ‘position of authority offences’ (sections 124B and 124C of the *Criminal Code*) into the definition of ‘sexual offence’ in subsection (1). This definition is relevant to establishing the offence of loitering near children in section 7A of the Principal Act.

### **Clause 29      Section 39A inserted**

Introduces a new section into the Principal Act, mirroring new section 430 of the *Criminal Code*. The new section specifies that where a person is acquitted of summary sexual or family violence offences because the prosecution offered or tendered no evidence, the evidence relevant to those charges may still be used as tendency, coincidence or relationship evidence in subsequent proceedings for sexual or family violence offences involving the same defendant. This provision does not override existing provisions concerning the admissibility of such

evidence, but simply provides the acquittal on that basis does not prevent the admission of the evidence for that purpose.

## **PART 12**

### **Clause 30      Principal Act**

Provides that the *Registration to Work with Vulnerable People Act 2013* is the 'Principal Act' referred to under this Part.

### **Clause 31      Section 3 amended (Interpretation)**

Amends the definition of additional risk assessment to clarify that section 46 does not create a separate risk assessment process to that which is set out in section 25.

### **Clause 32      Section 26 amended (Risk assessment order)**

Ensures that these amendments do not impact upon the Minister's power to make orders in relation to the conduct of risk assessments, as set out in section 26.

### **Clause 33      Section 28 amended (Risk assessments)**

Clause 33(a) inserts a new subsection (1AA), which specifies matters the Registrar must consider as part of a risk assessment (without limiting the matters they *may* consider). In particular, the Registrar is required to consider whether a person poses an unacceptable risk of harm to a vulnerable person, regardless of whether an allegation of previous harm has been proven on the balance of probability. In effect, this confirms that the Registrar can refuse, suspend or cancel a person's registration even where there is not definitive proof that the person has harmed vulnerable people in the past.

Clause 33(b) inserts a new subsection (1B). Subsection (1B) addresses matters the Registrar must, or may, take into account in determining, as part of a risk assessment, whether a person poses a risk of harm to vulnerable people. Subsection (1B)(a) requires the Registrar to consider all the possible work that a person may do when they are assessing the level of risk that the person poses to vulnerable people (because, when a person becomes registered in a category of registration (such as 'child-related activity'), they can use that registration to work in any activity within that category).

Subsection (1B)(b)-(c) ensures that the Registrar can consider any matter relevant to risk to vulnerable people when they are conducting a risk assessment



of a person, including that person's tendency to cause harm. It is important that the Registrar can consider a person's full history, serious health conditions, known associates, and any other factor which is relevant to the risk of harm that the person may pose to vulnerable people.

**Clause 34      Section 29 inserted**

Ensures that the Registrar only considers matters relevant to the risks of harm to vulnerable people when conducting a risk assessment and is not concerned by matters such as potential impacts on an applicant or registered person's employment. A risk assessment is only for assessing the level of risk a person poses to vulnerable people.

**Clause 35      Section 32 amended (Refusal to register a person and negative notices)**

Clause 35(a) ensures that once the Registrar makes a final determination that an applicant poses an unacceptable risk of harm to vulnerable people, they must refuse that person registration.

Clause 35(b) clarifies that where an applicant does not request that the Registrar reconsider an interim determination that an application poses an unacceptable risk of harm to vulnerable people, their application must be refused.

Clause 35(c) ensures that if an applicant has been convicted of a 'disqualifying offence', such an offence involving child sexual abuse, they cannot ever become registered.

Clause 35(d) clarifies that if a person is registered in a situation where registration should not have been provided because of section 32, then that registration is not valid (or in legal terms, it is void ab initio).

**Clause 36      Section 46 amended (Additional risk assessments)**

Ensures that where a person poses an unacceptable risk of harm to any class of vulnerable people that their registration allows them to work with, they cannot remain registered.

**Clause 37      Section 49 amended (Grounds for suspension or cancellation of registration)**

Clause 37(a) ensures that where a person poses an unacceptable risk of harm to any class of vulnerable people that their registration allows them to work with, they cannot remain registered.

Clause 37(b) inserts a new subsection (4). Under subsection (4)(a), the Registrar is permitted to impose a suspension on evidence which is not as certain as the

evidence they would need to make a final determination which would lead to cancelling registration.

Subsection (4)(b) ensures that the Registrar must suspend a person's registration if they are of the opinion that it is necessary for the safety, welfare or protection of vulnerable persons. This can take the form of an interim suspension, which has the effect of immediately preventing the person from working with vulnerable people during the risk assessment process. This can keep vulnerable people safe while the additional risk assessment occurs.

**Clause 38            Section 49A amended (Immediate suspension in certain circumstances)**

Clause 38(a) ensures that the Registrar must immediately suspend a person's registration when the Registrar completes an additional risk assessment and is of the opinion that it is necessary for the safety, welfare or protection of vulnerable persons.

Clause 38(b) ensures that the Registrar must immediately suspend a person's registration if it is necessary for the safety or welfare or protection of vulnerable people (there is no need to prove that it is necessary for all three).

**Clause 39            Section 51 amended (Suspension or cancelation of registration)**

Ensures that once the Registrar makes a final determination that a registered person poses an unacceptable risk of harm to vulnerable people, they must suspend or cancel that person's registration.

**PART 13**

**Clause 40            Principal Act**

Provides that the *Sentencing Act 1997* is the 'Principal Act' referred to under this Part.

**Clause 41            Section 4 amended (Interpretation)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'child sexual offence'. It also replaces the current reference to under '17 years' in that definition with under '18 years', because sections 124A, 124B and 124C, all listed in that definition, themselves define 'child' as a person under 18, not under 17. 'Child sexual offence' would otherwise not capture the full extent of those three offences.

This definition is relevant to sections 11 and 11A of the Principal Act.

**Clause 42      Section 11 amended (Matters to be taken or not taken into account in sentencing certain sexual offenders)**

Clause 42(a) makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence' in subsection (1), which is relevant to the provisions in subsection (2).

Clause 42(b) omits current subsection (3) and replaces it with a new subsection which, while retaining the effect of the original subsection, adds that any alleged consent or acquiescence made or given by the victim of a child sexual offence is not a mitigating factor.

**Clause 43      Section 27A amended (Interpretation of Part)**

Makes a consequential amendment to insert the two new 'position of authority offences' (sections 124B and 124C of the *Criminal Code*) into the definition of 'sexual offence'. The effect of this is that a drug treatment order will not be able to be made where a person has been found guilty of one of the new crimes.