

Act No. 10 of 1990

## MENTAL HEALTH (CRIMINALPROCEDURE) BILL 1990

NEW SOUTH WALES



### EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

This Bill is cognate with the Mental Health Bill 1990.

The object of this Bill is to re-enact provisions relating to proceedings involving persons affected by mental illness and other mental conditions (currently contained in Parts 11A and 11B of the Crimes Act 1900) as a consequence of the enactment of the proposed Mental Health Act 1990.

---

### PART 1 - PRELIMINARY

**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

**Clause 3** defines expressions used in the proposed Act.

### PART 2 - CRIMINAL PROCEEDINGS IN THE SUPREME COURT AND DISTRICT COURT RELATING TO PERSONS AFFECTED BY MENTAL DISORDERS

**Clause 4** applies the Part to criminal proceedings in the Supreme Court and the District Court.

**Clause 5** enables any party to proceedings to raise the question of a person's unfitness to be tried for an offence.

**Clause 6** provides that the question of a person's unfitness to be tried for an offence is to be determined on the balance of probabilities.

*Mental Health (Criminal Procedure) 1990*

---

**Clause 7** provides that the question of a person's unfitness to be tried for an offence is, so far as practicable, to be raised before the person is arraigned, but may be raised at any time during the proceedings in respect of the offence.

**Clause 8** requires the Attorney General to determine whether an inquiry should be conducted into a person's unfitness to be tried for an offence if the question of unfitness is raised before the person is arraigned.

**Clause 9** requires the Court to hear submissions relating to the conducting of an inquiry into a person's unfitness to be tried for an offence in the absence of the jury if the question of unfitness is raised after arraignment.

**Clause 10** requires the Court to conduct an inquiry into a person's unfitness to be tried in certain circumstances, including when the question of unfitness is raised after arraignment. The proposed section also gives the Court power to do certain things pending an inquiry as well as the power, in appropriate circumstances, to dismiss a charge and release a charged person.

**Clause 11** requires the question of a person's unfitness to be tried for an offence to be determined by a jury constituted for that purpose and makes provision with respect to such a jury.

**Clause 12** provides for the conduct of an inquiry into a person's unfitness to be tried for an offence.

**Clause 13** requires proceedings brought against a person, who is found fit to be tried for an offence to recommence or continue in accordance with the appropriate criminal procedures.

**Clause 14** requires the Court to refer a person to the Mental Health Review Tribunal, and enables it to make interim orders pending the Tribunal's determination, if the person is found unfit to be tried for an offence.

**Clause 15** sets out presumptions relating to a person's fitness to be tried which arise when a person has been found to be fit, or unfit, to be tried for an offence.

**Clause 16** requires the Mental Health Review Tribunal to make, in respect of a person referred to it under proposed section 14, findings as to whether, on the balance of probabilities, the person will within 12 months become fit to be tried for the relevant offence and, if so, to make other findings relating to the mental condition of the person and whether the person objects to being detained in a hospital. If the Tribunal determines that a person will not become fit to be tried within 12 months, it must notify the Attorney General and also give a copy of the notification to the Director of Public Prosecutions.

**Clause 17** sets out the action the Court may take on being notified by the Mental Health Review Tribunal of its determination that a person will, on the balance of probabilities, become fit to be tried within 12 months.

**Clause 18** enables the Attorney General to direct that a special hearing be held in respect of a person, or to advise that the person will not be further proceeded against, after being notified by the Mental Health Review Tribunal of its determination that the person will not, on the balance of probabilities, become fit to be tried within 12 months.

## *Mental Health (Criminal Procedure) 1990*

---

**Clause 19** provides that a Court must, at the direction of the Attorney General, conduct a special hearing for the purpose of ensuring, despite the unfitness of a person to be tried in accordance with normal procedures, that the person is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative. The proposed section also provides for the constitution of a jury for the purposes of a special hearing.

**Clause 20** requires the Court to order the release of a person on being advised by the Attorney General under proposed section 18 that the person will not be further proceeded against.

**Clause 21** provides for the conduct of a special hearing.

**Clause 22** sets out the verdicts available to the jury or the Court at a special hearing and their effect.

**Clause 23** provides for the action to be taken by the Court after a finding, following a special hearing, that on the limited evidence available an accused person committed the offence charged or some other offence available as an alternative. The Court must indicate whether it would have, in a normal trial, imposed a sentence of imprisonment or penal servitude and, in such a case, must nominate a "limiting term" in respect of the offence. If a sentence of imprisonment or penal servitude would not have been imposed, the Court may impose another penalty on the person or make any other order it may have made in a normal trial.

**Clause 24** requires a Court to refer a person in respect of whom a limiting term is nominated to the Mental Health Review Tribunal and sets out the matters to be determined by the Tribunal in respect of the person.

**Clause 25** provides that a person found, following a special hearing, to be not guilty by reason of mental illness is to be dealt with as if the verdict had been reached in a normal trial.

**Clause 26** provides that a person found, following a special hearing, to be not guilty of the offence charged is to be dealt with as if the verdict had been reached in a normal trial.

**Clause 27** sets out the orders the Court may make on being notified of the Mental Health Review Tribunal's determination under section 24.

**Clause 28** sets out the effect of a verdict, following a special hearing, that a person has on the limited evidence available committed the offence charged or some other offence. Such a finding generally constitutes a bar to any other criminal proceedings being brought against the person for the same offence or substantially the same offence, though such proceedings may be brought before the expiration of any limiting term nominated in respect of the person.

**Clause 29** sets out the procedure to be followed when the Mental Health Review Tribunal notifies the Attorney General that it is of the opinion that a person who has been found unfit to be tried for an offence is fit to be tried. The Attorney General must request a further inquiry to be held as to the person's unfitness or advise that the person will not be further proceeded against.

*Mental Health (Criminal Procedure) 1990*

---

**Clause 30** requires proceedings brought against a person who is found, after a further inquiry, to be fit to be tried for an offence to recommence or continue in accordance with the appropriate criminal procedures. A person who is found, after a further inquiry, to be unfit to be tried, who has been detained for a period or periods exceeding 12 months and in respect of whom a special hearing has not been held, is to be the subject of a special hearing. Any other person found unfit to be tried is to be returned to custody.

**PART 3 - SUMMARY PROCEEDINGS BEFORE A MAGISTRATE  
RELATING TO PERSONS AFFECTED BY MENTAL DISORDERS**

**Clause 31** applies the Part to criminal proceedings in respect of summary offences or indictable offences triable summarily before a Magistrate.

**Clause 32** sets out a procedure for the disposal of proceedings by a Magistrate where a defendant is developmentally disabled, suffering from mental illness or some other mental condition, but is not a mentally ill person within the meaning of Chapter 3 of the proposed Mental Health Act 1990. In these circumstances, the Magistrate may dismiss the charge and discharge the defendant or may take other action set out in the section.

**Clause 33** sets out a procedure for the disposal of proceedings by a Magistrate where a defendant is a mentally ill person within the meaning of Chapter 3 of the proposed Mental Health Act 1990. The Magistrate may order that the defendant be taken to a mental hospital for assessment or may discharge the defendant.

**Clause 34** enables a defendant to apply for the disqualification of a Magistrate from further hearing proceedings in which the Magistrate has previously decided not to deal with the defendant under section 32 or 33.

**Clause 35** enables a Magistrate to make appropriate orders to enable the transfer from prison to a mental hospital of a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case.

**Clause 36** provides that, for the purposes of the Part, a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.

**PART 4 - DEFENCE OF MENTAL ILLNESS**

**Clause 37** sets out the matters which must be explained to a jury by the Court if a question is raised as to whether a person was, at the time of commission of an offence, mentally ill as referred to in proposed section 38.

**Clause 38** requires a jury to return a special verdict of not guilty by reason of mental illness if it appears to the jury that a person charged with an offence was mentally ill at the time the person did the act or made the omission charged.

**Clause 39** requires the Court to order that a person in respect of whom a special verdict of not guilty by reason of mental illness is returned be detained in strict custody in such place and in such manner as the Court thinks fit until released by due process of law.

**PART 5 - MISCELLANEOUS**

**Clause 40** contains a regulation-making power.

---