

# Mental Health (Criminal Procedure) Act 1990 No 10

[1990-10]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Justices Legislation Repeal and Amendment Act 2001 No 121](#) (not commenced — to commence on 7.7.2003)
  - [Crimes Legislation Amendment Act 2002 No 130](#), Sch 9 [1]–[3] (not commenced)
- **See also**
  - [Crimes Legislation Amendment Bill 2003](#)

### Authorisation

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# Mental Health (Criminal Procedure) Act 1990 No 10



New South Wales

An Act with respect to criminal proceedings involving persons affected by mental illness and other mental conditions.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Mental Health (Criminal Procedure) Act 1990*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act:

**forensic patient** has the same meaning as in the *Mental Health Act 1990*.

**hospital** has the same meaning as in the *Mental Health Act 1990*.

**inquiry** means an inquiry under section 10 conducted in order to determine whether a person is unfit to be tried for an offence.

**Magistrate** means:

- (a) a justice or justices, or
- (b) a Magistrate, or
- (c) a Children's Magistrate.

**mental condition** means a condition of disability of mind not including either mental illness or developmental disability of mind.

**Mental Health Review Tribunal** means the Mental Health Review Tribunal constituted under the *Mental Health Act 1990*.

**special hearing** means a special hearing under section 19.

- (2) In this Act, a reference to a person having done an act alleged to have been done is a reference to a person having done or having omitted to do an act, matter or thing alleged to have been done or alleged to have been omitted to be done.
- (3) In this Act:
  - (a) a reference to a function includes a reference to a power, authority and duty, and
  - (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

## **Part 2 Criminal proceedings in the Supreme Court and District Court relating to persons affected by mental disorders**

### **4 Application**

This Part applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and criminal proceedings in the District Court.

### **5 Person by whom question of unfitness may be raised**

The question of a person's unfitness to be tried for an offence may be raised by any party to the proceedings in respect of the offence or by the Court.

### **6 Basis of determination of question of unfitness**

The question of a person's unfitness to be tried for an offence is to be determined on the balance of probabilities.

### **7 Time at which question of unfitness may be raised**

- (1) 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 on a charge in respect of the offence but may be raised at any time during the course of the hearing of the proceedings in respect of the offence.
- (2) Nothing in this section prevents the question of a person's unfitness to be tried for an offence from being raised on more than one occasion in respect of the same proceedings.

### **8 Procedure where question of unfitness raised before arraignment**

- (1) If the question of a person's unfitness to be tried for an offence is raised at any time before the person is arraigned on a charge in respect of the offence, the Attorney General must determine whether an inquiry should be conducted before the hearing of the proceedings in respect of the offence.

- (2) The Attorney General may, at any time before the inquiry is commenced, determine that there is no longer any need for such an inquiry to be conducted.

### **9 Procedure where question of unfitness raised after arraignment**

If the question of a person's unfitness to be tried for an offence is raised after the person is arraigned on a charge in respect of the offence, the Court must hear any submissions relating to the conducting of an inquiry in the absence of any jury which has been constituted for the purposes of the proceedings relating to the offence.

### **10 Procedure on raising question of unfitness**

- (1) If, in respect of an offence:

- (a) the Attorney General determines that an inquiry should be conducted and does not subsequently determine, before the inquiry is commenced, that there is no longer any need for such an inquiry to be conducted, or
- (b) the question of a person's unfitness to be tried for the offence is raised after the person is arraigned on a charge in respect of the offence,

the Court must (except as provided by this section), as soon as practicable after the Attorney General's determination is made or the question is raised, as the case may be, conduct an inquiry in order to determine whether the person is unfit to be tried for the offence.

- (2) The Court must not conduct an inquiry into the question of a person's unfitness to be tried for an offence unless it appears to the Court that the question has been raised in good faith.
- (3) Before conducting an inquiry, the Court may do any one or more of the following:
- (a) adjourn the proceedings,
  - (b) grant the accused person bail in accordance with the [Bail Act 1978](#),
  - (c) remand the accused person in custody for a period not exceeding 28 days,
  - (d) request the accused person to undergo a psychiatric examination or other examination,
  - (e) request that a psychiatric report or other report relating to the accused person be obtained,
  - (f) discharge any jury constituted for the purpose of those proceedings,
  - (g) make any other order that the Court considers appropriate.
- (4) If, in respect of a person charged with an offence, the Court is of the opinion that it is

inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the Court thinks proper to consider, to inflict any punishment, the Court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

### **11 Determination of question of unfitness**

- (1) The question of a person's unfitness to be tried for an offence is to be determined by a jury constituted for that purpose, except as provided by section 11A.
- (2) The *Jury Act 1977* applies to and in respect of the constitution of a jury and a jury constituted as referred to in subsection (1) in the same way as it applies to and in respect of the constitution of a jury and a jury constituted for the trial of any criminal proceedings.
- (3) If, in relation to the hearing of any proceedings against an accused person in respect of an offence, a jury has been constituted and, after the jury has been constituted:
  - (a) the prosecutor's opening address has commenced, or
  - (b) in the event that there is no such opening address, evidence has been called,a member of the jury is disqualified from being a member of a jury constituted for the purpose of an inquiry conducted in relation to the same accused person and the same offence.
- (4) A member of a jury constituted as referred to in this section is disqualified from being a member of a jury otherwise constituted for the purpose of any proceedings relating to the same accused person and the same offence.

### **11A Determination of question of unfitness by Judge**

- (1) The question of a person's unfitness to be tried for an offence is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.
- (2) An election may be made only with the consent of the prosecutor.
- (3) A person who elects to have the question determined by the Judge alone may, at any time before the date fixed for the determination of the person's unfitness to be tried, subsequently elect to have the question determined by a jury.
- (4) The Judge may make any finding that could have been made by a jury on the question of the person's unfitness to be tried. Any such finding has, for all purposes, the same effect as a finding of a jury.
- (5) Any determination by the Judge under this section must include the principles of law



applied by the Judge and the findings of fact on which the Judge relied.

(6) Rules of court may be made with respect to elections under this section.

## **12 Conduct of inquiry**

(1) At an inquiry, the accused person is, unless the Court otherwise allows, to be represented by counsel or a solicitor.

(2) An inquiry is not to be conducted in an adversary manner.

(3) The onus of proof of the question of a person's unfitness to be tried for an offence does not rest on any particular party to the proceedings in respect of the offence.

(4) At the commencement of an inquiry the Court is to explain to the jury the reason for the inquiry, the findings which may be made on the inquiry and the consequences, both at law and otherwise, of those findings.

## **13 Person found fit to be tried**

If, following an inquiry, an accused person is found fit to be tried for an offence, the proceedings brought against the person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures.

## **14 Person found unfit to be tried**

If, following an inquiry, an accused person is found unfit to be tried for an offence, the proceedings brought against the person in respect of the offence must not, except for the purpose of doing any of the things referred to in paragraph (b), be recommenced or continued and the Court:

(a) must refer the person to the Mental Health Review Tribunal, and

(b) may discharge any jury constituted for the purpose of those proceedings and may, pending the determination of the Tribunal under section 16, do any one or more of the following:

(i) adjourn the proceedings,

(ii) grant the person bail in accordance with the [Bail Act 1978](#),

(iii) remand the person in custody until the determination of the Tribunal has been given effect to,

(iv) make any other order that the Court considers appropriate.

## **15 Presumptions as to findings concerning unfitness**

It is to be presumed:

- (a) that a person who has, in accordance with this Part, been found to be unfit to be tried for an offence continues to be unfit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case, and
- (b) that a person who has, in accordance with this Part, been found fit to be tried for an offence continues to be fit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case.

#### **16 Functions of Mental Health Review Tribunal on referral after an inquiry**

- (1) If a person has been referred to the Mental Health Review Tribunal under section 14 after a finding that the person is unfit to be tried for an offence, the Tribunal must, as soon as practicable after the person is so referred, determine whether, on the balance of probabilities, the person will, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence.
- (2) If the Tribunal determines that a person will, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must also determine whether or not:
  - (a) the person is suffering from mental illness, or
  - (b) the person is suffering from a mental condition for which treatment is available in a hospital and, if the person is not in a hospital, whether or not the person objects to being detained in a hospital.
- (3) After determining in respect of a person the matters referred to in this section, the Tribunal must notify the Court which referred the person to it of its determination.
- (4) If the Tribunal determines that a person will not, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must notify the Attorney General of the determination and furnish the Director of Public Prosecutions with a copy of the notification.

#### **17 Orders Court may make following determination of Mental Health Review Tribunal that person will be fit to plead within 12 months**

- (1) If the Court is notified by the Mental Health Review Tribunal of its determination that a person will, on the balance of probabilities, become fit to be tried during the period of 12 months after the finding of unfitness and of its determination in relation to the matters set out in section 16 (2), the Court may take the action set out in subsection (2) or (3).
- (2) The Court may grant the person bail in accordance with the [Bail Act 1978](#) for a period not exceeding 12 months.
- (3) If the Tribunal has determined:

- (a) that the person is suffering from mental illness or that the person is suffering from a mental condition for which treatment is available in a hospital and that the person, not being in a hospital, does not object to being detained in a hospital—the Court may order that the person be taken to and detained in a hospital, or
  - (b) that the person is not suffering from mental illness or from a mental condition referred to in paragraph (a) or that the person is suffering from such a mental condition but that the person objects to being detained in a hospital—the Court may order that the person be detained in a place other than a hospital,
- for a period not exceeding 12 months.

**18 Attorney General’s functions following determination of Mental Health Review Tribunal that person will not be fit to plead within 12 months**

If the Attorney General is notified by the Mental Health Review Tribunal of its determination that a person will not, on the balance of probabilities, become fit to be tried during the period of 12 months after the finding of unfitness, the Attorney General (after receiving and considering the advice of the Director of Public Prosecutions) may:

- (a) direct that a special hearing be conducted in respect of the offence with which the person is charged, or
- (b) advise the Minister for Police and Emergency Services and the Court which referred the person to the Tribunal that the person will not be further proceeded against by the Attorney General or the Director of Public Prosecutions in respect of the offence.

**19 Court to hold special hearing on direction of Attorney General**

- (1) If the Attorney General directs that a special hearing be conducted in respect of an offence with which a person is charged, the appropriate Court must, as soon as practicable after the Attorney General so directs, conduct a special hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the 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 to the offence charged.
- (2) The question whether a person has committed an offence charged or any other offence available as an alternative to an offence charged is, except as provided by section 21A, to be determined at a special hearing by a jury constituted for that purpose.
- (3) The *Jury Act 1977* applies to and in respect of the constitution of a jury and a jury constituted as referred to in subsection (2) in the same way as it applies to and in respect of the constitution of a jury and a jury for the trial of any criminal proceedings.

- (4) A member of a jury otherwise constituted for the purpose of any proceedings relating to the same accused person and the same offence is disqualified from being a member of a jury constituted as referred to in this section.

## **20 Release of certain persons**

If, under section 18, the Attorney General advises a Court that a person will not be further proceeded against in respect of an offence, the Court must order the release of the person.

## **21 Nature and conduct of special hearing**

- (1) Except as provided by this Act, a special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.
- (2) At a special hearing, the accused person must, unless the Court otherwise allows, be represented by counsel or a solicitor and the fact that the person has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.
- (3) At a special hearing:
  - (a) the accused person is to be taken to have pleaded not guilty in respect of the offence charged, and
  - (b) the counsel or solicitor, if any, who represents the accused person may exercise the rights of the person to challenge jurors or the jury, and
  - (c) without limiting the generality of subsection (1), the accused person may raise any defence that could be properly raised if the special hearing were an ordinary trial of criminal proceedings, and
  - (d) without limiting the generality of subsection (1), the accused person is entitled to give evidence.
- (4) At the commencement of a special hearing, the Court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts.

### **21A Judge may try special hearing**

- (1) At a special hearing, the question whether an accused person has committed an offence charged or any other offence available as an alternative to an offence charged is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

- (2) An election may be made only with the consent of the prosecutor.
- (3) An election must be made before the date fixed for the person's special hearing in the Supreme Court or District Court.
- (4) An accused person who elects to have a special hearing determined by the Judge alone may, at any time before the date fixed for the person's special hearing, subsequently elect to have the matter determined by a jury.
- (5) Rules of court may be made with respect to elections under this section.

### **21B Verdict of Judge**

- (1) The verdicts available to a Judge who determines a special hearing without a jury are the verdicts available to a jury under section 22. Any such verdict has, for all purposes, the same effect as a verdict of a jury.
- (2) A determination by a Judge in any such special hearing must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

### **22 Verdicts at special hearing**

- (1) The verdicts available to the jury or the Court at a special hearing include the following:
  - (a) not guilty of the offence charged,
  - (b) not guilty on the ground of mental illness,
  - (c) that on the limited evidence available, the accused person committed the offence charged,
  - (d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.
- (2) A verdict in accordance with subsection (1) (b) is to be taken to be equivalent for all purposes to a special verdict that an accused person is not guilty by reason of mental illness under section 38.
- (3) A verdict in accordance with subsection (1) (c) or (d):
  - (a) constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates, and
  - (b) subject to section 28, constitutes a bar to further prosecution in respect of the same circumstances, and
  - (c) is subject to appeal in the same manner as a verdict in an ordinary trial of criminal proceedings, and

(d) is to be taken to be a conviction for the purpose of enabling a victim of the offence in respect of which the verdict is given to make a claim for compensation.

### **23 Procedure after completion of special hearing**

- (1) If, following a special hearing, it is found on the limited evidence available that an accused person committed the offence charged or some other offence available as an alternative, the Court:
  - (a) must indicate whether, if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for the offence which the person is found to have committed, it would have imposed a sentence of imprisonment, and
  - (b) where the Court would have imposed such a sentence, must nominate a term, in this section referred to as **a limiting term**, in respect of that offence, being the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.
- (2) If a Court indicates that it would not have imposed a sentence of imprisonment in respect of a person, the Court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial of criminal proceedings.
- (3) Any such other penalty imposed or order made, under subsection (2), is to be subject to appeal in the same manner as a penalty or order in a normal trial of criminal proceedings.
- (4) In nominating a limiting term in respect of a person or imposing any other penalty or making any other order, the Court may, if it thinks fit, take into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods related to the offence).
- (5) A limiting term nominated in respect of a person takes effect from the time when it is nominated unless the Court, after taking into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods related to the offence), directs that the term be taken to have commenced at an earlier time.

### **24 Consequences of nomination of limiting term**

- (1) If in respect of a person a Court has nominated a limiting term, the Court:
  - (a) must refer the person to the Mental Health Review Tribunal, and
  - (b) may make such order with respect to the custody of the person as the Court

considers appropriate.

- (2) If a Court refers a person to the Tribunal, the Tribunal must determine whether or not:
  - (a) the person is suffering from mental illness, or
  - (b) the person is suffering from a mental condition for which treatment is available in a hospital and, where the person is not in a hospital, whether or not the person objects to being detained in a hospital.
- (3) The Tribunal must notify the Court which referred the person to it of its determination with respect to the person.

## **25 Special verdict of not guilty by reason of mental illness**

If at a special hearing the defence of mental illness is raised and the jury or Judge, as the case may be, returns a special verdict that the accused person is not guilty by reason of mental illness, the person is thereafter to be dealt with and an order may be made under this Act in respect of the person as if the jury or Judge, as the case may be, had returned such a special verdict at a normal trial of criminal proceedings.

## **26 Verdict of not guilty**

If at a special hearing it is found that an accused person is not guilty of an offence charged, the person is thereafter to be dealt with as if the person had been found not guilty at a normal trial of criminal proceedings.

## **27 Orders Court may make following determination of Mental Health Review Tribunal after limiting term is imposed**

If a Court is notified by the Mental Health Review Tribunal of its determination in respect of a person under section 24 (3), the Court may:

- (a) if the Tribunal has determined that the person is suffering from mental illness or that the person is suffering from a mental condition for which treatment is available in a hospital and that the person, not being in a hospital, does not object to being detained in a hospital—order that the person be taken to and detained in a hospital, or
- (b) if the Tribunal has determined that the person is not suffering from mental illness or from a mental condition referred to in paragraph (a) or that the person is suffering from such a mental condition but that the person objects to being detained in a hospital—order that the person be detained in a place other than a hospital.

## **28 Effect on other proceedings of finding on special hearing**

- (1) If, following a special hearing, an accused person is found on the limited evidence available to have committed the offence charged or some other offence available as an alternative, the finding, except as provided by subsection (2), constitutes a bar to any other criminal proceedings brought against the person for the same offence or

substantially the same offence.

- (2) Nothing in subsection (1) prevents other criminal proceedings referred to in that subsection from being commenced at any time before the expiration of any limiting term nominated in respect of a person unless, before the expiration of the limiting term, the person has been released from custody as a prisoner or discharged from detention as a forensic patient.
- (3) If, pursuant to other criminal proceedings referred to in subsection (1), an accused person is convicted of the offence or substantially the same offence as that which, at a special hearing, the person was found to have committed, the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods relating to the offence) are to be fully taken into account in determining any period of any sentence or the terms of any disposition consequent on the conviction.

## **29 Action to be taken on notification that a person is fit to be tried**

- (1) If the Mental Health Review Tribunal has notified the Attorney General that it is of the opinion that a person who has been found to be unfit to be tried for an offence has become fit to be tried for the offence (whether or not a special hearing has been conducted in respect of the offence), the Attorney General (after consultation with the Director of Public Prosecutions):
  - (a) must request the Court before which the person was found to be unfit to be tried for the offence to hold a further inquiry as to the person's unfitness, or
  - (b) must advise the Minister for Health that the person will not be further proceeded against by the Attorney General or the Director of Public Prosecutions in respect of the offence.
- (2) If the Attorney General requests that a further inquiry be held, the appropriate Court must, as soon as practicable after the Attorney General so requests, hold a further inquiry.
- (3) If the Attorney General advises the Minister for Health that a person will not be further proceeded against, the Minister for Health must, after having informed the Minister for Police and Emergency Services of the date of the person's release, do all such things within the power of the Minister for Health to order the person's release from detention or to otherwise ensure the person's release from detention.
- (4) Sections 11 (subsection (3) excepted) and 12 apply to and in respect of a further inquiry under subsection (2) in the same way as those sections apply to and in respect of an inquiry.

## **30 Procedure after completion of further inquiry**

- (1) If, following a further inquiry under section 29, an accused person is found fit to be



tried for an offence, the proceedings brought against the person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures.

- (2) If, following a further inquiry under section 29, an accused person is found unfit to be tried for an offence:
  - (a) in the case of an accused person who has been detained in custody as a prisoner or in a hospital as a forensic patient for a period or continuous periods in the aggregate of not less than 12 months and in respect of whom a special hearing has not been held—the Court must conduct a special hearing, or
  - (b) in the case of any other accused person—the Court may conduct a special hearing (if a special hearing has not been held) or order that the person be returned to the custody or hospital from which the person was taken.

### **Part 3 Summary proceedings before a Magistrate relating to persons affected by mental disorders**

#### **31 Application**

- (1) This Part applies to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, but does not apply to committal proceedings.
- (2) Sections 32 and 33 apply to the condition of a defendant as at the time when a Magistrate considers whether to apply the relevant section to the defendant.

#### **32 Persons suffering from mental illness or condition**

- (1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:
  - (a) that the defendant is developmentally disabled, is suffering from mental illness or is suffering from a mental condition for which treatment is available in a hospital, but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and
  - (b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,

the Magistrate may take the action set out in subsection (2) or (3).

- (2) The Magistrate may do any one or more of the following:
  - (a) adjourn the proceedings,

- (b) grant the defendant bail in accordance with the *Bail Act 1978*,
  - (c) make any other order that the Magistrate considers appropriate.
- (3) The Magistrate may dismiss the charge and discharge the defendant:
- (a) into the care of a responsible person, unconditionally or subject to conditions, or
  - (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both, or
  - (c) unconditionally.
- (4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

### **33 Mentally ill persons**

- (1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate that the defendant is a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, the Magistrate (without derogating from any other order the Magistrate may make in relation to the defendant, whether by way of adjournment, the granting of bail in accordance with the *Bail Act 1978* or otherwise):
- (a) may order that the defendant be taken by a police officer to, and detained in, a hospital for assessment, or
  - (b) may order that the defendant be taken by a police officer to, and detained in, a hospital for assessment and that, if the defendant is found on assessment at the hospital not to be a mentally ill person or mentally disordered person, the person be brought by a police officer back before the court, or
  - (c) may discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.
- (1A) Without limiting subsection (1) (c), at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, the Magistrate may make a community treatment order in accordance with the *Mental Health Act 1990* for implementation by a health care agency in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order by a Magistrate under that Act (other than the holding of an inquiry) have been met in respect of the defendant.
- (1B) The provisions of the *Mental Health Act 1990* (other than sections 131 (2), 132 and 133 (1) (a)) apply to and in respect of the defendant and that order as if the order had been made by a Magistrate under that Act.

- (1C) A Magistrate must, before making an order under subsection (1A), notify the Chief Health Officer, or a person authorised by the Chief Health Officer for the purposes of this section, of the proposed order.
- (2) If a defendant is dealt with at the commencement or at any time during the course of the hearing of proceedings before a Magistrate in accordance with this section, the charge which gave rise to the proceedings, on the expiration of the period of 6 months after the date on which the defendant is so dealt with, is to be taken to have been dismissed unless, within that period, the defendant is brought before a Magistrate to be further dealt with in relation to the charge.
- (3) If a defendant is brought before a Magistrate to be further dealt with in relation to a charge as referred to in subsection (2), the Magistrate must, in dealing with the charge, take account of any period during which the defendant was in a hospital as a consequence of an order made under this section.
- (4) The fact that charges are to be taken to have been dismissed under subsection (2) does not constitute a finding that the charges against the defendant are proven or otherwise.
- (5) The regulations may prescribe the form of an order under this section.

#### **34 Disqualification of Magistrate**

- (1) If:
  - (a) a Magistrate has inquired into whether a defendant should be dealt with under section 32 or 33, and
  - (b) the Magistrate has decided not to so deal with the defendant,the Magistrate must, on the application of the defendant, disqualify himself or herself from further hearing the proceedings concerned.
- (2) An application may be made by a defendant under this section only if:
  - (a) except as provided by paragraph (b), the question whether the defendant should be dealt with under section 32 or 33 has not been previously inquired into by another Magistrate in the same proceedings, or
  - (b) in the case of proceedings in which another Magistrate has previously inquired into whether the defendant should be dealt with under section 32 or 33, the Magistrate before whom the proceedings are being heard considers that it should, because of the circumstances of the case, be permitted to be made.

#### **35 Transfer of prisoners**

- (1) This section applies to a person who is awaiting committal for trial or trial for an

offence or summary disposal of the person's case.

- (2) If it appears to a Magistrate that it may be appropriate to transfer a person to whom this section applies from prison to a hospital under section 97 or 98 of the *Mental Health Act 1990*, the Magistrate may make an order directing:
- (a) that the defendant be examined by 2 medical practitioners, one of whom is a psychiatrist, and
  - (b) that, if appropriate, the relevant certificates be furnished to the Chief Health Officer under section 97 or 98 of the *Mental Health Act 1990*, and
  - (c) that the Director of the Prison Medical Service notify the Magistrate of the action, if any, taken under section 97 or 98 of the *Mental Health Act 1990*.

### **36 Means by which Magistrate may be informed**

For the purposes of this 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**

### **37 Explanation to jury**

If, on the trial of a person charged with an offence, a question is raised as to whether the person was, at the time of commission of the offence, mentally ill as referred to in section 38, the Court must explain to the jury the findings which may be made on the trial and the legal and practical consequences of those findings and must include in its explanation:

- (a) a reference to the existence and composition of the Mental Health Review Tribunal constituted under the *Mental Health Act 1990*, and
- (b) a reference to the relevant functions of that Tribunal with respect to forensic patients within the meaning of that Act, including a reference to the requirements of that Act that the Tribunal may make a recommendation for the release of a person detained in accordance with section 39 only if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

### **38 Special verdict**

If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.

### **39 Effect of finding and declaration of mental illness**

If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court must order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law.

## **Part 5 Miscellaneous**

### **40 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### **41 Savings and transitional provisions**

Schedule 1 has effect.

## **Schedule 1 Savings and transitional provisions**

(Section 41)

### **1A Savings and transitional regulations**

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

*Crimes Legislation Amendment Act 2002* (but only to the extent that it amends this Act)

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **1 Application of abolition of accused person's right to make unsworn statement**

The amendment to section 21 made by the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* applies to a special hearing conducted in respect of an offence with which a person is charged on or after the commencement of the amendment.

## **2 Amendments made by [Crimes Legislation Amendment Act 2002](#)**

An amendment made to section 32 or 33 by the [Crimes Legislation Amendment Act 2002](#):

- (a) applies to proceedings for offences whether committed before, on or after the commencement of the amendment, and
- (b) does not apply to proceedings commenced before the commencement of the amendment.