

# Mental Health (Criminal Procedure) Act 1990 No 10

[1990-10]



New South Wales

## Status Information

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### Provisions in force

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

### Notes—

- **See also**  
[Statute Law \(Miscellaneous Provisions\) Bill \(No 2\) 2007](#)

### 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:

**correctional centre** has the same meaning as in the *Crimes (Administration of Sentences) Act 1999*.

**detention centre** has the same meaning as in the *Children (Detention Centres) Act 1987*.

**forensic patient** means a person:

- (a) who is detained in a mental health facility, correctional centre or other place, or released from custody subject to conditions, pursuant to an order:
  - (i) under section 10 (3) (c), 14, 17 (3), 25, 27 or 39, or
  - (ii) under section 7 (4) of the *Criminal Appeal Act 1912* (including that subsection as applied by section 5AA (5) of that Act), or
- (b) who is granted bail pursuant to section 14 (b) (ii) or 17 (2), or
- (c) who is detained in a mental health facility pending the person's committal for trial for an offence or pending the person's trial for an offence, or

- (d) who has been transferred to a mental health facility while serving a sentence of imprisonment and who has not been classified by the Tribunal as an involuntary patient.

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

***involuntary patient*** has the same meaning as it has in the [Mental Health Act 2007](#).

***Magistrate*** means:

- (a) (Repealed)
- (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 facility*** has the same meaning as it has in the [Mental Health Act 2007](#).

***mentally ill person*** has the same meaning as it has in the [Mental Health Act 2007](#).

***prescribed authority***—see section 40.

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

***Tribunal*** means the Mental Health Review Tribunal constituted under the [Mental Health Act 2007](#).

- (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 Court must determine whether an inquiry should be conducted before the hearing of the proceedings in respect of the offence.
- (2) The Court 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 Court 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 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 the Judge alone.
- (2) 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.

## **11A (Repealed)**

## **12 Conduct of inquiry**

- (1) At an inquiry, the accused person is, unless the Court otherwise allows, to be represented by an Australian legal practitioner.
- (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) (Repealed)

### **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 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 Tribunal on referral after inquiry**

- (1) If a person has been referred to the 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 mental health facility and, if the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility.
- (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 Director of Public Prosecutions of the determination.

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

- (1) If the Court is notified by the 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 mental health facility and that the person, not being in a mental health facility, does not object to being detained in a mental health facility—the Court may order that the person be taken to and detained in a mental health facility, 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 mental health facility—the Court may order that the person be detained in a place other than a mental health facility,for a period not exceeding 12 months.
- (4) As soon as practicable after the grant of bail under subsection (2) or the making of an

order under subsection (3), the Registrar of the Court is to notify the Tribunal of the grant of bail or the terms of the order.

## **18 (Repealed)**

## **19 Court to hold special hearing after advice received from Director of Public Prosecutions**

- (1) If the Court receives a notification of a determination from the Tribunal under section 16 (3), 42 (4) or 44 (2) 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 Court:
  - (a) is to obtain the advice of the Director of Public Prosecutions as to whether further proceedings will be taken by the Director of Public Prosecutions in respect of the offence, and
  - (b) is to conduct a special hearing as soon as practicable unless the Director of Public Prosecutions advises that no further proceedings will be taken.
- (2) A special hearing is a 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.
- (3) If the Director of Public Prosecutions advises the Court under subsection (1) (a) that no further proceedings will be taken in respect of the offence, the Director of Public Prosecutions is also to give that advice to the Minister for Police.
- (4) Subsection (1) does not apply if the Court has already held a special hearing in relation to the offence concerned.

## **20 Release of certain persons**

If, under section 19, the Director of Public Prosecutions 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 an Australian legal practitioner 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 Australian legal practitioner, 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 for which a jury has been constituted, 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 to try special hearing unless election for jury made**

- (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 unless an election to have a special hearing determined by a jury is made by:
- (a) the accused person and the Court is satisfied that the person sought and received advice in relation to the election from an Australian legal practitioner and understood the advice, or
  - (b) an Australian legal practitioner representing the accused person, or
  - (c) the prosecutor.
- (2) An election to have a special hearing determined by a jury must be made:
- (a) in the case of an election by the accused person or the Australian legal practitioner representing the accused person—on any day before the day fixed for the special hearing in the Supreme Court or the District Court, or
  - (b) in the case of an election by the prosecutor—at least 7 days before the day fixed for the special hearing in the Supreme Court or the District Court.
- (3) An accused person or an Australian legal practitioner representing an accused person who elects to have a special hearing determined by a jury may, at any time before the day fixed for the special hearing, subsequently elect to have the matter determined by the Judge alone.

- (4) The *Jury Act 1977* applies to and in respect of the constitution of a jury, and a jury constituted, for the purpose of a special hearing 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.
- (5) 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 subsection (4).
- (6) 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.

## **22A Amendment of indictment**

- (1) The provisions of the [Criminal Procedure Act 1986](#) apply to the amendment of an indictment under this section in the same way as they apply to the amendment of an indictment in ordinary criminal proceedings, subject to any modifications that the Court considers appropriate in the circumstances.
- (2) Without limiting subsection (1), the Director of Public Prosecutions may, with the leave of the Court or the consent of an Australian legal practitioner representing the accused person, amend an indictment to which a special hearing relates.

## **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:

- (a) 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, or
  - (b) directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated in respect of the person or a sentence of imprisonment imposed on the person.
- (6) When making a direction under subsection (5) (b), the Court is to take into account that:
- (a) a sentence of imprisonment imposed in a normal trial of criminal proceedings may be subject to a non-parole period whereas a limiting term is not, and
  - (b) in a normal trial of criminal proceedings, consecutive sentences of imprisonment are to be imposed with regard to non-parole periods (as referred to in section 47 (4) and (5) of the [Crimes \(Sentencing Procedure\) Act 1999](#)).

## **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 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 mental health facility and, where the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility.
- (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 Tribunal after limiting term is imposed**

If a Court is notified by the 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 mental health facility and that the person, not being in a mental health facility, does not object to being detained in a mental health facility—order that the person be taken to and detained in a mental health facility, 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 mental health facility—order that the person be detained in a place other than a mental health facility.

## **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 an inmate (within the meaning of the [Crimes \(Administration of Sentences\) Act 1999](#)) 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 person is fit to be tried**

- (1) If the Tribunal has notified the Court 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 Court:
  - (a) is to obtain the advice of the Director of Public Prosecutions as to whether further proceedings will be taken by the Director of Public Prosecutions in respect of the offence, and
  - (b) is to hold a further inquiry as to the person's fitness as soon as practicable unless the Director of Public Prosecutions advises that the person will not be further proceeded against in respect of the offence.
- (2) The Director of Public Prosecutions must advise the Minister for Health and the Tribunal if the Director has determined that no further proceedings will be taken in respect of the offence.
- (3) If the Director of Public Prosecutions 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 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 and 12 apply to and in respect of a further inquiry under this section 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 an inmate (within the meaning of the *Crimes (Administration of Sentences) Act 1999*) or in a mental health facility 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 mental health facility 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, and includes any related proceedings under the [Bail Act 1978](#), but does not apply to committal proceedings.
- (2) (Repealed)

### **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 (or was at the time of the alleged commission of the offence to which the proceedings relate):
    - (i) developmentally disabled, or
    - (ii) suffering from mental illness, or
    - (iii) suffering from a mental condition for which treatment is available in a mental health facility,but is not a mentally ill person, 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 make an order dismissing 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.

(3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.

(3B) If the defendant fails to appear, the Magistrate may:

(a) issue a warrant for the defendant's arrest, or

(b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.

(3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:

(a) issue a warrant for the defendant's arrest, or

(b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.

(3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(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.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(5) The regulations may prescribe the form of an order under this section.

### **32A Reports from treatment providers**

(1) Despite any law, a person who is to assess another person's mental condition or provide treatment to another person in accordance with an order under section 32 (3) (a **treatment provider**) may report a failure to comply with a condition of the order by the other person to any of the following:

(a) an officer of Community Offender Services, Probation and Parole Service,

- (b) an officer of the Department of Juvenile Justice,
  - (c) any other person or body prescribed by the regulations.
- (2) A treatment provider may include in a report under this section any information that the treatment provider considers is relevant to the making of a decision in relation to the failure to comply concerned.
- (3) A report provided under this section is to be in the form approved for the time being by the Director-General of the Attorney General's Department.

### **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, 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 mental health facility for assessment, or
  - (b) may order that the defendant be taken by a police officer to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the person be brought by a police officer back before a Magistrate or an authorised officer, 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 2007](#) 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 2007](#) (other than section 51 (1) and (2)) 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 Director-General of the Department of Health, or a person authorised by the Director-General of the Department of Health for the purposes of this section, of the proposed order.

- (1D) If, at the commencement or at any time during the course of the hearing of proceedings under the [Bail Act 1978](#) before an authorised officer, it appears to the authorised officer that the defendant is a mentally ill person, the authorised officer (without derogating from any other order under the [Bail Act 1978](#) that the officer may make in relation to the defendant):
- (a) may order that the defendant be taken by a police officer to, and detained in, a mental health facility for assessment, or
  - (b) may order that the defendant be taken by a police officer to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the defendant be brought by a police officer back before a Magistrate or an authorised officer.
- (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 or authorised officer 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 mental health facility 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.
- (4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1) or (1A).
- (4B) An authorised officer is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1D).
- (4C) A failure to comply with subsection (4A) or (4B) does not invalidate any decision of a Magistrate or authorised officer under this section.
- (5) The regulations may prescribe the form of an order under this section.
- (5A) An order under this section may provide that, in the case of a defendant who is a juvenile, the defendant is to be taken to or from a place by a juvenile justice officer employed in the Department of Juvenile Justice rather than by a police officer.
- (6) In this section, a reference to an **authorised officer** is a reference to an authorised

officer within the meaning of the *Criminal Procedure Act 1986*.

#### **34 (Repealed)**

#### **35 Transfer from correctional centre or detention centre**

- (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 a correctional centre or detention centre to a mental health facility under section 51, 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 Director-General of the Department of Health under section 51, and
  - (c) that the Chief Executive Officer, Justice Health or, in the case of a juvenile, the Director-General of the Department of Juvenile Justice notify the Magistrate of the action, if any, taken under section 51.

#### **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 Tribunal, and
- (b) a reference to the relevant functions of the Tribunal with respect to forensic patients, including a reference to the requirements of this 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**

- (1) 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.

- (2) If a special verdict of not guilty by reason of mental illness is returned at the trial of a person for an offence, the Court may remand the person in custody until the making of an order under section 39 in respect of the person.

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

- (1) 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 may 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 or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.
- (2) The Court is not to make an order under this section for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release.
- (3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Tribunal of the terms of the order.

## **Part 5 Forensic patients**

### **Division 1 Preliminary**

#### **40 Definitions**

In this Part:

**authorised medical officer** has the same meaning as it has in the [Mental Health Act 2007](#).

**correctional centre** includes a detention centre.

**Director-General** means the Director-General of the Department of Health.

**prescribed authority**, in relation to the exercise of a function, means the authority prescribed by the regulations for the purposes of the function concerned.

### **Division 2 Review and release of forensic patients**



#### **41 Initial review by Tribunal of cases of persons found not guilty by reason of mental illness**

- (1) The Tribunal must review a person's case as soon as practicable after the person is found not guilty of an offence by reason of mental illness, after a special hearing, a trial or on an appeal, and ordered to be detained in a mental health facility or other place or to be released from custody subject to conditions.

**Note—**

Relevant orders may be made under this Act (including sections 25 and 39) and under section 7 (4) of the [Criminal Appeal Act 1912](#) (including that subsection as applied by section 5AA (5) of that Act).

- (2) The Tribunal must, after reviewing a person's case, make a recommendation to the Minister:
  - (a) as to the person's care, detention or treatment, or
  - (b) 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, as to the person's release (either unconditionally or subject to conditions).
- (3) On a recommendation being made under this section for a person's release, the prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release.

#### **42 Initial review by Tribunal of person found unfit to be tried after order for detention**

- (1) The Tribunal must review a person's case as soon as practicable after:
  - (a) the person is granted bail under section 17 (2) or an order is made under section 17 (3) in relation to the person, or
  - (b) an order is made under section 27 in relation to the person.
- (2) On a review, the Tribunal must determine whether, in its opinion:
  - (a) the person has become fit to be tried for an offence, and
  - (b) the safety of any person or any member of the public will be seriously endangered by the person's release.
- (3) If the Tribunal is of the opinion that the person has not become fit to be tried for an offence and is satisfied that the safety of any person or any member of the public will not be seriously endangered by the person's release, it must make a recommendation to the Minister for the person's release.
- (4) The Tribunal must notify the court that made the finding of unfitness and the Director of Public Prosecutions if, on a review, it is of the opinion that the person:

- (a) has become fit to be tried for an offence, or
- (b) has not become fit to be tried for an offence and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.

#### **43 Further reviews by Tribunal of forensic patients**

- (1) The Tribunal must review the case of each forensic patient every 6 months but may review the case of any forensic patient at any time.
- (2) The Tribunal must review the case of a forensic patient if requested to do so by the Minister for Health, the Attorney General, the Minister for Justice, the Director-General or the medical superintendent of the mental health facility in which the patient is detained.
- (3) For the purposes of a review, the Tribunal may communicate with any persons, take any action and make any recommendations it thinks fit.
- (4) On a review, the Tribunal may make a recommendation to the Minister as to one or more of the following:
  - (a) 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, as to the patient's release (either conditionally or unconditionally),
  - (b) as to the patient's continued detention, care or treatment in a mental health facility, correctional centre or other place.
- (5) The Tribunal may not make a recommendation for the release of a patient if:
  - (a) the patient is a person who has been remanded in custody under section 10 (3) (c) pending an inquiry into the question of the person's unfitness to be tried for an offence, or
  - (b) the patient has been transferred to a mental health facility while serving a sentence of imprisonment and has not served the term of the sentence or, if a non-parole period has been set in relation to the sentence, the non-parole period.

#### **44 Reviews of persons found unfit to be tried**

- (1) On reviewing under section 43 the case of a forensic patient who is subject to a finding that the person is unfit to be tried for an offence, the Tribunal may make a recommendation as to the fitness of the patient to be tried for an offence.
- (2) The Tribunal must notify the court that made the finding of unfitness and the Director of Public Prosecutions if, on a review, it is of the opinion that the person:

- (a) has become fit to be tried for an offence, or
- (b) has not become fit to be tried for an offence and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.

#### **45 Release of patients after being found unfit to be tried or on further review**

- (1) On receiving a recommendation under section 42 or 43 for the release of a person, the Minister must notify the Attorney General of the recommendation and at the same time furnish a copy of the notification to the Director of Public Prosecutions.
- (2) The Director of Public Prosecutions must, within 21 days after the date of any such notification, indicate to the Attorney General whether the Director intends to proceed with criminal charges against the person concerned.
- (3) The prescribed authority must not order the person's release if, within 30 days after being notified of the recommendation, the Attorney General indicates an objection to the person's release on the ground that:
  - (a) the person has served insufficient time in custody or under detention, or
  - (b) the Attorney General or the Director of Public Prosecutions intends to proceed with criminal charges against the person.
- (4) The prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release if the Attorney General fails to indicate any such objection within that period.
- (5) Before ordering the person's release, the prescribed authority must inform the Minister for Police of the date of the person's release.

#### **46 Review of persons transferred from correctional centres**

- (1) The Tribunal must review the case of a person transferred under Division 3 to a mental health facility from a correctional centre as soon as practicable after the person is so transferred and must make a recommendation to the prescribed authority as to the person's continued detention, care or treatment in a mental health facility.
- (2) On a review, the Tribunal is to determine whether the person is a mentally ill person who should continue to be detained in a mental health facility.
- (3) In addition to any review required under subsection (1), the Tribunal, or any member of the Tribunal on behalf of the Tribunal, must informally review the cases of the following persons each month in order to determine whether their pending legal proceedings are delayed:
  - (a) a person referred to in subsection (1) whose trial for an offence has not been

completed,

(b) a person referred to in subsection (1) who is subject to a finding that the person is unfit to be tried for an offence and a person in respect of whom a special hearing under section 19 has not been conducted.

- (4) If the Tribunal determines on an informal review that there is such a delay, the Tribunal may take such action as it thinks fit.
- (5) On an informal review, the Tribunal may make a recommendation as to the person's continued detention, care or treatment.
- (6) If a person is transferred under Division 3 from a correctional centre to a mental health facility, the Tribunal may, at any time, make a recommendation to the prescribed authority that the person be transferred to a correctional centre.
- (7) For the purposes of a review under this section, the Tribunal may communicate with such persons, take such action and make such recommendations as the Tribunal thinks fit.

#### **47 Community treatment orders**

- (1) On a review under this Division, the Tribunal may make a community treatment order in relation to a patient recommended to be released conditionally or to be transferred to a correctional centre or other place.
- (2) Any such community treatment order has effect only if it is confirmed in writing by the prescribed authority.
- (3) Part 3 of Chapter 3 of the [Mental Health Act 2007](#) applies to the making of any such order, subject to any modifications prescribed by the regulations under that Act or under this Act.

#### **48 Prescribed authority may make orders as to detention, care or treatment**

On a recommendation being made by the Tribunal (other than a recommendation as to the release of a person) under this Part as to the detention, care or treatment of a person, the prescribed authority may, subject to the regulations, make an order for the person's detention, care or treatment in a mental health facility, correctional centre or other place specified in the order and in the manner specified in the order.

#### **49 Transfer of patients**

- (1) On a review under this Part, the Tribunal may make a recommendation to the Minister as to the transfer of the patient to a mental health facility, correctional centre or other place.
- (2) On a recommendation being made under this Part for the transfer of a person, the

prescribed authority may, subject to the regulations, make an order for the transfer of the patient to a mental health facility, correctional centre or other place.

#### **50 Recommendations not required for forensic patients classified as involuntary patients**

The Tribunal is not required to make any recommendation that it would otherwise be required to make on a review of a forensic patient if it classifies the patient as an involuntary patient under section 67.

### **Division 3 Transfers to and from correctional centres**

#### **51 Transfer from correctional centre by Director-General**

- (1) The Director-General may, by order in writing, order that a person imprisoned in a correctional centre be transferred to a mental health facility.
- (2) The Director-General may make an order under subsection (1) on the basis of 2 certificates about the person's condition issued by 2 medical practitioners, one of whom is a psychiatrist. The certificate is to be in the form set out in Schedule 2.
- (3) A transfer order may be made without the person's consent if it appears to the Director-General, on the basis of the certificates, that the person is a mentally ill person.
- (4) A transfer order may be made with the person's consent if it appears to the Director-General, on the basis of the certificates, that the person is suffering from a mental condition for which treatment is available in a mental health facility.
- (5) Subsection (4) does not apply to a person who is a mentally ill person or who has a developmental disability of mind.
- (6) The Director-General may revoke an order made under this section.
- (7) The Director-General must notify the Tribunal in writing of any transfer order.

#### **52 Transfer back to correctional centre**

- (1) This section applies to a forensic patient transferred to a mental health facility under any provision of this Division.
- (2) The patient must be transferred back to the correctional centre within 7 days unless the Director-General, or a person authorised by the Director-General for the purposes of this section, is of the opinion that:
  - (a) the patient is a mentally ill person or is suffering from a mental condition for which treatment is available in a mental health facility, and
  - (b) other care of an appropriate kind would not be available to the person in the correctional centre.

- (3) The patient may be transferred back to the correctional centre at any time if the Director-General or a person authorised by the Director-General is of the opinion that:
  - (a) the patient has ceased to be a mentally ill person or to be suffering from a mental condition for which treatment is available in a mental health facility, or
  - (b) other care of an appropriate kind would be reasonably available to the patient in a correctional centre.
- (4) Nothing in this section affects the powers of the Tribunal to receive and make recommendations in respect of a patient transferred to a mental health facility from a correctional centre.

### **53 Requests for transfer to correctional centre**

- (1) A forensic patient who is detained in a mental health facility may, at any time, request the Tribunal to make a recommendation to a prescribed authority for an order that the patient be transferred to a correctional centre.
- (2) The Tribunal, after considering any such request, may make the recommendation requested by the forensic patient or may refuse to make that recommendation.
- (3) The Tribunal must make the recommendation if it is satisfied that the person is not a mentally ill person.

**Note—**

Section 49 empowers the prescribed authority to make the transfer order.

### **54 Review by Tribunal of patients awaiting transfer to mental health facility**

- (1) The Tribunal must informally review the case of a person who is subject to an order for transfer to a mental health facility under this Division but who is not transferred within the period prescribed by the regulations.
- (2) The Tribunal must carry out such a review each month until the person is transferred to a mental health facility or the Tribunal recommends to the Director-General that the transfer not take place.
- (3) On a review, the Tribunal may make a recommendation to the prescribed authority as to the person's detention, care or treatment in a mental health facility or other place and in the manner specified in the order.

**Note—**

Section 48 empowers the prescribed authority to make an order giving effect to a recommendation of the Tribunal.

- (4) For the purposes of a review under this section, the Tribunal may communicate with such persons, take such action and make such recommendations as the Tribunal

thinks fit.

## **Division 4 Leave of absence for forensic patients**

### **55 Leave of absence for forensic patients**

- (1) The Director-General may allow a forensic patient to be absent from a mental health facility for the period, and subject to the conditions (if any), that the Director-General thinks fit.
- (2) The Director-General must not grant leave of absence if the Tribunal has previously, under similar circumstances, refused to recommend that leave of absence in similar terms be granted to the patient.
- (3) A forensic patient may apply to the medical superintendent for special leave of absence for any of the following purposes:
  - (a) to visit a sick or dying relative,
  - (b) to attend the funeral of a near relative,
  - (c) to deal with circumstances constituting, in the opinion of the medical superintendent and the Director-General, an emergency.
- (4) On receiving an application for special leave of absence, the medical superintendent may recommend to the Director-General that leave be granted, if the medical superintendent is of the opinion that, having regard to the leave proposed, the safety of the patient or any member of the public will not be seriously endangered if the special leave of absence is granted.
- (5) The Director-General may approve the recommendation and grant special leave of absence to the forensic patient for the period and subject to the conditions (if any) that the Director-General thinks fit.

### **56 Leave of absence for medical reasons**

The Director-General may allow a forensic patient to be absent from a mental health facility for the period, and subject to the conditions (if any), that the Director-General thinks fit for the purpose of undergoing medical investigation or treatment.

### **57 Leave of absence on review of case**

- (1) The Tribunal may, as a consequence of the review of the case of a forensic patient, and if of the opinion that it will benefit the health of the patient to do so, make a recommendation to the prescribed authority that the patient be allowed to be absent from a mental health facility for such period and subject to such terms and conditions, if any, as the Tribunal thinks fit.

- (2) If any such recommendation is made in respect of a forensic patient, the prescribed authority may, subject to the regulations, make an order allowing the patient to be absent from a mental health facility for such period and subject to such terms and conditions, if any, as are specified in the order.
- (3) The Tribunal may not make a recommendation unless it is satisfied that, having regard to the leave proposed to be granted, the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.

## **Division 5 Breaches of orders and escapes by forensic patients**

### **58 Breach of orders for release**

- (1) The prescribed authority may make an order under this section in respect of a person if it appears to the prescribed authority that:
  - (a) the person has breached a condition of an order for the person's conditional release under this Part, or
  - (b) the person has committed a breach of an order releasing the person from custody under section 39, or
  - (c) the person has breached a condition of leave of absence granted under this Part, or
  - (d) the person has been granted conditional release or leave of absence under this Part and has suffered a deterioration of mental condition and become a serious danger to himself or herself or to any member of the public because of his or her mental condition.
- (2) The prescribed authority may order the patient's apprehension and detention, care or treatment in a mental health facility, correctional centre or other place, and in the manner, specified in the order.
- (3) A police officer to whose notice a detention order is brought must:
  - (a) apprehend and take or assist in taking the person to the mental health facility, correctional centre or other place specified in the order, or
  - (b) cause or make arrangements for some other police officer to do so.
- (4) A police officer may enter premises to apprehend a person under this section, and may apprehend any such person, without a warrant and may exercise any of the powers conferred on a person who is authorised under section 81 of the [Mental Health Act 2007](#) to take a person to a mental health facility.



## **59 Apprehended person may seek reconsideration by Tribunal**

- (1) A person who is apprehended under section 58 may request the Tribunal to investigate the evidence on which the order for the person's apprehension was made and may adduce other evidence for the consideration of the Tribunal.
- (2) On a reconsideration under this section, the Tribunal may make such recommendations as it thinks fit concerning the person to the prescribed authority.

## **60 Retaking of escapees**

- (1) A forensic patient who escapes from a mental health facility may be retaken at any time by any of the following persons:
  - (a) the medical superintendent of the mental health facility or any other suitably qualified person employed in the mental health facility who is authorised to do so by the medical superintendent,
  - (b) a police officer,
  - (c) a person authorised by the Director-General or the medical superintendent,
  - (d) a person assisting a person referred to in paragraph (a), (b) or (c).
- (2) On being retaken, the patient is to be conveyed to and detained in the mental health facility from which the patient escaped.

## **61 Aiding or permitting escape**

- (1) A person must not release or attempt to release a person who is being conveyed to or detained in a mental health facility under this Act.
- (2) A medical superintendent or any other person employed in a mental health facility must not:
  - (a) through wilful neglect or connivance, permit any person detained in the facility under this Act to escape from the facility, or
  - (b) abet or connive at the escape of any such person from a mental health facility.

Maximum penalty:

- (a) on conviction on indictment—imprisonment for 3 years, or
- (b) on summary conviction—imprisonment for 1 year or 10 penalty units, or both.

## **62 Issue of warrants for apprehension of persons outside State**

A Magistrate or an authorised officer within the meaning of the [Criminal Procedure Act 1986](#) may issue a warrant for the apprehension of a person if a credible person, on oath

before the Magistrate or officer, shows reasonable cause to suspect that the person is a forensic patient:

- (a) who has escaped from a mental health facility and is outside the State, or
- (b) is the subject of an order under section 58.

## **Division 6 Termination of classification as forensic patient**

### **63 Termination of classification as forensic patient on unconditional release**

- (1) A forensic patient ceases to be a forensic patient if any of the following events occurs:
  - (a) the person is released unconditionally in accordance with an order under this Part of the prescribed authority,
  - (b) if the person has been released in accordance with such an order subject to conditions—the time specified in the conditions as being a time during which those conditions, or any of them, are to be complied with expires.
- (2) This section applies in addition to sections 64–67.

### **64 Additional circumstances for termination of classification as forensic patient**

- (1) A person who has been detained in a mental health facility, correctional centre or other place following a special hearing under section 19 ceases to be a forensic patient if any of the following events occurs:
  - (a) the limiting term (where that term is less than life) imposed in respect of the person expires,
  - (b) the person is classified as an involuntary patient.
- (2) A person who has been found by a court to be unfit to be tried for an offence ceases to be a forensic patient if the Tribunal notifies the court and the Director of Public Prosecutions that it is of the opinion that the person has become fit to be tried for an offence (whether or not a special hearing has been conducted in respect of the offence) and:
  - (a) a finding is made, at a further inquiry by the court as to the person's unfitness, that the person is fit to be tried for the offence, or
  - (b) the Director of Public Prosecutions advises the Minister for Health that the person will not be further proceeded against in respect of the offence and the person is released from detention pursuant to section 29.

### **65 Termination of classification of forensic patient serving sentence of imprisonment**

A person who became a forensic patient because the person was transferred to a mental

health facility from a correctional centre under this Part ceases to be a forensic patient if any of the following events occurs:

- (a) the person is transferred to a correctional centre from the mental health facility,
- (b) the person's sentence of imprisonment expires,
- (c) if the person's non-parole period has expired—the person is released unconditionally by order of the prescribed authority following a recommendation of the Tribunal,
- (d) if the person has been released in accordance with such an order subject to conditions—the time specified in the conditions as being a time during which those conditions, or any of them, are to be complied with expires.

#### **66 Termination of classification as forensic patient of person on remand**

A person on remand who is a forensic patient because the person has been transferred to a mental health facility ceases to be a forensic patient if any of the following events occurs:

- (a) the person is released (which the Minister for Health is hereby authorised to order or to otherwise ensure) following advice by the Director of Public Prosecutions that the person will not be further proceeded against in respect of the offence in relation to which the person has been remanded or is otherwise lawfully released from the mental health facility,
- (b) the person is transferred to a correctional centre.

#### **67 Classification as involuntary patient**

- (1) The Tribunal may, on a review of a forensic patient under this Act, classify the patient as an involuntary patient if the patient would, by virtue of the operation of this Act or any other law, cease to be a forensic patient within 6 months after the date of the review and the patient:
  - (a) has been detained in a mental health facility, correctional centre or other place following a special hearing under section 19, or
  - (b) has been transferred to a mental health facility from a correctional centre while serving a sentence of imprisonment.
- (2) On classification as an involuntary patient under this section, the person ceases to be a forensic patient.

#### **68 Release on ceasing to be a forensic patient**

A person who ceases to be a forensic patient (other than a person classified as an involuntary patient under section 67 (2)) must be discharged from the mental health facility in which the person is detained if the person ceases to be a forensic patient.

## Division 7 General

### 69 Security conditions for forensic patients

- (1) A forensic patient who is detained in a mental health facility, correctional centre or other place or absent in accordance with this Part is to be subject to any security conditions that the Director-General considers necessary.
- (2) Despite subsection (1), a forensic patient detained in any part of the Long Bay Prison Hospital that is a mental health facility is to be subject to any security conditions that the Director-General of the Department of Corrective Services considers necessary.
- (3) For the purposes of subsection (2):
  - (a) any part of the Long Bay Prison Hospital that is a mental health facility is taken to be a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999*, and
  - (b) a forensic patient who is detained in that facility is taken to be an inmate within the meaning of that Act and that Act and the regulations made under that Act, apply to any such patient, subject to any modifications and to the extent specified by the regulations.

### 70 Transport of forensic patients

- (1) A forensic patient may be transported to or from a mental health facility, correctional centre or other place if it is necessary or convenient to do so for the administration of this Act or the *Mental Health Act 2007*. Any such transport is to be subject to any security conditions that the Director-General considers necessary.
- (2) The Director-General may, by order in writing, order the transfer of a forensic patient detained in a mental health facility to another mental health facility.
- (3) The order is sufficient authority for the transfer.
- (4) A forensic patient may be taken to or from a mental health facility by a person referred to in section 81 (1) of the *Mental Health Act 2007* and any other person prescribed by the regulations.
- (5) Section 81 of that Act applies to or in respect of the transport of a forensic patient to or from a mental health facility in the same way as it applies to or in respect of the transport of a person under that Act.

### 71 Other Ministers may make transfer orders as prescribed authority

An order that may be made under this Part by a prescribed authority for the transfer of a person between a correctional centre and a mental health facility or other place or between a mental health facility and a place other than a correctional centre may, in the

absence or unavailability, for any cause, of the prescribed authority be made by any Minister of the Crown.

## **72 Appeals against decisions of Director-General**

- (1) A forensic patient may appeal to the Tribunal against a failure or refusal by the Director-General to grant the patient leave of absence under this Part.
- (2) An appeal may be made orally or in writing and is to be made in accordance with the regulations. An oral appeal is to be recorded in accordance with the regulations.
- (3) The Director-General must provide the Tribunal with a report about the patient, including the Director-General's reasons for refusing or failing to grant leave of absence.
- (4) The Tribunal, for the purpose of determining an appeal, has and may exercise the functions of the Director-General with respect to the granting of leave and may make an order accordingly.
- (5) In addition, the Tribunal may determine that no further right of appeal may be exercised under this section before the date on which the person is next reviewed by the Tribunal under this Act, if it thinks it appropriate to do so.

## **73 Planning for release and leave**

- (1) The authorised medical officer of a mental health facility in which a forensic patient is detained must, if the person is to be released or granted leave under this Part, take all reasonably practicable steps to ensure that the person and any primary carer of the person are consulted in relation to planning the person's release and leave and any subsequent treatment or other action considered in relation to the person.
- (2) In planning the release of any such person and any subsequent treatment or other action considered in relation to any such person, the authorised medical officer must take all reasonably practicable steps to consult with agencies involved in providing relevant services to the person, any primary carer of the person and any dependent children or other dependants of the person.
- (3) The authorised medical officer must take all reasonably practicable steps to provide a person who is released or given leave of absence from the mental health facility, and the person's primary carer, with appropriate information as to follow-up care.
- (4) In this section, **primary carer** has the same meaning as it has in the [Mental Health Act 2007](#).

## **74 Effect of detention in mental health facility on sentence and parole**

- (1) Any period of detention of a person in a mental health facility or other place, following a transfer under this Part from a correctional centre, is to be treated as if it were a

period of imprisonment in a correctional centre for the purposes of the person's sentence and parole.

- (2) For the purposes of Part 6 of the *Crimes (Administration of Sentences) Act 1999*, a forensic patient who is detained in a mental health facility is taken to be serving a full-time sentence of detention in a correctional centre.

**Note—**

Part 6 of that Act contains provisions permitting the grant of parole to certain persons serving full-time sentences of detention.

## **75 Orders under this Part**

- (1) An order under this Part must be in writing.
- (2) An order under this Part has effect according to its tenor.

## **76 Person who ceases to be a forensic patient may be detained as an involuntary patient**

Nothing in this Part prevents the application of Chapter 3 of the *Mental Health Act 2007* to a person who ceases to be a forensic patient or a person from remaining in a mental health facility as a voluntary patient.

## **Part 6 Miscellaneous**

### **77 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.

### **78 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)

*Mental Health (Criminal Procedure) Amendment Act 2005*

*Mental Health Act 2007*

- (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.

### **3 Amendments made by [Mental Health \(Criminal Procedure\) Amendment Act 2005](#)**

- (1) Except as provided by subclause (2), an amendment made to this Act by Schedule 1 to the [Mental Health \(Criminal Procedure\) Amendment Act 2005](#) applies to proceedings whether commenced before, on or after the commencement of the amendment.
- (2) An amendment made to this Act by Schedule 1 [4] or [12] to the [Mental Health \(Criminal Procedure\) Amendment Act 2005](#) applies to proceedings for offences, whether or not the offences were committed before, on or after the commencement of the amendment, but does not apply to proceedings commenced before the commencement of the amendment.

## **Schedule 2 Medical certificate as to examination of inmate**

(Section 51 (2))

[Mental Health \(Criminal Procedure\) Act 1990](#)

I, [name in full—use block letters] (\*Medical Practitioner/Psychiatrist) of do hereby certify that on the [date]

at [state name of correctional centre where examination took place] separately from any other medical practitioner, I personally examined [name of inmate in full] and I am of the opinion that \*he/she is \*a mentally ill person/suffering from a mental condition for which treatment is available in a mental health facility.

I have formed this opinion on the following grounds:

(1) Facts indicating \*mental illness/mental condition observed by myself.

.....  
.....  
.....  
.....

(2) Other relevant information (if any) communicated to me by others (state name and address of each informant).

.....  
.....  
.....  
.....  
.....

Made and signed this [date]

[Signature]

\*Delete whichever does not apply.