

# Mental Health (Criminal Procedure) Amendment Act 2005 No 109

[2005-109]



New South Wales

## Status Information

### Currency of version

Repealed version for 7 December 2005 to 19 June 2006 (accessed 17 July 2024 at 21:18)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

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

### Notes—

- **Repeal**

The Act was repealed by Sch 4 to the [Statute Law \(Miscellaneous Provisions\) Act 2006 No 58](#) with effect from 20.6.2006.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Mental Health (Criminal Procedure) Amendment Act 2005 No 109



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## Contents

<b>Long title</b> .....	3
1 Name of Act .....	3
2 Commencement .....	3
3 Amendment of Mental Health (Criminal Procedure) Act 1990 No 10 .....	3
4 Amendment of Mental Health Act 1990 No 9 .....	3
<b>Schedule 1 Principal amendments to Mental Health (Criminal Procedure) Act 1990</b> .....	3
<b>Schedule 2 Amendments to Mental Health (Criminal Procedure) Act 1990 by way of statute law revision</b> .....	10
<b>Schedule 3 Amendment of Mental Health Act 1990</b> .....	11

# Mental Health (Criminal Procedure) Amendment Act 2005 No 109



New South Wales

An Act to amend the *Mental Health (Criminal Procedure) Act 1990* with respect to inquiries to determine a person's fitness to be tried for an offence and special hearings and to amend the *Mental Health Act 1990* in connection with those matters; and for other purposes.

## 1 Name of Act

This Act is the *Mental Health (Criminal Procedure) Amendment Act 2005*.

## 2 Commencement

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

## 3 Amendment of *Mental Health (Criminal Procedure) Act 1990 No 10*

The *Mental Health (Criminal Procedure) Act 1990* is amended as set out in Schedules 1 and 2.

## 4 Amendment of *Mental Health Act 1990 No 9*

The *Mental Health Act 1990* is amended as set out in Schedule 3.

## Schedule 1 Principal amendments to *Mental Health (Criminal Procedure) Act 1990*

(Section 3)

### [1] Section 8 Procedure where question of unfitness raised before arraignment

Omit "Attorney General" wherever occurring. Insert instead "Court".

### [2] Section 10 Procedure on raising question of unfitness

Omit "Attorney General" from section 10 (1) (a). Insert instead "Court".

### [3] Section 10 (1)

Omit "Attorney General's".

**[4] Section 11**

Omit sections 11 and 11A. Insert instead:

**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.

**[5] Section 12 Conduct of inquiry**

Omit section 12 (4).

**[6] Section 16 Functions of Mental Health Review Tribunal on referral after inquiry**

Omit "Attorney General of the determination and furnish the Director of Public Prosecutions with a copy of the notification" from section 16 (4).

Insert instead "Director of Public Prosecutions of the determination".

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

Insert after section 17 (3):

- (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 Mental Health Review Tribunal of the grant of bail or the terms of the order.

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

Omit the section.

**[9] Section 19**

Omit the section. Insert instead:

**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 Mental Health Review Tribunal under section 16 (3) of this Act or under section 80 (5) or 82 (3A) of the *Mental Health Act 1990* 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.

**[10] Section 20 Release of certain persons**

Omit “section 18, the Attorney General”.

Insert instead “section 19, the Director of Public Prosecutions”.

**[11] Section 21 Nature and conduct of special hearing**

Insert “for which a jury has been constituted” after “a special hearing” in section 21 (4).

**[12] Section 21A**

Omit the section. Insert instead:

**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.

**[13] Section 22A**

Insert after section 22:

**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.

**[14] Section 23 Procedure after completion of special hearing**

Omit section 23 (5). Insert instead:

- (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*).

**[15] Section 29**

Omit the section. Insert instead:

**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 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 Mental Health Review 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.

**[16] Section 31 Application**

Omit section 31 (2).

**[17] Section 32 Persons suffering from mental illness or condition**

Insert "(or was at the time of the alleged commission of the offence to which the proceedings relate)" after "defendant is" in section 32 (1) (a).

**[18] Section 32 (4A) and (4B)**

Insert after section 32 (4):

(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.

**[19] Section 32A**

Insert after section 32:

**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.

**[20] Section 33 Mentally ill persons**

Insert after section 33 (4):

- (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.

**[21] Section 34 Disqualification of Magistrate**

Omit the section.

**[22] Section 38 Special verdict**

Insert at the end of the section:

- (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.

**[23] Section 39 Effect of finding and declaration of mental illness**

Insert at the end of the section:

- (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 Mental Health Review Tribunal of the terms of the order.

**[24] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1A (1):

*Mental Health (Criminal Procedure) Amendment Act 2005*

**[25] Schedule 1, clause 3**

Insert after clause 2:

**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 Amendments to [Mental Health \(Criminal Procedure\) Act 1990](#) by way of statute law revision**

(Section 3)

**[1] Section 3 Definitions**

Insert in alphabetical order in section 3 (1):

**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](#).

**[2] Sections 12 (1) and 21 (2)**

Omit “counsel or a solicitor” wherever occurring.

Insert instead “an Australian legal practitioner”.

**[3] Section 21 Nature and conduct of special hearing**

Omit “the counsel or solicitor” from section 21 (3) (b).

Insert instead “the Australian legal practitioner”.

**[4] Section 28 Effect on other proceedings of finding on special hearing**

Omit “as a prisoner” from section 28 (2).

Insert instead “as an inmate (within the meaning of the *Crimes (Administration of Sentences) Act 1999*)”.

**[5] Section 30 Procedure after completion of further inquiry**

Omit “as a prisoner” from section 30 (2) (a).

Insert instead “as an inmate (within the meaning of the *Crimes (Administration of Sentences) Act 1999*)”.

**[6] Section 33 Mentally ill persons**

Insert after section 33 (5):

(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.

**[7] Section 35 Transfer from correctional centre or detention centre**

Omit “prison” from section 35 (2).

Insert instead “a correctional centre or detention centre”.

**[8] Section 35 (2) (c)**

Omit “Director of the Prison Medical Service”.

Insert instead “Chief Executive Officer, Justice Health or, in the case of a juvenile, the Director-General of the Department of Juvenile Justice”.

**Schedule 3 Amendment of *Mental Health Act 1990***

(Section 4)

**[1] Section 80 Tribunal to review cases of persons found unfit to be tried**

Omit section 80 (1) (a). Insert instead:

(a) to an accused person who has been found, after an inquiry by a court, to be unfit to be tried for an offence and is ordered to be detained in a hospital or other place, or is granted bail, under section 17 of the *Mental Health (Criminal Procedure) Act 1990*, and

**[2] Section 80 (3)**

Omit the subsection. Insert instead:

- (3) If the Tribunal is of the opinion that a person has become fit to be tried for an offence, it must notify the court that made the finding of unfitness and the Director of Public Prosecutions accordingly.

**[3] Section 80 (5)**

Insert after section 80 (4):

- (5) If the Tribunal is of the opinion that a person referred to in subsection (1) (a) 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, the Tribunal must notify the court that made the finding of unfitness and the Director of Public Prosecutions accordingly.

**[4] Section 82 Tribunal to review cases of forensic patients**

Omit "Attorney General accordingly" from section 82 (3).

Insert instead "Director of Public Prosecutions and the court that made the finding of unfitness".

**[5] Section 82 (3A)**

Insert after section 82 (3):

- (3A) The Tribunal must notify the Court and the Director of Public Prosecutions if, for the purpose of making a recommendation under this section in relation to a forensic patient subject to a determination that the patient is unfit to be tried for an offence, the Tribunal forms the opinion that the patient:
- (a) has not become fit to be tried for an offence, and
  - (b) will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.

**[6] Section 82 (5)**

Omit the subsection. Insert instead:

- (5) The Tribunal may not recommend the release of a forensic patient who:
- (a) is remanded in custody under section 10 (3) (c) of the *Mental Health (Criminal Procedure) Act 1990* pending an inquiry into the question of the person's unfitness to be tried for an offence, or
  - (b) has been transferred to a hospital 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.

**[7] Section 93 Breach of condition of order for release**

Insert after section 93 (1) (a):

- (a1) has committed a breach of a condition of an order releasing the person from custody under section 39 of the *Mental Health (Criminal Procedure) Act 1990*, or

**[8] Section 104**

Omit the section. Insert instead:

**104 Termination of classification as forensic patient of person who becomes fit to be tried for an offence**

A person in respect of whom, after a finding that the person is unfit to be tried for an offence, the Tribunal has notified the court that made the finding 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 under section 19 of the *Mental Health (Criminal Procedure) Act 1990* in respect of the offence) ceases to be a forensic patient:

- (a) on a finding, at a further inquiry by a court as to the person's unfitness, that the person is fit to be tried for the offence, or
- (b) if the Director of Public Prosecutions advises the Minister that the person will not be further proceeded against in respect of the offence—on the person's release from detention pursuant to section 29 of the *Mental Health (Criminal Procedure) Act 1990*,

whichever first occurs.

**[9] Section 105**

Omit the section. Insert instead:

**105 Termination of classification as forensic patient of person serving term of imprisonment for which no non-parole period set**

A person who, while serving a term of imprisonment for which no non-parole period has been set, has been transferred to a hospital from a prison ceases to be a forensic patient:

- (a) on the expiry of the term, or

- (b) on being classified by the Tribunal as a continued treatment patient, or
  - (c) on being transferred to a prison,
- whichever first occurs.

**[10] Section 106**

Omit the section. Insert instead:

**106 Termination of classification as forensic patient of person serving sentence of imprisonment for life**

A person who, while serving a sentence of imprisonment for life, being a sentence imposed otherwise than pursuant to a special hearing under section 19 of the *Mental Health (Criminal Procedure) Act 1990*, has been transferred to a hospital from a prison ceases to be a forensic patient on being transferred to a prison.

**[11] Section 107**

Omit the section. Insert instead:

**107 Termination of classification as forensic patient of person serving term of imprisonment for which non-parole period set**

A person who, while serving a term of imprisonment for which a non-parole period has been set, has been transferred to a hospital from a prison ceases to be a forensic patient:

- (a) on the expiry of the term of imprisonment, or
  - (b) if the non-parole period has expired—on unconditional release by order of the prescribed authority following a recommendation of the Tribunal, or
  - (c) if the non-parole period has expired and the person has been released by order of the prescribed authority subject to conditions—on the expiry of any time specified in the conditions as being a time during which those conditions, or any of them, are to be complied with, or
  - (d) on being classified by the Tribunal as a continued treatment patient, or
  - (e) on being transferred to a prison,
- whichever first occurs.

**[12] Section 108 Termination of classification as forensic patient of person on remand**

Omit “Attorney General to the Minister that the person will not be further proceeded

against by the Attorney General or the Director of Public Prosecutions” from section 108 (a).

Insert instead “Director of Public Prosecutions to the Minister that the person will not be further proceeded against”.

**[13] Schedule 1 Dictionary of terms used in the Act**

Insert at the end of paragraph (c) of the definition of **forensic patient**:

, or

(d) a person who is granted bail pursuant to section 14 (b) (ii) or 17 (2) of the *Mental Health (Criminal Procedure) Act 1990*.

**[14] Schedule 7 Savings, transitional and other provisions**

Insert at the end of clause 2 (1A):

*Mental Health (Criminal Procedure) Amendment Act 2005*

**[15] Schedule 7, Part 9**

Insert after Part 8:

## **Part 9 Provisions consequent on enactment of Mental Health (Criminal Procedure) Amendment Act 2005**

### **45 Application of amendments**

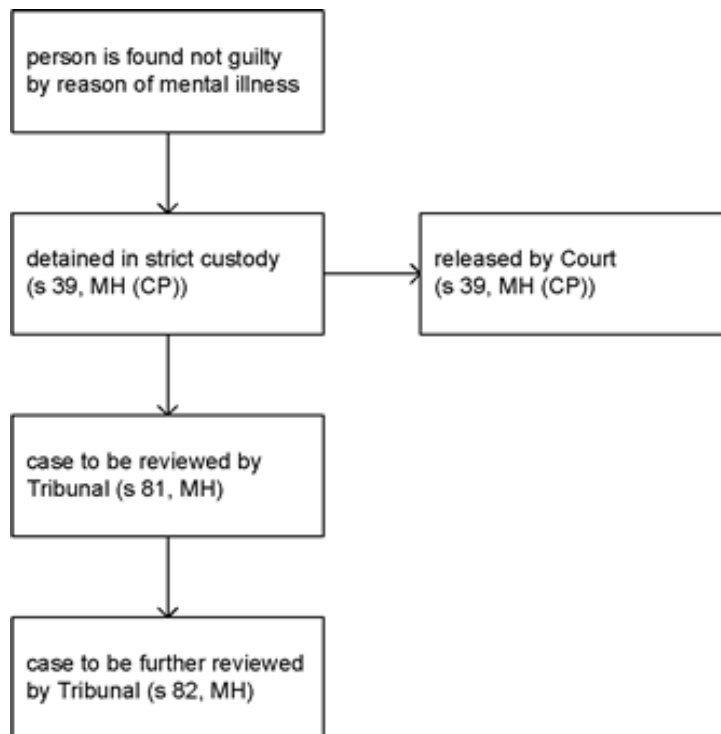
- (1) In this clause, **amending Act** means the *Mental Health (Criminal Procedure) Amendment Act 2005*.
- (2) An amendment made by Schedule 3 [1], [2], [3], [4] or [5] to the amending Act applies to a finding by a court that a person is unfit to be tried for an offence whether or not the finding is made in proceedings commenced before, on or after the commencement of the amendment.
- (3) Section 82 (5) (b) (as inserted by the amending Act) applies to a forensic patient whether or not the relevant transfer to a hospital occurred before, on or after the commencement of the paragraph.
- (4) An amendment made to this Act by Schedule 3 [7] to the amending Act applies to orders whether made before, on or after the commencement of the amendment.

- (5) An amendment made to this Act by Schedule 3 [9], [10] or [11] to the amending Act extends to a person who was a forensic patient immediately before the commencement of the amendment.
- (6) An amendment made to this Act by Schedule 3 [13] to the amending Act applies to a person whether or not the relevant grant of bail was made before, on or after the commencement of the amendment.

**[16] Explanatory note**

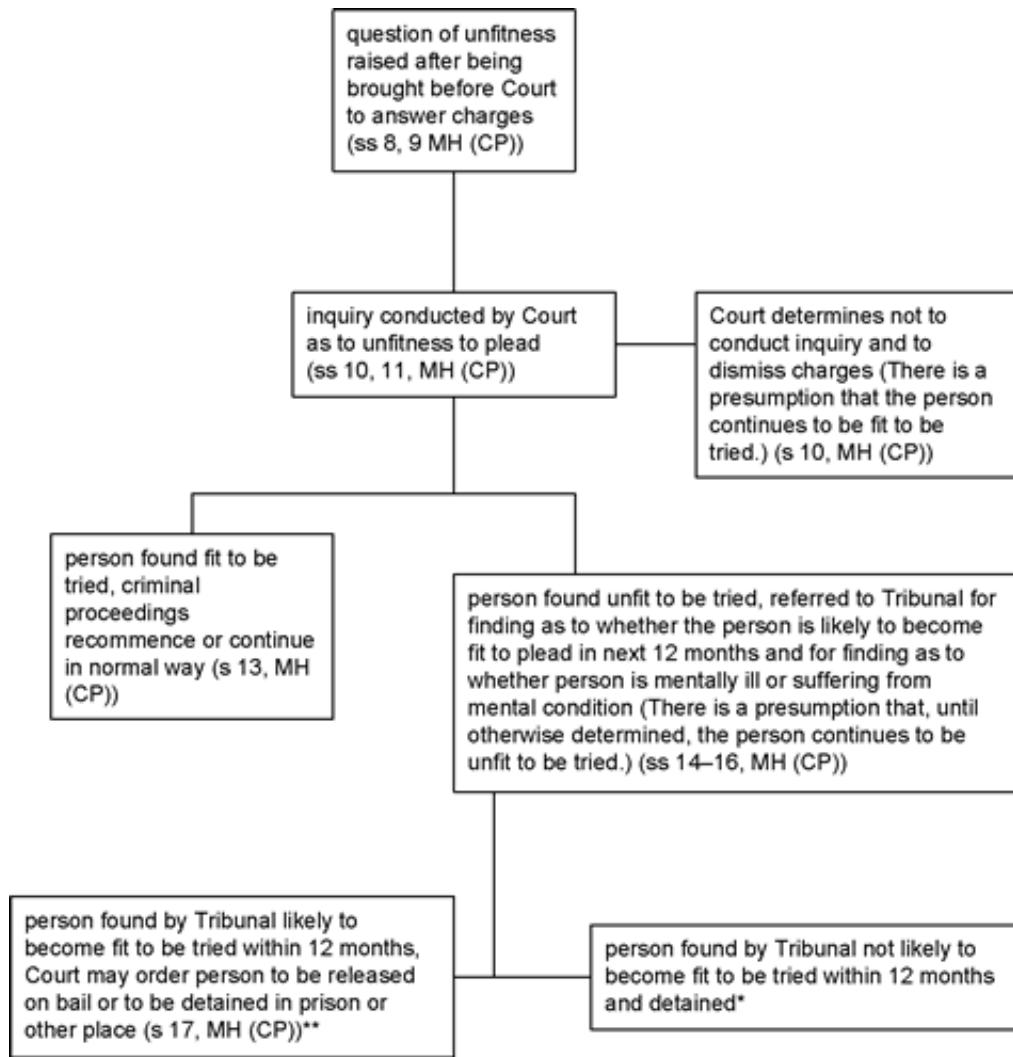
Omit the Tables to the explanatory note. Insert instead:

**Table 1—Persons found not guilty by reason of mental illness**



**Table 2—Persons who may be unfit to plead**

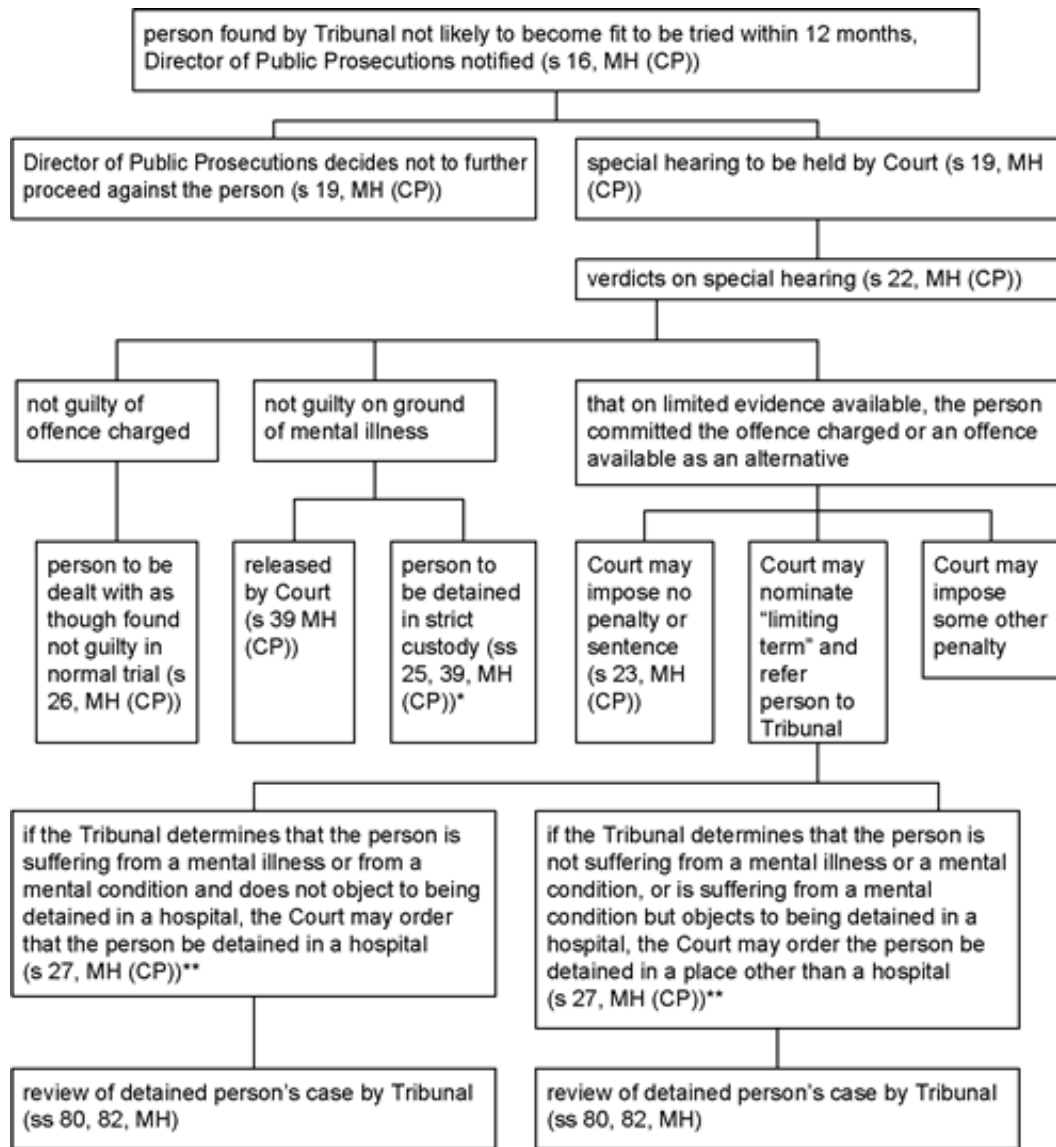




\* Note: See Table 3 for consequences of such a finding.

\*\* Note: See Table 4 for effects of the review of such a person's case. The person is a forensic patient. See section 102 for circumstances when the person ceases to be a forensic patient.

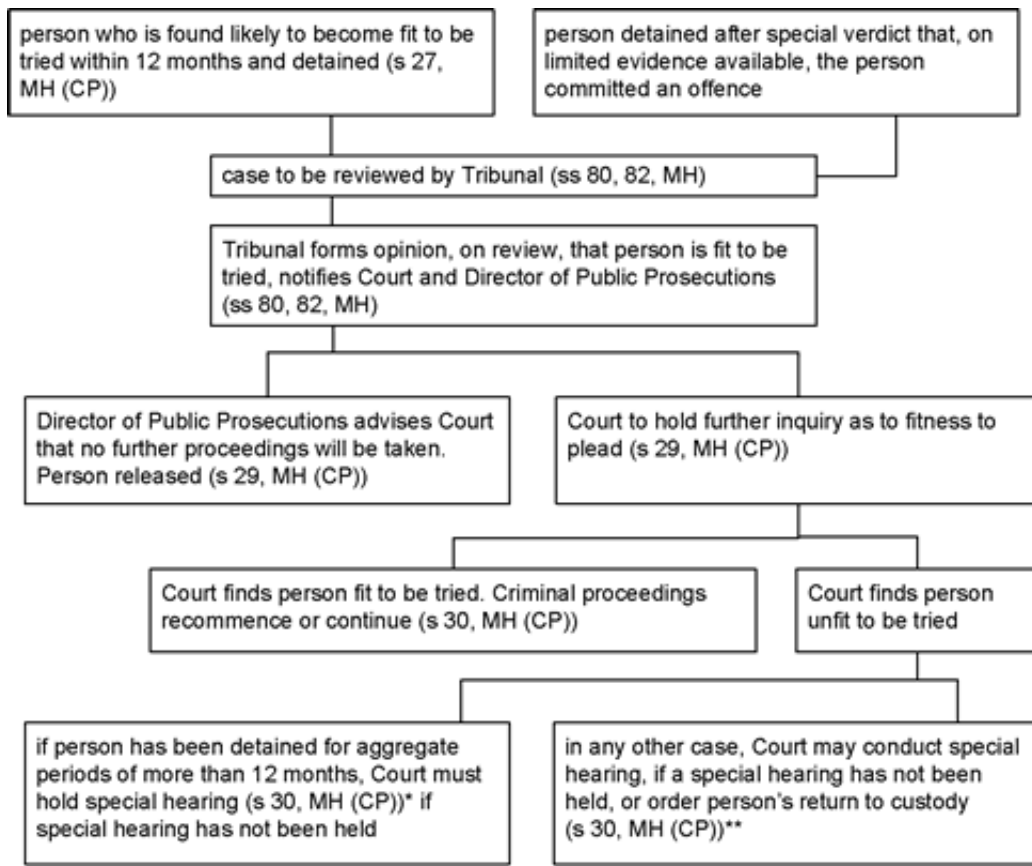
**Table 3—Persons found by Tribunal not likely to be fit to be tried within 12 months**



\* Note: The person is a forensic patient. See section 101 for circumstances when the person ceases to be a forensic patient.

\*\*Note: The person is a forensic patient. See section 103 for circumstances when the person ceases to be a forensic patient.

**Table 4—Effects of review of cases and determination by Tribunal that a person is fit to be tried**



\* Note: See Table 3 for results of special hearing.

\*\*Note: The person is a forensic patient. For circumstances when the person ceases to be a forensic patient, see section 102 (where there has not been a special hearing) or section 103 (where there has been a special hearing).