

2004

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**CRIMES AMENDMENT BILL 2004 (NO 3)
EXPLANATORY STATEMENT**

**Circulated with the authority of
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Outline

This explanatory statement relates to the Crimes Amendment Bill 2004 (No 3) as introduced into the Legislative Assembly.

The Bill amends the *Crimes Act 1900*, the *Mental Health (Treatment and Care) Act 1994*, the *Community Advocate Act 1991* and the *Magistrates Court Act 1930*.

The main purpose of the Bill is to address the question of fitness to plead being decided by the Mental Health Tribunal, and not by the courts. Currently when the issue of fitness to plead is raised in the court proceedings, the Supreme Court and the Magistrates Court are required to refer the question to the Mental Health Tribunal for determination. The Mental Health Tribunal must notify the relevant court of its determination and make recommendations to the court how a person should be dealt with. This Bill ensures that the legal process of determining fitness to plead is decided by the relevant court before a special hearing is held if the defendant is found unfit to plead.

The Bill removes the function of the Mental Health Tribunal of deciding the fitness to plead of an offender or alleged offender, and the question whether a person will become fit within 12 months. The Mental Health Tribunal will maintain its review function of the on-going fitness of a person.

The Supreme Court will be able to decide by a judge alone the question of fitness to plead, before having a special hearing in the event that a person is not fit to plead. The judge will also have to determine the question of whether or not a person will become fit to plead within 12 months.

The Magistrates Court will be able to determine the question of fitness to plead in summary proceedings and proceedings for indictable offences that can be tried summarily. If the Magistrates Court decides a person is unfit to plead, it must also determine whether or not the person will become fit within 12 months.

As a consequence of the Magistrates Court's new functions, amendments are made to the *Magistrates Court Act 1930* to allow for appeals to the Supreme Court.

The Magistrates Court in committal proceedings must reserve the question of fitness to plead for the trial judge, in the event that the matter is committed for trial.

A minor consequential amendment is made to the *Community Advocate Act 1991* in the definitions.

Crimes Amendment Bill 2004 (No 3)

Clauses

Part 1 Preliminary

Clause 1: Name of Act

This is a technical clause which names the short title of the Act.

Clause 2: Commencement

Clause 2 triggers the commencement of the Act on the day after the notification. An Act is defined as a notifiable instrument under section 10 of the *Legislation Act 2001* and must be notified on the ACT legislation register after being made by the Legislative Assembly.

Part 2 Community Advocate Act 1991

Clause 3: Legislation amended - pt 2

Clause 3 amends the *Community Advocate Act 1991*.

Clause 4: Section 3, definition of *forensic patient*, paragraph (b)

Clause 4 amends the definition of ‘forensic patient’ in the *Community Advocate Act 1991* so that a person found unfit to plead by either a court or the Mental Health Tribunal is within the definition. The Mental Health Tribunal retains the function of reviewing fitness to plead when a court has found a person unfit to plead and will not become fit within 12 months.

Part 3 Crimes Act 1900

Clause 5: Legislation amended

This clause lists the parent Act, the *Crimes Act 1900*, which will be amended by the Act.

Clause 6: Section 300, definition of *special hearing*

This clause amends the definition of *special hearing* in section 300 by renumbering section 315 to section 316 as a consequence of the amendments in this Bill.

Clause 7: Sections 310 to 315

Clause 7 substitutes sections 310 to 315 of the *Crimes Act 1900* and substitutes new sections 310 to 315(D) into Division 13.2 of the *Crimes Act 1900*. The new provisions apply to criminal proceedings in the Supreme Court and the Magistrates Court and have the effect of giving the courts jurisdiction to determine the question of fitness to

plead, and if a person is found unfit, whether the person will become fit within 12 months.

What follows is an explanation of each amendment to Part 2.

New section 310 applies Division 13.2 to proceedings in the Supreme Court or the Magistrates Court.

New section 311 inserts the definition of ‘fitness to plead’ into the *Crimes Act 1900*. The definition is based on the existing definition in section 68 the *Mental Health (Treatment and Care) Act 1994*. A person is unfit to plead to a charge if the person’s mental processes are so disordered or impaired that the person cannot understand the nature of the charge, cannot enter a plea or challenge jurors, cannot understand the nature or course of the proceedings, cannot understand the effect of the evidence that may be given by the prosecution or is not able to give instructions to his or her lawyer.

New section 311 (2) provides a person is not unfit to plead only because of memory loss, which is in the existing provision.

New sections 312(1)-(3) state that there is a rebuttable presumption that a person is fit to plead, that the question is a question of fact, and that the question is to be decided on the balance of probabilities.

New section 312(4) provides that no party bears the onus of rebutting the presumption.

New section 313 provides that the question of fitness to plead can be raised by either party to the proceedings or by the court.

New section 314 outlines the procedure to be followed if the question of fitness to plead is raised in the Magistrates Court (other than at a committal hearing), at a committal hearing or in the Supreme Court. If the question arises in a committal hearing, the committal hearing must be completed, and the defendant must not be discharged. If a real and substantial question about the defendant’s fitness to plead arises in the Magistrates Court or the Supreme Court, the question must be reserved for investigation by the court in accordance with the procedures established in new sections 315 and 315A.

Section 315 (1) provides that if a court reserves the question for investigation, it must adjourn or discontinue the hearing or trial and proceed with an investigation. New section 315(2) clarifies what orders the court can make pending an investigation into the fitness to plead of the defendant. Currently section 310(2) of the *Crimes Act 1900* provides that the court can make any order it thinks appropriate including the granting of bail. The proposed provision provides the court can make one or more of the following orders:

- (a) an order granting bail;
- (b) an order remanding the defendant in custody in an appropriate place for a stated period;
- (c) an order requiring the defendant to undergo examination by a psychiatrist or other stated health professional;
- (d) an order discharging the jury if a jury had been empanelled;
- (e) any other order the court considers appropriate.

A safeguard is inserted in new section 315(3) that the court must be satisfied that facilities and services are available at a place designated under (b). This provision is modeled on section 10 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*.

If the court is of the opinion that it is inappropriate having regard to the trivial nature of the charge or offence, or the nature of the person's disability to inflict punishment on the defendant in relation to the offence, under new section 315(4) the court can discontinue the investigation, dismiss the charge and order that the person be released.

New section 315A sets out the procedures for the investigation into the defendant's fitness to plead. If the court finds that a person is unfit to plead, it must also then consider whether the defendant will become fit within 12 months.

Under new section 315B if the court finds that a person is fit to plead, then the proceedings brought against the person can recommence or continue in accordance with normal criminal procedures. This provision is consistent with existing section 311 of the *Crimes Act 1900* when the court has been notified by the Mental Health Tribunal that a person is fit to plead to a charge.

Section 315C requires the Supreme Court or the Magistrates Court to hold a special hearing under existing section 316 or conduct a hearing under existing section 335 respectively in the event that a person has been found to be unfit to plead and unlikely to become fit to plead.

Sections 315D(1)-(2) incorporate the existing orders the court can make for a serious or a non-serious offence under existing sections 313 and 314 of the *Crimes Act 1900* when the Mental Health Tribunal has found that a person is temporarily unfit to plead. The same orders and processes are maintained in the new provisions, but reference is now made to the court determining fitness to plead instead of the Mental Health Tribunal. Sections 315D(3)-(5) give the court the function of reviewing the person's fitness to plead at any time before the end of the 12-month period. This provision replaces section 69 of the *Mental Health (Treatment and Care) Act 1994*.

Section 315D (6) sets out the procedures when the court is reinvestigating a person's fitness to plead within the 12 month period which are the same procedures followed in the initial investigation. Section 315D(7) provides that the court must make a decision on fitness to plead. Section 315D (8) mirrors section 315B and provides that if a person is found fit to plead then the criminal proceedings can continue. Section 315D (9) mirrors section 315C when a person is found unfit to plead, and the court must conduct a special hearing under section 316 or section 335.

Clause 8: Section 316 heading

Section 316 is given a new heading 'special hearing' to reflect that this provision is the substantive provision for the Supreme Court's function of conducting a special hearing when a person has been found unfit to plead and unlikely to become fit within 12 months.

Clause 9: Section 316(3)

Clause 9 makes a consequential amendment to section 316(3) to remove reference to existing section 315(1) which is substituted in the amendments.

Clause 10: Section 316(7)

Clause 10 is a consequential amendment and reinstates existing section 316(7) without reference to the ‘tribunal’.

Clause 11: Action if accused becomes fit to plead after special hearing**Section 319A(1), note**

Clause 11 amends the note to section 319A(1) to direct the reader to the relevant section in the *Mental Health (Treatment and Care) Act 1994* when the Mental Health Tribunal decides on review that a person has become fit after the 12 months period. The existing provision section 69A will become section 68 as a result of the repeal of sections 68 and 69 of that Act.

Clause 12: Fitness to plead-Magistrates Court**Section 335(2)(a)**

Clause 12 is a consequential amendment and reinstates existing section 335(2)(a) without reference to the ‘tribunal’. Section 335 provides for the Magistrates Court to hold a special hearing in the event that a person has been found unfit to plead under new section 315C or new section 315D(9).

Clause 13: Section 335(4)(a)

Clause 13 is a consequential amendment and reinstates existing section 335(4)(a) without reference to the ‘tribunal’.

Clause 14: Action if accused becomes fit to plead after hearing**Section 335A(1), note**

Clause 14 amends the note to section 335A(1) to direct the reader to the relevant section in the *Mental Health (Treatment and Care) Act 1994* when the Mental Health Tribunal decides on review that a person has become fit after the 12 months period. The existing provision section 69A will become section 68 as a result of the repeal of sections 68 and 69 of that Act.

Part 4 Magistrates Court Act 1930**Clause 15 Legislation amended-pt 4**

Clause 15 provides that Part 4 of the Bill amends the *Magistrates Court Act 1930*.

Clause 16 Appeals to which div 11.2 applies**New section 208(1)(aa)**

New section 208(1)(aa) is inserted into Part 11 Division 11.2 of the *Magistrates Court Act 1930* to allow appeals from decisions of the Magistrates Court as to a person’s fitness or unfitness to plead under sections 315A(2) or (3) or section 315D(7). An appeal can be made by the person whose fitness to plead was decided, by anyone who

appeared at the proceeding, or anyone else by leave of the court. An appeal right was required as the function of deciding fitness is a new function for the Magistrates Court and specific provision for an appeal was necessary. This addresses human rights issues as to decisions being appealable or reviewable. The persons' who can appeal is wider than other appeal provisions in the *Magistrates Court Act 1930* due to the special nature of proceedings when fitness to plead is raised. Under existing section 141 of the *Mental Health (Treatment and Care) Act 1994* decisions of the Mental Health Tribunal are appealable to the Supreme Court including decisions under existing sections 68 and 69, and these functions will be transferred to the Magistrates Court under this Bill.

Clause 17 Section 208(1)

Section 208(1) paragraphs will require renumbering when the *Magistrates Court Act 1930* is republished.

Clause 18 Institution of appeal

Section 209(2)

Section 209 requires amendment to provide for service of a notice of appeal on relevant parties if an appeal is made under new section 208(1)(aa).

Clause 19 Appeals in cases other than civil cases

Section 214(1)

Clause 19 is a consequential amendment to section 214 to include mention of the new appeal provision that is being inserted into the *Magistrates Court Act 1934* by this Bill. Section 214 sets out the procedures that apply in a Supreme Court appeal.

Clause 20 Stay of execution pending appeal in certain cases

Section 216

Clause 20 amends section 216 to insert the word 'decision' to incorporate a decision of the Magistrates Court that can be appealed under new section 208(1)(aa).

Part 5 Mental Health (Treatment and Care) Act 1994

Clause 21: Legislation amended

Clause 21 provides that Part 5 of the Bill amends the *Mental Health (Treatment and Care) Act 1994*.

Clause 22: Functions

Section 11(e)

Clause 22 amends the functions of the Mental Health Tribunal to remove the function of determining fitness to plead of persons charged with criminal offences and to specifically include the function of reviewing the fitness to plead of a person who has been found by the courts to be unfit and unlikely to become fit within 12 months. This function of review that the Mental Tribunal has under existing section 69A of the

Mental Health (Treatment and Care) Act 1994 is being retained, and will be in new section 68 of the Act as a consequence of the repeal of sections 68 and 69.

Clause 23: Section 11

Clause 23 will enable renumbering of the paragraphs of section 11 when the *Mental Health (Treatment and Care) Act 1994* is next republished.

Clause 24: Sections 68, 69 and 69A

Clause 24 omits sections 68 and 69 from the Act so that the Mental Health Tribunal does not make a determination as to a person's fitness to plead or decide the question whether or not the person is likely to become fit within 12 months. Existing section 69A is renumbered as a consequence. The definition of fitness to plead that is set out in existing section 68 is reinserted in the new section 68 for the purposes of the Mental Health Tribunal's review functions under that provision.

When a person has been found to be unfit to plead but is likely to become fit within 12 months by a court under the amendments to the *Crimes Act 1900*, the function of reinvestigating that finding during the 12 month period is to be carried out by the court, not the Mental Health Tribunal. Existing section 69 of the *Mental Health (Treatment and Care) Act 1994* has been effectively mirrored by proposed section 315D, which is to be inserted into the *Crimes Act 1900*.

The Mental Health Tribunal will maintain its remaining review functions under the *Mental Health (Treatment and Care) Act 1994*. New section 68 substantially reinstates existing section 69A.

New section 68 is amended to omit reference to the Mental Health Tribunal's functions under repealed sections 68 and 69 and inserts instead a reference to a decision made under the *Crimes Act 1900* by a court that a person is unfit to plead.

New section 68(1)(b)-(4) remains the same as the existing section 69A(1)(b)-(4).

New section 68(5) is a consequential amendment to remove reference to repealed section 68(3) and (4), whether a person is unfit to plead. New section 68(6) and (7) reinstates the definition of fitness to plead from repealed section 68(3) and (4) so that the Mental Health Tribunal can review a person's fitness to plead in accordance with the definition of fitness to plead, as previously provided.

Clause 25: Section 71

Clause 25 removes reference to determinations made under existing sections 68 and 69 as a consequence of the proposed repeal of the provisions. Section 71 relates to the service of a decision, determination or recommendation made by the Mental Health Tribunal. Service must be made on the person affected by the decision, that person's representative if any, the Community Advocate, the Director of Public Prosecutions, and the Chief Executive for Children and Young People, depending on the circumstances of the case.

Clause 26: Constitution for exercise of powers**Section 83(2)(d) and (e)**

Existing section 83 governs how the Mental Health Tribunal is constituted, either by a presidential member or as a panel, depending on the purpose or function being performed. Clause 25 removes reference to sections 68 and 69 which are to be repealed, and inserts reference to the function of the Mental Health Tribunal under new section 68 which is the review of the fitness to plead of persons who have been found by the court to be unfit and unlikely to become fit within 12 months.

Clause 26: Section 83(2)

Paragraphs of section 83(2) will require renumbering when the Act is next republished. This is a drafting amendment.