

2004

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Crimes Amendment Bill 2004 (No 3)

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2004

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Crimes Amendment Bill 2004 (No 3)

A Bill for

An Act to amend the *Crimes Act 1900*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 **Part 1 Preliminary**

2 **1 Name of Act**

3 This Act is the *Crimes Amendment Act 2004 (No 3)*.

4 **2 Commencement**

5 This Act commences on the day after its notification day.

6 *Note* The naming and commencement provisions automatically commence on
7 the notification day (see Legislation Act, s 75 (1)).

1 **Part 2 Community Advocate Act 1991**

2 **3 Legislation amended—pt 2**

3 This part amends the *Community Advocate Act 1991*.

4 **4 Definitions for Act**
5 **Section 3, definition of *forensic patient*, paragraph (b)**

6 *substitute*

7 (b) found by a court or the mental health tribunal to be unfit to
8 plead; or

1 **Part 3 Crimes Act 1900**

2 **5 Legislation amended—pt 3**

3 This part amends the *Crimes Act 1900*.

4 **6 Definitions for pt 13**
5 **Section 300, definition of *special hearing***

6 *omit*

7 section 315

8 *substitute*

9 section 316

10 **7 Sections 310 to 315**

11 *substitute*

12 **310 Application of div 13.2**

13 This division applies to a criminal proceeding in the Supreme Court
14 or the Magistrates Court.

15 **311 When a person is unfit to plead**

16 (1) A person is unfit to plead to a charge if the person's mental
17 processes are disordered or impaired to the extent that the person
18 cannot—

19 (a) understand the nature of the charge; or

20 (b) enter a plea to the charge and exercise the right to challenge
21 jurors or the jury; or

22 (c) understand that the proceeding is an inquiry about whether the
23 person committed the offence; or

-
- 1 (d) follow the course of the proceeding; or
- 2 (e) understand the substantial effect of any evidence that may be
- 3 given in support of the prosecution; or
- 4 (f) give instructions to the person's lawyer.
- 5 (2) A person is not unfit to plead only because the person is suffering
- 6 from memory loss.

7 **312 Presumption of fitness to plead, standard of proof etc**

- 8 (1) A person is presumed to be fit to plead.
- 9 (2) The presumption is rebutted only if it is established, on an
- 10 investigation under this division, that the person is unfit to plead.
- 11 (3) The question of a person's fitness to plead—
- 12 (a) is a question of fact; and
- 13 (b) is to be decided on the balance of probabilities.
- 14 (4) No party bears a burden of proof in relation to the question.

15 **313 Who can raise question of unfitness to plead**

16 The question of a defendant's fitness to plead to a charge may be

17 raised by a party to a proceeding in relation to the charge or by the

18 court.

19 **314 Procedure if question raised**

- 20 (1) If the question is raised in the Magistrates Court (other than at a
- 21 committal hearing) and the court is satisfied that there is a real and
- 22 substantial question about the defendant's fitness to plead, the court
- 23 must reserve the question for investigation under this division.
- 24 (2) If the question is raised at a committal hearing—
- 25 (a) the committal hearing must be completed; and

- 1 (b) the defendant must not be discharged only because the
2 question has been raised; and
- 3 (c) if the person is committed for trial—the question must be
4 reserved for consideration by the Supreme Court.
- 5 (3) If the question has been reserved under subsection (2) (c) or is
6 otherwise raised in the Supreme Court and the court is satisfied that
7 there is a real and substantial question about the defendant's fitness
8 to plead, the court must reserve the question for investigation under
9 this division.
- 10 **315 Procedure if question reserved for investigation**
- 11 (1) If a court reserves the question for investigation, the court must
12 adjourn the hearing or trial in which the question was raised and
13 proceed with an investigation under this division.
- 14 (2) The court may make 1 or more of the following orders:
- 15 (a) an order granting bail;
- 16 (b) an order remanding the defendant in custody in an appropriate
17 place for a stated period;
- 18 (c) an order requiring the defendant to be examined by a
19 psychiatrist or other health professional;
- 20 (d) if the question arose in a trial for which a jury had been
21 empanelled—an order discharging the jury;
- 22 (e) any other order the court considers appropriate.
- 23 (3) The court must not make an order under subsection (2) (b)
24 remanding the defendant in custody at a place other than a prison or
25 remand centre unless satisfied that the facilities or services
26 necessary for the order are available at the place.
- 27 (4) If the court considers that, because of the trivial nature of the charge
28 or the nature of the defendant's disability, it would be inappropriate
29 to inflict any punishment on the defendant in relation to the offence,

the court may decide not to carry out or continue the investigation and may dismiss the charge and order that the person be released.

315A Investigation into fitness to plead

- (1) On an investigation into a defendant's fitness to plead—
 - (a) the court must hear any relevant evidence and submissions put to the court by the prosecution or the defence; and
 - (b) if the court considers that it is in the interests of justice to do so, the court may—
 - (i) call evidence on its own initiative; or
 - (ii) require the defendant to be examined by a psychiatrist or other health professional; or
 - (iii) require the results of the examination to be put before the court.
- (2) The court must decide whether the defendant is unfit to plead.
- (3) If the court finds that the defendant is unfit to plead, the court must also decide whether the defendant is likely to become fit to plead within the next 12 months.

315B Person found fit to plead

If the court decides that the defendant is fit to plead, the proceeding brought against the defendant must be continued in accordance with ordinary criminal procedure.

315C Person found unfit to plead and unlikely to become fit to plead

If the court decides that the defendant is unfit to plead and is unlikely to become fit to plead within the next 12 months, the court must—

- (a) for a proceeding in the Supreme Court—

- 1 (i) discharge any jury empanelled for the proceeding; and
2 (ii) hold a special hearing under section 316; and
3 (b) for a proceeding in the Magistrates Court—conduct a hearing
4 under section 335.

5 **315D Person found temporarily unfit to plead**

- 6 (1) If the court decides that the defendant is unfit to plead but is likely
7 to become fit to plead within the next 12 months, the court must
8 adjourn the proceeding and—
9 (a) if the defendant is charged with a serious offence—remand the
10 defendant in custody or release the defendant on bail; and
11 (b) if the defendant is charged with an offence other than a serious
12 offence—make the orders it considers appropriate.
13 (2) The orders the court may make under subsection (1) (b) include—
14 (a) an order remanding the defendant in custody; and
15 (b) an order requiring the defendant to submit to the jurisdiction of
16 the tribunal to enable the tribunal to make a mental health
17 order.
18 (3) The court may (on application or its own initiative) reinvestigate the
19 defendant's fitness to plead at any time before the end of the
20 12-month period.
21 (4) However, if the court has not reinvestigated the defendant's fitness
22 to plead within 6 months after the day the initial decision was made,
23 the court must reinvestigate it as soon as practicable (but within
24 30 days) after the end of that period.
25 (5) If, before the end of the 12-month period, the defendant has not
26 been found fit to plead, the court must reinvestigate the defendant's
27 fitness to plead as soon as practicable (but within 3 months) after the
28 end of that period.

- 1 (6) On a reinvestigation—
- 2 (a) the court must hear any relevant evidence and submissions put
- 3 to the court by the prosecution or the defence; and
- 4 (b) if the court considers that it is in the interests of justice to do
- 5 so, the court may—
- 6 (i) call evidence on its own initiative; or
- 7 (ii) require the defendant to be examined by a psychiatrist or
- 8 other health professional; or
- 9 (iii) require the results of the examination to be put before the
- 10 court.
- 11 (7) The court must decide whether the defendant is unfit to plead.
- 12 (8) If the court decides that the defendant is fit to plead, the proceeding
- 13 brought against the defendant must be continued in accordance with
- 14 ordinary criminal procedure.
- 15 (9) If, on a reinvestigation mentioned in subsection (5), the court
- 16 decides that the defendant is unfit to plead, the court must—
- 17 (a) for a proceeding in the Supreme Court—
- 18 (i) discharge any jury empanelled for the proceeding; and
- 19 (ii) hold a special hearing under section 316; and
- 20 (b) for a proceeding in the Magistrates Court—conduct a hearing
- 21 under section 335.

8 Section 316 heading

substitute

316 Special hearing

| | | |
|----|-----------|--|
| 1 | 9 | Section 316 (3) |
| 2 | | <i>omit</i> |
| 3 | | If section 315 (1) applies, then |
| 4 | | <i>substitute</i> |
| 5 | | The |
| 6 | 10 | Section 316 (7) |
| 7 | | <i>omit</i> |
| 8 | | A determination by the tribunal |
| 9 | | <i>substitute</i> |
| 10 | | A decision |
| 11 | 11 | Action if accused becomes fit to plead after special hearing |
| 12 | | Section 319A (1), note |
| 13 | | <i>substitute</i> |
| 14 | | <i>Note</i> For the relevant review of fitness to plead provisions, see the <i>Mental Health (Treatment and Care) Act 1994</i> , s 68. |
| 15 | | |
| 16 | | |
| 17 | 12 | Fitness to plead—Magistrates Court |
| 18 | | Section 335 (2) (a) |
| 19 | | <i>omit</i> |
| 20 | | tribunal determines |
| 21 | | <i>substitute</i> |
| 22 | | Magistrates Court decides as mentioned in section 315C or |
| 23 | | section 315D (9) |

1 **13 Section 335 (4) (a)**

2 *omit*

3 tribunal determines

4 *substitute*

5 Magistrates Court decides as mentioned in section 315C or
6 section 315D (9)

7 **14 Action if accused becomes fit to plead after hearing**
8 **Section 335A (1), note**

9 *substitute*

10 *Note* For the relevant review of fitness to plead provisions, see the *Mental*
11 *Health (Treatment and Care) Act 1994*, s 68.

Part 4 Magistrates Court Act 1930

15 Legislation amended—pt 4

This part amends the *Magistrates Court Act 1930*.

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

before paragraph (a), insert

(aa) an appeal by any of the following from a decision of the Magistrates Court under the Crimes Act, section 315A (2) or (3) (Investigation into fitness to plead) or section 315D (7) (Person found temporarily unfit to plead):

(i) the person whose fitness to plead was decided;

(ii) anyone who appeared at the proceeding in which the decision was made;

(iii) anyone else with the leave of the court;

17 Section 208 (1)

renumber paragraphs when Act next republished under Legislation Act

**18 Institution of appeal
Section 209 (2)**

substitute

(2) As soon as practicable after instituting the appeal, the appellant must—

(a) file a copy of the notice of appeal with the Magistrates Court;
and

(b) serve a copy of the notice of appeal on—

- 1 (i) for an appeal mentioned in section 208 (1) (aa)—each
2 other person mentioned in that paragraph; and
3 (ii) for any other appeal—the informant.

4 **19 Appeals in cases other than civil cases**
5 **Section 214 (1)**

- 6 *before*
7 (a)
8 *insert*
9 (aa),

10 **20 Stay of execution pending appeal in certain cases**
11 **Section 216 (1)**

- 12 *before*
13 conviction
14 *insert*
15 decision,

1 **Part 5** **Mental Health (Treatment and**
2 **Care) Act 1994**

3 **21** **Legislation amended—pt 5**

4 This part amends the *Mental Health (Treatment and Care) Act 1994*.

5 **22** **Functions**
6 **Section 11 (e)**

7 *substitute*

8 (e) to make orders for the treatment, care, control, rehabilitation
9 and protection of people found unfit to plead, to review their
10 welfare and to make any appropriate order for their release
11 (subject to conditions or unconditionally);

12 (ea) to review the fitness to plead of certain people under
13 section 68;

14 **23** **Section 11**

15 *renumber paragraphs when Act next republished under Legislation*
16 *Act*

17 **24** **Sections 68, 69 and 69A**

18 *substitute*

19 **68** **Review of certain people found unfit to plead**

20 (1) This section applies if—

21 (a) the Supreme Court or the Magistrates Court makes a decision
22 under the *Crimes Act 1900*, section 315A (2) or
23 section 315D (7) that a person is unfit to plead to a charge; and

-
- 1 (b) the charge is for an offence punishable by imprisonment for
2 5 years or longer; and
- 3 (c) an order is made in relation to the charge under any of the
4 following provisions of the *Crimes Act 1900*:
- 5 • section 318 (2) (Non-acquittal at special hearing—non-
6 serious offence);
- 7 • section 319 (2) (Non-acquittal at special hearing—serious
8 offence);
- 9 • section 335 (2), (3) or (4) (Fitness to plead—Magistrates
10 Court).
- 11 (2) The tribunal may (on application or on its own initiative) review the
12 person's fitness to plead at any time.
- 13 (3) However, the tribunal must review the person's fitness to plead—
- 14 (a) as soon as practicable (but within 3 months) after the end of
15 12 months after the day the order is made; and
- 16 (b) at least once every 12 months after each review.
- 17 (4) Subsection (3) does not apply if—
- 18 (a) the person has already been found fit to plead; or
- 19 (b) the director of public prosecutions has told the tribunal, in
20 writing, of the director's intention not to take further
21 proceedings against the person in relation to the offence.
- 22 (5) On a review, the tribunal must decide on the balance of probabilities
23 whether the person is unfit to plead.
- 24 (6) The tribunal must decide that the person is unfit to plead if satisfied
25 that the person's mental processes are disordered or impaired to the
26 extent that the person cannot—
- 27 (a) understand the nature of the charge; or
- 28 (b) enter a plea to the charge and exercise the right to challenge
29 jurors or the jury; or
-

- 1 (c) understand that the proceeding is an inquiry about whether the
2 person committed the offence; or
3 (d) follow the course of the proceeding; or
4 (e) understand the substantial effect of any evidence that may be
5 given in support of the prosecution; or
6 (f) give instructions to the person's lawyer.
7 (7) The person is not unfit to plead only because the person is suffering
8 from memory loss.
9 (8) To remove any doubt, this section applies even if the person is no
10 longer in custody or under a mental health order.
11 *Note* A person the subject of a proceeding may be summoned to appear at the
12 proceeding (see s 90).

13 **25 Section 71**

14 *substitute*

15 **71 Service of decisions etc**

- 16 The registrar must serve a copy of a decision, determination or
17 recommendation made under section 68 or section 70 on—
18 (a) the person about whom the decision, determination or
19 recommendation is made; and
20 (b) the representative of that person (if any); and
21 (c) the community advocate; and
22 (d) the director of public prosecutions; and
23 (e) if the person about whom the decision, determination or
24 recommendation is made is a child—the C&YP chief
25 executive.

1 **26 Constitution for exercise of powers**
2 **Section 83 (2) (d) and (e)**

3 *substitute*

4 (d) reviewing a person's fitness to plead under section 68; or

5 **27 Section 83 (2)**

6 *renumber paragraphs when Act next republished under Legislation*
7 *Act*

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2004.

2 Notification

Notified under the Legislation Act on 2004.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.
