



AUSTRALIAN CAPITAL TERRITORY

Crimes (Amendment) Act 1999

No. 32 of 1999

An Act to amend the *Crimes Act 1900* and for related purposes

[Notified in ACT Gazette S34: 25 June 1999]

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

1. Short title

This Act may be cited as the *Crimes (Amendment) Act 1999*.

2. Commencement

(1) Sections 1 to 4 (inclusive) commence on the day this Act is notified in the *Gazette*.

(2) The remaining provisions commence on 1 October 1999.

3. Principal Act

In this Act, “Principal Act” means the *Crimes Act 1900*.¹

4. Repeal

Section 428A of the Principal Act is repealed.

5. Definitions

Section 428B of the Principal Act is amended by inserting the following definitions:

“ ‘accused’, for a person before the Magistrates Court, means the defendant;

‘defendant’ has the meaning given by the *Magistrates Court Act 1930*, subsection 5 (1);

‘mental illness’ has the same meaning as in the *Mental Health (Treatment and Care) Act 1994*, section 4;”.

6. Substitution

Section 428C of the Principal Act is repealed and the following sections are substituted:

“428C. Limitation on orders and detention—non-acquittals

“(1) If, under subsection 428L (2) or 428M (2), the court makes an order that the accused be detained in custody until the tribunal orders otherwise, the court shall indicate whether, if the special hearing had been normal criminal proceedings against a person who was fit to be tried for and convicted of the offence with which the accused is charged, it would have imposed a sentence of imprisonment.

“(2) If, under subsection (1), the court indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate if the special hearing had been normal criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.

“428CA. Limitation on orders and detention—acquittals

“(1) If, under section 428Q or 428R, the court makes an order that the accused be detained in custody until the tribunal orders otherwise, the court shall indicate whether, if the accused had not been acquitted, it would have imposed a sentence of imprisonment.

“(2) If, under subsection (1), the court indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate if the accused were a person who had been found guilty of that offence.

“428CB. Limitation on Supreme Court orders

The court shall not order that an accused be detained for a period greater than the term nominated by it under section 428C or 428CA, as the case may be.

“428CC. Limitation on orders and detention—dismissal of charge

“(1) If under section 428RD or 428RE, the Magistrates Court makes an order that the accused be detained in custody until the tribunal orders otherwise, the Magistrates Court shall indicate whether, if the charges against the accused had not been dismissed and the accused were a person who had been found guilty of the offence, it would have imposed a sentence of imprisonment.

“(2) If, under subsection (1), the Magistrates Court indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate if the accused were a person who had been found guilty of that offence.

“428CD. Limitation on orders and detention—Magistrates Court

“(1) If under section 428WA, the Magistrates Court makes an order that the accused be detained in custody until the tribunal orders otherwise, the Magistrates Court shall indicate whether, if the hearing had been a normal criminal hearing against a person who was fit to be tried for and convicted of the offence with which the accused is charged, it would have imposed a sentence of imprisonment.

“(2) If, under subsection (1), the Magistrates Court indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate if the hearing had been a normal criminal hearing against a person who was fit to be tried for that offence and the person had been found guilty of that offence.

“428CE. Limitation on Magistrates Court orders

The Magistrates Court shall not order that an accused be detained for a period greater than the term nominated by it under subsection 428CC (2) or 428CD (2).

“428CF. Manner in which relevant court to inform itself

For sections 428C, 428CA, 428CC and 428CD, in determining the sentence it would have imposed, the relevant court may inform itself and consider such evidence and submissions as it would were the court determining the sentence to be imposed in normal criminal proceedings.”.

7. Criteria for detention

Section 428D of the Principal Act is amended—

- (a) by inserting “(except section 428WA)” after “Division 5”; and
- (b) by inserting in paragraph (a) “or mental illness” after “dysfunction”.

8. Insertion

After section 428D of the Principal Act the following section is inserted in Division 1 of Part 11A:

“428DA. Assessment whether emergency detention required

“(1) If, in proceedings before the Magistrates Court, it has reasonable grounds for believing that an accused requires immediate treatment or care by reason of his or her being mentally dysfunctional or mentally ill, the Magistrates Court may, without requiring the accused to submit to the jurisdiction of the tribunal, order that—

- (a) the accused be taken by a police officer, or an escort under the *Custodial Escorts Act 1998*, to an approved health facility for examination by a medical practitioner for the purpose of determining whether the accused is mentally dysfunctional or mentally ill;
- (b) the accused may only be released into the custody of a police officer—
 - (i) by the person in charge of the approved health facility; or
 - (ii) if the accused is found to be mentally dysfunctional or mentally ill requiring detention and care—by the person in charge of an approved health facility or approved mental health facility at which the accused is detained for care; and
- (c) on being so released, the accused be dealt with in 1 of the following ways:
 - (i) subject to subsection (2) and despite the Bail Act, be admitted to bail by an authorised officer;

- (ii) despite the Bail Act, be held in the custody of a police officer who shall cause the accused to be brought before a court as soon as practicable for the purpose of the court determining whether or not to grant bail;
- (iii) be dealt with by an authorised officer in accordance with the Bail Act.

“(2) If, when making an order under subparagraph (1) (c) (i), the Magistrates Court specifies terms and conditions on which bail is to be granted, an authorised officer may only grant bail subject to those terms and conditions.

“(3) If, under this section, an accused who is taken to an approved health facility—

- (a) is released or discharged from the approved health facility or, if detained for care, an approved mental health facility, otherwise than into the custody of a police officer; or
- (b) leaves the approved health facility or approved mental health facility, otherwise than in the custody of a police officer;

a police officer may arrest the accused without warrant for the purposes of the terms of the order being satisfied.

“(4) In this section—

‘approved health facility’ has the meaning given by the *Mental Health (Treatment and Care) Act 1994*, section 4;

‘approved mental health facility’ has the meaning given by the *Mental Health (Treatment and Care) Act 1994*, section 4;

‘authorised officer’ has the meaning given by the Bail Act, subsection 3 (1);

‘Bail Act’ means the *Bail Act 1992*.”.

9. Referral to tribunal

Section 428E of the Principal Act is amended—

- (a) by omitting from subsection (1) all the words from and including “Where” to and including “charge” (second occurring) and substituting the following:

“(1) If—

- (a) a person has been committed for trial for an indictable offence;

- (b) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the court; and
 - (c) the court is satisfied that there is a question as to the person's fitness to plead to the charge;"; and
- (b) by adding at the end the following subsection:
- "(3) If, on the hearing of an information laid before the Magistrates Court—
- (a) the issue of fitness to plead is raised by a party to the proceedings or by the Magistrates Court; and
 - (b) the Magistrates Court is satisfied that there is a question as to the person's fitness to plead;
- the Magistrates Court shall order the person to submit to the jurisdiction of the tribunal to enable the tribunal to determine whether or not the person is fit to plead."

10. Insertion

After section 428F of the Principal Act the following section is inserted:

"428FA. Action pending determination by tribunal

"If—

- (a) an accused is charged with a serious offence or a non-serious offence;
- (b) the court has made an order under subsection 428E (1); and
- (c) a jury has been empanelled for the proceedings;

the court may, having regard to the time that is likely to be taken by the tribunal before it makes its determination, discharge the jury."

11. Temporary unfitness to plead—non-serious offence

Section 428G of the Principal Act is amended by omitting paragraph (2) (a) and substituting the following paragraph:

"(a) if a jury has been empanelled—discharge the jury;".

12. Temporary unfitness to plead—serious offence

Section 428H of the Principal Act is amended by omitting paragraph (2) (a) and substituting the following paragraph:

"(a) if a jury has been empanelled—discharge the jury;".

13. Special hearings

Section 428I of the Principal Act is amended by omitting from subsection (2) all the words after “shall” and substituting “, if a jury has been empanelled, discharge the jury”.

14. Nature and conduct of a special hearing

Section 428J of the Principal Act is amended—

- (a) by omitting subsection (2) and substituting the following subsections:

“(2) A special hearing shall be a trial by jury—

(a) unless—

- (i) the court is satisfied that the accused is capable of making an election to have a special hearing to be a trial by a single judge without a jury before the court first fixes a date for the hearing; and
- (ii) the accused makes the election before that date; or

(b) unless—

- (i) the court is satisfied that the accused is incapable of making the election mentioned in subparagraph (a) (i); and
- (ii) before the court first fixes a date for the hearing, any guardian of the accused notifies the court that, in his or her opinion, it is in the best interests of the accused for the special hearing to be a trial by a single judge without a jury.

“(2A) If subsection 428I (1) applies, the court shall—

- (a) unless satisfied that the accused is capable of making an election under subparagraph (2) (a) (i); or
- (b) if satisfied that—
 - (i) the accused is incapable of making an election under subparagraph (2) (a) (i); and

- (ii) a guardian has not been appointed by the Guardianship and Management of Property Tribunal under the *Guardianship and Management of Property Act 1991*, who has power to make an election of that kind;

direct that tribunal to appoint a guardian with power to make an election of that kind.

“(2B) If—

- (a) the accused makes an election under subparagraph (2) (a) (ii); or
- (b) a guardian notifies the court under subparagraph (2) (b) (ii);

the special hearing shall be by single judge without a jury.

“(2C) Despite paragraph (2) (b), if before the date fixed by the court for the hearing—

- (a) the court is satisfied that the accused is capable of making the election mentioned in subparagraph (2) (a) (i); and
- (b) the accused notifies the court that he or she objects to the special hearing being a trial by a single judge without a jury;

the special hearing shall be a trial by jury.”; and

- (b) by omitting from subsection (6) “At the commencement of a special hearing, the Court shall” and substituting “If a special hearing is a trial by jury, the court shall, at the commencement of the hearing,”.

15. Verdicts available at special hearing

Section 428K of the Principal Act is amended—

- (a) by inserting in subsection (1) “that is a trial by jury,” after “hearing”; and
- (b) by inserting after subsection (2) the following subsection:

“(2A) If, at a special hearing by a single judge without a jury, the judge is not satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence charged—

 - (a) the judge shall find the accused not guilty of the offence charged; and

- (b) the accused shall be dealt with as if the accused had been found not guilty at an ordinary trial.”.

16. Non-acquittal at special hearing—non-serious offence

Section 428L of the Principal Act is amended by omitting paragraph (1) (b) and substituting the following paragraph:

- “(b) at a special hearing that is a trial—
 - (i) by a single judge without a jury—the judge is satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence charged; or
 - (ii) by jury—the jury advises the court under subsection 428K (1).”.

17. Non-acquittal at special hearing—serious offence

Section 428M of the Principal Act is amended by omitting paragraph (1) (b) and substituting the following paragraph:

- “(b) at a special hearing that is a trial—
 - (i) by a single judge without a jury—the judge is satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence charged; or
 - (ii) by jury—the jury advises the court under subsection 428K (1).”.

18. Heading—Division 3, Part 11A

The heading to Division 3 of Part 11A of the Principal Act is amended by omitting “*illness*” and substituting “*impairment*”.

19. Acquittal on grounds of mental impairment

Section 428N of the Principal Act is amended—

- (a) by omitting from subsection (1) “illness” and substituting “impairment”;
- (b) by inserting in subsection (1) “or mental illness” after “dysfunction”; and
- (c) by omitting from subsections (2) and (3) “illness” and substituting “impairment”.

20. Plea of not guilty by reason of mental impairment

Section 428O of the Principal Act is amended by omitting “illness” and substituting “impairment”.

21. Explanation to jury

Section 428P of the Principal Act is amended—

- (a) by inserting “by jury” after “trial”; and
- (b) by omitting “illness” and substituting “impairment”.

22. Court orders following acquittal—non-serious offence

Section 428Q of the Principal Act is amended by omitting from subsection (1) “illness” and substituting “impairment”.

23. Court orders following acquittal—serious offence

Section 428R of the Principal Act is amended by omitting from subsection (1) “illness” and substituting “impairment”.

24. Insertion

After section 428R of the Principal Act the following Division is inserted:

“Division 3A—Dismissal by Magistrates Court on grounds of mental impairment

“428RA. Definition

In this Division—

‘serious offence’ means—

- (a) an offence involving actual or threatened violence; or
- (b) an offence against subsection 27 (3) or (4).

“428RB. Dismissal on grounds of mental impairment

“(1) An accused is entitled to have charges against him or her dismissed on the grounds of mental impairment if it is established on the balance of probabilities that, at the time of the alleged offence, the accused was, as a result of mental dysfunction—

- (a) incapable of knowing what he or she was doing; or
- (b) incapable of understanding that what he or she was doing was wrong.

“(2) The onus of establishing that the accused is entitled to have charges against him or her dismissed on the grounds of mental impairment lies on the party seeking the dismissal.

“(3) Evidence adduced by the prosecution to establish that the accused is entitled to have charges against him or her dismissed on the grounds of mental impairment is inadmissible except with the leave of the Magistrates Court.

“428RC. Plea of not guilty by reason of mental impairment

If an accused pleads not guilty by reason of mental impairment, the Magistrates Court shall find the accused not guilty on that ground with respect to the offence charged if—

- (a) the Magistrates Court considers the finding appropriate; and
- (b) the prosecution agrees to the finding.

“428RD. Magistrates Court orders following dismissal—non-serious offence

“(1) If an accused has been charged with an offence other than a serious offence and the charges are dismissed on the ground of mental impairment, the Magistrates Court may—

- (a) make an order requiring the accused to submit to the jurisdiction of the tribunal to enable the tribunal to make recommendations as to how he or she should be dealt with; or
- (b) make such other orders as it considers appropriate.

“(2) Where—

- (a) the Magistrates Court makes an order under paragraph (1) (a); and
- (b) the tribunal notifies the Magistrates Court of its recommendations;

the Magistrates Court shall, in consideration of the tribunal’s recommendations, make such further orders as it considers appropriate.

“(3) The orders the Magistrates Court may make under subsections (1) and (2) include the following:

- (a) that the accused be detained in custody until the tribunal orders otherwise;
- (b) that the accused submit to the jurisdiction of the tribunal to enable the tribunal to make a mental health order.

“428RE. Magistrates Court orders following dismissal—serious offence

“(1) If an accused is charged with a serious offence and the charges against him or her are dismissed on the ground of mental impairment, the Magistrates Court shall order that the accused be detained in custody until the tribunal orders otherwise unless, in consideration of the criteria for detention in section 428D, it is satisfied that it is more appropriate to order that the accused submit to the jurisdiction of the tribunal to enable the tribunal to make a mental health order.

“(2) If the Magistrates Court is satisfied as mentioned in subsection (1), it shall make an order accordingly.”.

25. Heading—Division 4, Part 11A

The heading to Division 4 of Part 11A of the Principal Act is amended by inserting “*or mentally ill*” after “*dysfunctional*”.

26. Application

Section 428S of the Principal Act is amended by inserting in paragraph (b) “or mentally ill” after “dysfunctional”.

27. Referral to tribunal

Section 428T of the Principal Act is amended—

- (a) by inserting in paragraphs (1) (a) and (b) “or mentally ill” after “dysfunctional”;
- (b) by inserting in subsection (2) “or mentally ill” after “dysfunctional”; and
- (c) by adding at the end the following subsection:

“(4) If the relevant court orders a person who is found by the tribunal to be mentally dysfunctional or mentally ill to be sentenced to a period of imprisonment, the court shall not order the person to be imprisoned for a period greater than any period of imprisonment to which the person could have been sentenced, but for that finding.”.

28. Heading—Division 5, Part 11A

The heading to Division 5 of Part 11A of the Principal Act is amended by inserting “*or mentally ill*” after “*dysfunctional*”.

29. Indictable offences heard and determined summarily

Section 428V of the Principal Act is amended by inserting in paragraph (a) “or mental illness” after “dysfunction”.

30. Powers of Magistrates Court

Section 428W of the Principal Act is amended—

(a) by inserting in paragraph (1) (a) “or mentally ill” after “dysfunctional”;

(b) by inserting after subsection (2) the following subsections:

“(2A) In determining whether to make an order under paragraph (2) (a) or (b), the Magistrates Court shall have regard to—

- (a) the nature and seriousness of the mental dysfunction or mental illness;
- (b) the period for which the mental dysfunction or mental illness is likely to continue;
- (c) the extent to which by reason of the accused’s mental dysfunction or mental illness the accused is likely to do serious harm to himself or herself or others;
- (d) whether the tribunal could make an order under section 26 or 27 of the *Mental Health (Treatment and Care) Act 1994*;
- (e) the seriousness of the alleged offence;
- (f) the antecedents of the accused; and
- (g) the effectiveness of any order previously made under paragraph (2) (a) or (b), including to the extent to which—
 - (i) the order assisted the accused to obtain appropriate treatment and care for his or her mental dysfunction or mental illness; and
 - (ii) access to that treatment and care has enabled the accused to modify his or her behaviour, being behaviour of a kind that has previously resulted in the accused having been charged with an offence.

“(2B) Despite subsection (2), the Magistrates Court may only make an order under that subsection in relation to proceedings with respect to an indictable offence that may be heard and determined summarily with the consent of the Director of Public Prosecutions.”;

- (c) by inserting in subsection (6) “or mentally ill” after “dysfunctional”; and
- (d) by adding at the end the following subsection:

“(7) If the Magistrates Court makes an order under paragraph (6) (a), the tribunal shall notify the Magistrates Court about each of the matters referred to in paragraphs (2A) (a) to (d), inclusive.”.

31. Insertion

After section 428W of the Principal Act the following section is inserted:

“428WA. Fitness to plead—Magistrates Court

“(1) This section applies to an indictable offence that can be heard and determined summarily if the Magistrates Court is of the opinion that the case can properly be disposed of summarily having regard to—

- (a) any relevant representations made by the accused;
- (b) any relevant representations made by the prosecutor in the presence of the accused;
- (c) the circumstances and, in particular, the degree of seriousness of the case; and
- (d) any other circumstances which appear to the Magistrates Court to make it more appropriate for the case to be dealt with on indictment rather than summarily.

“(2) If this section applies and—

- (a) the tribunal determines that the accused charged with a serious offence is unfit to plead; and
- (b) after hearing the charge, the Magistrates Court is satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence;

the Magistrates Court shall order that the accused be detained in custody until the tribunal orders otherwise unless, in consideration of the criteria for detention in section 428D, it is satisfied that it is more appropriate to order that the accused submit to the jurisdiction of the tribunal to enable the tribunal to make a mental health order.

“(3) If, under subsection (2), the Magistrates Court is satisfied that it is more appropriate to order that the accused submit to the jurisdiction of the tribunal to enable the tribunal to make a mental health order, it shall make an order to that effect.

“(4) If this section applies and—

- (a) the tribunal determines that the accused charged with an offence other than a serious offence is unfit to plead; and
- (b) after hearing the charge, the Magistrates Court is satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence;

the Magistrates Court may make such orders as it considers appropriate, including the following:

- (c) that the accused be detained in custody until the tribunal orders otherwise;
- (d) that the accused submit to the jurisdiction of the tribunal to enable the tribunal to make a mental health order.

“(5) The Magistrates Court shall conduct a hearing under this section as nearly as possible as if it were a normal criminal proceeding.

“(6) In a hearing under this section—

- (a) if legal representation is available to the accused—the accused shall have legal representation unless the Magistrates Court otherwise orders; and
- (b) the accused is to be taken to have pleaded not guilty in respect of the offence charged.

“(7) If the Magistrates Court is satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence, its finding—

- (a) does not constitute a basis in law for the recording of any conviction for the offence charged; and
- (b) constitutes a bar to further prosecution of the accused for any offence in respect of the acts which were alleged to constitute the offence charged.

“(8) In this section—

‘serious offence’ means—

- (a) an offence involving actual or threatened violence; or
- (b) an offence against subsection 27 (3) or (4).”.

32. Amendment of *Guardianship and Management of Property Act 1991*

Section 7 of the *Guardianship and Management of Property Act 1991* is amended by adding at the end the following subsection:

“(5) If the Supreme Court gives a direction under subsection 428J (2A) of the Crimes Act, the Tribunal shall appoint a guardian for the accused with power to make an election mentioned in that subsection.”.

NOTE

Principal Act

1. Reprinted as at 28 February 1999.

[Presentation speech made in Assembly on 22 April 1999]