

1994

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Crimes (Amendment) Bill ~~(No. 2)~~ 1994

**A BILL
FOR**

An Act to amend the *Crimes Act 1900*

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

Short title

- 5 1. This Act may be cited as the *Crimes (Amendment) Act ~~(No. 2)~~ 1994*.

Commencement

- 10 2. (1) Sections 1, 2 and 3 commence on the day on which this Act is notified in the *Gazette*.
- (2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.
- (3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which

84043 1991/100 (T43/94)

Principal Act

3. In this Act, "Principal Act" means the *Crimes Act 1900*.¹

Insertion

4. After Part XI of the Principal Act the following Part is inserted:

5 **"PART XIA—UNFITNESS TO PLEAD, MENTAL ILLNESS
AND MENTAL DYSFUNCTION**

"Division 1—Preliminary

Application

"428A. (1) This Part ceases to have effect—

- 10 (a) if the operation of the Part is not extended—at the expiration of the period of 2 years from the commencement date; or
- (b) if the operation of the Part is extended—at the expiration of the period of 4 years from the commencement date.

15 "(2) For the purposes of subsection (1), the Minister may, at any time before the expiration of the period of 2 years from the commencement date, extend the operation of this Part by notice published in the *Gazette*.

"(3) A notice under subsection (2) is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

"(4) In this section—

20 'commencement date' means the date on which section 428B commences.

Interpretation

"428B. In this Part, unless the contrary intention appears—

'Court' means the Supreme Court;

25 'mental dysfunction' means a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion;

'mental health order' means a mental health order under the *Mental Health (Treatment and Care) Act 1994*;

30 'serious offence' means—

- (a) an indictable offence involving actual or threatened violence; or

(b) an offence against subsection 27 (3) or (4);

'special hearing' means a hearing conducted in accordance with section 428I;

5 'Tribunal' means the Mental Health Tribunal established under the *Mental Health (Treatment and Care) Act 1994*.

Limit on detention

10 "428C. Nothing in this Part permits the Supreme Court or the Magistrates Court to order that an accused be detained for a period greater than the maximum period of imprisonment to which the accused, if convicted of the relevant offence in normal criminal proceedings, could have been sentenced.

Criteria for detention

15 "428D. For the purposes of this Part, other than Division 5, in making a decision which could include an order for detention, the Supreme Court or the Magistrates Court shall consider the following criteria:

- (a) the nature and extent of the accused's mental dysfunction, including the effect it is likely to have on the person's behaviour in the future;
- (b) whether or not, if released—
 - 20 (i) the accused's health and safety is likely to be substantially impaired; or
 - (ii) the accused is likely to be a danger to the community;
- (c) the nature and circumstances of the offence with which the accused is charged;
- 25 (d) the principle that a person should not be detained in prison unless no other reasonable option is available;
- (e) any recommendation made by the Tribunal as to how the accused should be dealt with.

Division 2—Unfitness to plead

30 **Referral to Tribunal**

"428E. (1) Where, on the trial of a person charged with an indictable offence—

- (a) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the Court; and

- (b) the Court is satisfied that there is a question as to the person's fitness to plead to the charge;

5 the 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 to the charge.

“(2) Where the Court makes an order under subsection (1), it shall adjourn the proceedings to which the order relates and shall make such orders as it considers appropriate, including the granting of bail to the person who is the subject of the order.

10 **Person found fit to plead**

“428F. Where the Tribunal notifies the Court that it has determined that a person who is the subject of an order under subsection 428E (1) is fit to plead to a charge—

- 15 (a) the proceedings brought against the person in respect of the offence charged shall continue in accordance with ordinary criminal procedures; or
- (b) if the Court considers it appropriate—
- (i) the Court shall discharge the jury originally empanelled for the proceedings and empanel a new jury; and
- 20 (ii) the proceedings shall recommence in accordance with ordinary criminal procedures.

Temporary unfitness to plead—non-serious offences

“428G. (1) This section applies where—

- 25 (a) an accused is charged with an offence other than a serious offence;
- (b) the Court has made an order under subsection 428E (1) in relation to the accused; and
- (c) the Tribunal notifies the Court that it has determined that the accused is unfit to plead to a charge but is likely to become fit within 12 months after the determination.

30 “(2) Where this section applies, the Court shall—

- (a) discharge the jury;
- (b) make such orders as it considers appropriate in relation to the accused; and
- (c) adjourn the proceedings.

“(3) The orders the Court may make under paragraph (2) (b) include the following:

- 5
- (a) an order requiring the accused to be detained in custody;
 - (b) an order requiring the accused to submit to the jurisdiction of the Tribunal to enable the Tribunal to make a mental health order.

Temporary unfitness to plead—serious offences

“428H. (1) This section applies where—

- 10
- (a) an accused is charged with a serious offence;
 - (b) the Court has made an order under subsection 428E (1) in relation to the accused; and
 - (c) the Tribunal notifies the Court that it has determined that the accused is unfit to plead to the charge but is likely to become fit within 12 months after the determination.

“(2) Where this section applies, the Court shall—

- 15
- (a) discharge the jury;
 - (b) order that the accused be detained in custody or released on bail; and
 - (c) adjourn the proceedings.

Special hearings

20 “428I. (1) The Court shall conduct a special hearing in relation to an accused who is the subject of an order under subsection 428E (1), where the Tribunal notifies the Court that—

- 25
- (a) it has determined that the accused is unfit to plead to a charge and is unlikely to become fit within 12 months after the determination; or
 - (b) having determined that the accused was unfit to plead to a charge but was likely to become fit within 12 months after the determination, it has determined that, the period of 12 months having elapsed, the accused remains unfit to plead.

30 “(2) Where paragraph (1) (a) applies, the Court shall discharge the jury originally empanelled for the trial.

Nature and conduct of a special hearing

“428J. (1) Subject to this section, the Court shall conduct a special hearing as nearly as possible as if it were an ordinary criminal proceeding.

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

“(3) Unless the Court otherwise orders, the accused shall have legal representation at a special hearing.

5 “(4) A determination by the Tribunal that the accused is unfit to plead to the charge is not to be taken to be an impediment to his or her being represented at a special hearing.

“(5) At a special hearing, the accused is to be taken to have pleaded not guilty in respect of the offence charged.

10 “(6) At the commencement of a special hearing, the Court shall explain to the jury—

- (a) the meaning of unfitness to plead;
- (b) that the accused is unfit to plead to the charge in accordance with ordinary criminal procedures;
- 15 (c) that the purpose of the special hearing is to ensure that, despite the unfitness of the accused to plead in accordance with ordinary criminal procedures, the accused should be acquitted unless it can be proved beyond reasonable doubt that, on the evidence available, the accused committed the acts which constitute the offence;
- (d) the actions that are available to the jury under section 428K; and
- 20 (e) the legal and practical consequences of those actions.

Verdicts available at special hearings

“428K. (1) At a special hearing the jury shall, if satisfied beyond reasonable doubt that the accused committed the acts which constitute the offence charged, advise the Court accordingly.

25 “(2) If the jury is not satisfied in accordance with subsection (1)—

- (a) the jury shall return a verdict of not guilty in respect of the offence charged; and
- (b) the accused shall be dealt with as though the jury had returned that verdict at an ordinary trial.

30 “(3) An advice under subsection (1)—

- (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.
- 35

Non-acquittal at special hearing—non-serious offences

“428L. (1) This section applies where—

- (a) an accused is charged with an offence other than a serious offence; and
- 5 (b) at a special hearing, the jury advises the Court under subsection 428K (1).

“(2) Where this section applies, the Court may make such orders as it considers appropriate, including the following:

- 10 (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.

Non-acquittal at special hearing—serious offences

“428M. (1) This section applies where—

- 15 (a) an accused is charged with a serious offence; and
- (b) at a special hearing, the jury advises the Court under subsection 428K (1).

“(2) Where this section applies, the 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) Where the Court is satisfied under subsection (2), it shall make an order accordingly.

25 **“Division 3—Acquittal on grounds of mental illness**

Acquittal on grounds of mental illness

30 “428N. (1) An accused is entitled to be acquitted of an indictable offence on the grounds of mental illness 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.

35 “(2) The onus of establishing that an accused is entitled to be acquitted on the ground of mental illness lies on the party seeking such acquittal.

“(3) Evidence adduced by the prosecution to establish that an accused is entitled to be acquitted on the grounds of mental illness is inadmissible except with the leave of the Court.

Plea of not guilty by reason of mental illness

5 “428O. Where an accused pleads not guilty by reason of mental illness, the Court shall enter a verdict of not guilty on that ground with respect to the offence charged if—

- (a) the Court considers the verdict appropriate; and
- (b) the prosecution agrees to the entering of the verdict.

10 **Explanation to jury**

“428P. If, on the trial of an accused charged with an indictable offence, evidence is adduced which tends to establish that the accused is entitled to be acquitted on the grounds of mental illness, the Court shall explain to the jury the verdicts which may be returned at the trial and the legal and practical consequences of those verdicts.

Court orders following acquittal—non-serious offences

“428Q. (1) Where an accused has been charged with an indictable offence other than a serious offence and is acquitted on the grounds of mental illness, the Court may—

- 20
- (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—

- 25
- (a) the Court makes an order under paragraph (1) (a); and
 - (b) the Tribunal notifies the Court of its recommendations;

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

30 “(3) The orders the 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.

Court orders following acquittal—serious offences

5 “428R. (1) Where an accused is charged with a serious offence and is acquitted on the grounds of mental illness, the 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) Where the Court is satisfied under subsection (2), it shall make an order accordingly.

10 **“Division 4—Referral of mentally dysfunctional persons to Tribunal following conviction**

Application

“428S. This Division applies where—

- 15 (a) a person has been convicted of an offence in the Supreme Court or Magistrates Court; and
- (b) that Court is satisfied that the convicted person is mentally dysfunctional.

Referral to Tribunal

20 “428T. (1) Where this Division applies, the relevant court may, before sentencing the convicted person, order him or her to submit to the jurisdiction of the Tribunal to enable the Tribunal—

- (a) to determine whether or not the person is mentally dysfunctional; and
- 25 (b) if the Tribunal determines that the person is mentally dysfunctional—to make recommendations as to how the person should be dealt with.

“(2) If the Tribunal notifies the relevant court that a convicted person is mentally dysfunctional, the court shall, in consideration of the Tribunal’s recommendations, make such order as it considers appropriate.

30 “(3) The orders that the court may make under subsection (2) include an order that the person submit to the jurisdiction of the Tribunal to enable the Tribunal to make a mental health order.

“Division 5—Summary proceedings against mentally dysfunctional persons

Application

5 “428U. This Division applies to criminal proceedings (not including committal proceedings) with respect to—

- (a) summary offences; and
- (b) indictable offences that may be heard and determined summarily.

Indictable offences heard and determined summarily

10 “428V. Proceedings to which this Division applies with respect to an indictable offence shall be heard and determined summarily if—

- (a) the Magistrates Court is satisfied that the accused is unable, by reason of mental dysfunction, to elect to have the case heard summarily; and
- 15 (b) the prosecution agrees to the offence being heard and determined summarily.

Powers of Magistrates Court

“428W. (1) This section applies where, in proceedings to which this Division applies before the Magistrates Court, that Court is satisfied that—

- (a) the accused is mentally dysfunctional; and
- 20 (b) on an outline of the facts to be alleged in the proceedings, or such other evidence as the Magistrates Court considers relevant—it would be appropriate to deal with the person under this Division.

“(2) Where this section applies, the Magistrates Court may by order—

- 25 (a) dismiss the charge and require the accused to submit to the jurisdiction of the Tribunal to enable the Tribunal to make a mental health order; or
- (b) dismiss the charge unconditionally.

“(3) Where the Magistrates Court makes an order under paragraph (2) (a), the order operates as a stay of proceedings, or of further proceedings, 30 against the accused in relation to the offence.

“(4) Where the Magistrates Court makes an order under subsection (2), that Court shall not make an order under section 437, 556A or 556B or Part XVA in relation to the offence.

“(5) An order under subsection (2) does not constitute a finding that an 35 offence has or has not been committed.

“(6) In proceedings to which this section applies, in order to determine whether an accused is mentally dysfunctional, the Magistrates Court may make such orders as it considers appropriate, including the following:

- (a) that the accused submit to the jurisdiction of the Tribunal;
- 5 (b) that the proceedings be adjourned;
- (c) that the person be released on bail.

Means by which Magistrates Court may be informed

10 “428X. For the purposes of this Division, the Magistrates Court may inform itself as it thinks fit, but not so as to require the accused to incriminate himself or herself.”

Repeal

- 5. Section 439 of the Principal Act is repealed.

NOTE

- 1. Reprinted as at 31 January 1994. See also Act No. , 1994.