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THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

CRIMES AMENDMENT BILL (NO. 2) 2004
EXPLANATORY STATEMENT

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Outline

This explanatory statement relates to the Crimes Amendment Bill (No.2) 2004 as introduced into the Legislative Assembly.

The Bill amends the *Crimes Act 1900* and the *Mental Health (Treatment and Care) Act 1994*.

The main purpose of the Bill is to address a small number of recently identified issues relating to fitness to plead in criminal trials and the special hearing process established under the *Crimes Act 1900*.

The Bill amends provisions to clarify that only the physical elements of an offence are required to be proved at a special hearing. The Bill is silent as to what, if any, and the circumstances in which, defences may be raised in a special hearing.

The Bill provides for offences, such as manslaughter, where omissions are relied upon as elements of the offence.

The Bill removes the bar to further prosecution after a non-acquittal verdict at a special hearing and introduces a regime to ensure that a person's fitness to plead is subsequently reviewed so that where people subsequently become fit to plead they can face prosecution for the offence originally the subject of the special hearing.

The Bill ensures that alternative verdicts, available in ordinary criminal proceedings, are also available verdicts at special hearings. The Bill also makes provision for greater flexibility with respect to the timing of the review of decisions of people who are unfit to plead.

Crimes Amendment Bill (No. 2) 2004

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 notification day. An Act is defined as a notifiable instrument in 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 Crimes Act 1900

Clause 3: Legislation amended

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

The amending Act will also amend the *Mental Health (Treatment and Care) Act 1994.* Explanations of the amendments to these latter Acts are discussed at Part 3 on page 8 below.

Clause 4: Definitions for Part 13

The term ‘engage in conduct’ is inserted. The term is derived from the existing definition under the *Criminal Code 2002* and shall have the same meaning as that given to the term under the Code. This definition includes only the physical elements of the offence, and includes omissions.

The inclusion of omissions will ensure that allegations of the commission of offences that rely upon omissions as the elements of the offence, such as manslaughter and criminal neglect, can be dealt with in accordance with the provisions of Part 13.

Clause 5: Nature and conduct of special hearing

Clause 5 substitutes the term ‘engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)’ for the current phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is

only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

This provision also clarifies that offences available as an alternative to the offence charged in an ordinary criminal proceeding are also available in a special hearing. Alternate verdicts are listed in section 49 of the *Crimes Act 1900*. For example, on a charge of murder if the judge or jury is firstly not satisfied that the accused engaged in the conduct required for the offence but is satisfied that the accused engaged in the conduct required for an alternate offence, such as manslaughter then the alternative verdict of manslaughter would be available.

Clause 6: Verdicts available at special hearing

Clause 6 substitutes the term 'engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)' for the current phrase 'committed the acts that constitute the offence.' This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

Clause 7: Verdicts available at special hearing

Clause 7 substitutes the term 'engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)' for the current phrase 'committed the acts that constitute the offence.' This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

This provision also clarifies that offences available as an alternative to the offence charge in an ordinary criminal proceeding are also available in a special hearing. Alternate verdicts are listed in section 49 of the *Crimes Act 1900*. For example, on a charge of murder if the judge or jury is firstly not satisfied that the accused engaged in the conduct required for the offence but is satisfied that the accused engaged in the conduct required for an alternate offence, such as manslaughter then the alternative verdict of manslaughter would be available.

Clause 7 also amends subsection (b) to allow further prosecution of an accused who becomes fit to plead after a non-acquittal at a special hearing in the circumstances set out in Clause 10.

Clause 8: Non-acquittal at special hearing – non-serious offence

Clause 8 substitutes the term 'engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)' for the current

phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

This provision also clarifies that offences available as an alternative to the offence charged in an ordinary criminal proceeding are also available in a special hearing. Alternate verdicts are listed in section 49 of the *Crimes Act 1900*. For example, on a charge of murder if the judge or jury is firstly not satisfied that the accused engaged in the conduct required for the offence but is satisfied that the accused engaged in the conduct required for an alternate offence, such as manslaughter then the alternative verdict of manslaughter would be available.

Clause 9: Non-acquittal at special hearing – serious offence

Clause 9 substitutes the term ‘engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)’ for the current phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

This provision also clarifies that offences available as an alternative to the offence charge in an ordinary criminal proceeding are also available in a special hearing as provided for in section 49 of the *Crimes Act 1900*. For example, on a charge of murder if the judge or jury is firstly not satisfied that the accused engaged in the conduct required for the offence but is satisfied that the accused engaged in the conduct required for an alternate offence, such as manslaughter then the alternative verdict of manslaughter would be available.

Clause 10: Action if accused becomes fit to plead after special hearing

Clause 10 inserts a new section into the *Crimes Act 1900* that makes provision for further criminal proceedings against a person who has been the subject of a non-acquittal at a special hearing after having been found unfit to plead for more than 12 months.

This provision will apply if the offence under which an order under sections 318 or 319 of the *Crimes Act 1900* was made is an offence punishable by imprisonment for five years or longer.

If the Mental Health Tribunal subsequently finds that the person is fit to plead the Director of Public Prosecutions must consider whether to take further proceedings against the accused in relation to the offence that resulted in the special hearing.

A special hearing verdict of non-acquittal does not amount to a finding of guilt or provide a basis for the recording of a conviction at law. A special hearing does not determine the guilt, or otherwise, of an accused but rather is designed as a safeguard to ensure that there is, at some level, a testing of the allegations, and that people who could not have been responsible for the commission of the offence are not unnecessarily detained by the criminal justice system simply because they are not fit to plead to the alleged offence.

The effect of this amendment will be to allow the Director of Public Prosecutions to reinstitute criminal proceedings for serious offences against an accused if, and when, that accused becomes fit to stand trial.

Subsection (3) provides that if further criminal proceedings are taken and the accused is found guilty of the offence charged, or an alternate offence, the sentencing court must take into account any time the accused has spent in custody or detention in relation to the offence. This would include time spent on remand, in a gaol, or in a secure mental health facility pursuant to an order under sections 318 or 319 of the *Crimes Act 1900* in relation to the offence.

Clause 11: Fitness to plead – Magistrates Court

Clause 11 substitutes the term ‘engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)’ for the current phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

Clause 12: Fitness to plead – Magistrates Court

Clause 12 substitutes the term ‘engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)’ for the current phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

Clause 13: Fitness to plead – Magistrates Court

Clause 13 substitutes the term ‘engage in the conduct required for the offence charged (or an offence available as an alternative to the offence charged)’ for the current phrase ‘committed the acts that constitute the offence.’ This amendment clarifies that

proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The prosecution is not required to establish intent, or any mental element, of any offence.

Clause 13 also amends subsection (b) to allow further prosecution of an accused who becomes fit to plead after a non-acquittal at a special hearing in the circumstances set out in Clause 14.

Clause 14: Action if accused because fit to plead after hearing

Clause 14 inserts a new section into the *Crimes Act 1900* that makes provision for further criminal proceedings against a person who has been the subject of a non-acquittal at a special hearing after having been found unfit to plead for more than 12 months.

This provision will apply if the offence under which an order under section 335 (2), (3) or (4) of the *Crimes Act 1900* was made is an offence punishable by imprisonment for five years or longer.

If the Mental Health Tribunal subsequently finds that the person is fit to plead the Director of Public Prosecutions must consider whether to take further proceedings against the accused in relation to the offence that resulted in the special hearing.

A special hearing verdict of non-acquittal does not amount to a finding of guilt or provide a basis for the recording of a conviction at law. A special hearing does not determine the guilt, or otherwise, of an accused but rather is designed as a safeguard to ensure that there is, at some level, a testing of the allegations, and that people who could not have been responsible for the commission of the offence are not unnecessarily detained by the criminal justice system simply because they are not fit to plead to the alleged offence.

The effect of this amendment will be to allow the Director of Public Prosecutions to reinstitute criminal proceedings for serious offences against an accused if, and when, that accused becomes fit to stand trial.

Subsection (3) provides that if further proceedings are taken and the accused is found guilty of the offence charged, or an alternate offence, the sentencing court must take into account any time the accused has spent in custody or detention in relation to the offence. This would include time spent on remand, in a gaol, or in a secure mental health facility pursuant to an order under sections 335 (2), (3) or (4) of the *Crimes Act 1900* in relation to the offence.

Part 3 Mental Health (Treatment and Care) Act 1994

Clause 15: Legislation amended

This clause lists the other Act, the *Mental Health (Treatment and Care) Act 1994,* which will be amended by the Act.

Clause 16: Review of people unfit to plead

These provisions deal with the review of people unfit to plead.

S69 – Review of people temporarily unfit to plead

Subsection (1) states that this provision will apply if the Mental Health Tribunal has made a determination under section 68 of the *Mental Health (Treatment and Care) Act 1994* that a person is unfit to plead to a charge but is likely to become fit to plead to the charge within 12 months after the initial determination.

Subsection (2) provides that the Mental Health Tribunal may, on application or of its own initiative review the person's fitness to plead at any time before the end of the 12 month period. This introduces flexibility in when a review can be conducted.

Subsection (3) provides that a review must be conducted as soon as is practicable after a six month period if no review has been conducted within that period.

Subsection (4) provides that if, before the end of the 12 month period, the person has not been found fit to plead, the Mental Health Tribunal must review the person's fitness to plead as soon as practicable after the end of the period.

The effect of subsections (2) – (4) will be to provide that the Mental Health Tribunal must review the issue of fitness to plead each six months, or as soon as is practicable after each six month period. However, the provision allows for reviews at any time during the 12 month period without other restriction on timing or frequency.

Subsection (5) clarifies that the Mental Health Tribunal is to apply the criteria set out in section 68 (3) and (4) of the *Mental Health (Treatment and Care) Act 1994* when conducting these reviews. The determination will be on the balance of probabilities.

Subsection (6) provides that the Mental Health Tribunal must inform the relevant court of each determination it makes and may make recommendations to the court about how the person should be dealt with.

Subsection (7) adopts the definition of "relevant court" in section 68(1), being the Court that made the order referring the issue of fitness to plead to the Mental Health Tribunal.

69A – Review of certain other people found unfit to plead

Subsection (1) sets out when this provision will apply. The provision will apply where a determination has been made under either sections 68 or 69 of the *Mental Health (Treatment and Care) Act 1994* where the charge alleged against a person is an offence punishable by imprisonment for five years or longer after an order has been made either by the Supreme Court pursuant to sections 318(2) or 319(2) or the Magistrates Court pursuant to sections 335 (2), (3) or (4) in relation to that charge or an alternative as provided for in section 49 of the *Crimes Act 1900*.

The provision will apply where an accused has been the subject of a non-acquittal after a special hearing, either in the Supreme or Magistrates Court, and the charge the subject of the special hearing was one with a maximum penalty of five years imprisonment or more.

Subsection (2) provides that the Mental Health Tribunal may, on application or of its own initiative review the person's fitness to plead at any time. This introduces flexibility in when a review can be conducted.

Subsection (3) provides that the Mental Health Tribunal must review a person's fitness to plead as soon as practicable after the end of 12 months after the order is made and at least once every 12 months after each review. The effect of this will be that yearly reviews of a person's status as unfit to plead will be conducted where they have been subject to a non-acquittal at special hearing in relation to a serious offence.

Subsection (4) provides that the Mental Health Tribunal is not required to review a person's status under this section if the person has been found fit to plead or the Director of Public Prosecutions has notified the Mental Health Tribunal in writing that he does not intend to take further proceedings against the person in relation to the offence.

Subsection (5) clarifies that the Mental Health Tribunal is to apply the criteria set out in section 68 (3) and (4) of the *Mental Health (Treatment and Care) Act 1994* when conducting each review. The determination will be on the balance of probabilities.

Subsection (6) clarifies that this provision will apply even if the person is no longer in custody or under a mental health order. Accordingly, unless the Director of Public Prosecutions gives notice of his intention not to proceed further with charges against the person in relation to the offence or the person is found fit to plead the Mental Health Tribunal will be required to review the status of a person's fitness to plead at least once each year.

If the person is no longer subject to a mental health order the Registrar of the mental Health Tribunal is empowered to summons the person to appear pursuant to section 90 of the *Mental Health (Treatment and Care) Act 1994*.

Clause 17: Service of determinations and recommendations

This provision ensures that any determinations and recommendations pursuant to section 69A of the *Mental Health (Treatment and Care) Act 1994* are served on, and in the same manner, as those currently provided for in section 71 of the *Mental Health (Treatment and Care) Act 1994*.