

1999

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

CRIMES (AMENDMENT) BILL 1999

EXPLANATORY MEMORANDUM

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Outline

The Crimes (Amendment) Bill 1999 (the bill) amends the provisions of Part 11A of the *Crimes Act 1900* (the Act). Part 11A of the Act contains provisions:

- limiting the period for which an accused person, dealt with pursuant to Part 11A, can be detained to a period no longer than the maximum sentence of imprisonment that could be imposed for the offence with which the person is charged;
- enabling a 'special hearing' to be conducted in the Supreme Court when an accused person is unfit to plead;
- setting out the orders which the Supreme Court can make where an accused person is the subject of a special hearing;
- providing for an accused person to be acquitted on the grounds of 'mental illness' and the orders the Supreme Court can make where a person is acquitted on those grounds;
- enabling the referral of mentally dysfunctional persons who have been convicted of an offence by the Magistrates Court or Supreme Court to the Mental Health Tribunal (the tribunal); and
- enabling the Magistrates Court to dismiss charges against a person charged with a summary offence where the person is mentally dysfunctional. The court can either dismiss the charges unconditionally or require the person to submit to the jurisdiction of the tribunal.

The bill amends this part of the Act to implement a number of recommendations which arose from a review of the *Mental Health (Treatment and Care) Act 1994* (the Mental Health (Treatment and Care) Act) and Part 11A of the Act. Many of the proposed amendments have come from key stakeholders in the criminal justice

system to improve the workability, consistency and transparency of the provisions of the part.

The key changes made by the bill will:

- limit the period for which an accused person, dealt with under Part 11A, can be detained in custody to a period no longer than that for which the person would have been imprisoned had the person been found guilty of the offence charged and dealt with in normal criminal proceedings;
- enable the Supreme Court to require a person who has been committed for trial, in respect of whom it appears that there may be a question of fitness to plead, to submit to an assessment by the tribunal, without having to wait until a jury has been empanelled and the trial is underway;
- enable the Supreme Court to discharge a jury if it appears that there will be a delay in the tribunal advising the Court as to the accused's fitness to plead;
- include provisions enabling the Magistrates Court to require an accused person before the court who appears to be mentally dysfunctional or mentally ill to be assessed to determine whether or not the person requires treatment or care;
- give the Magistrates Court powers similar to those of the Supreme Court to deal with a defendant in respect of whom the issue of fitness to plead arises;
- give the Magistrates Court the capacity to make the same types of orders as the Supreme Court presently can, in relation to persons who are acquitted on the grounds of mental impairment;
- set out the matters which the Magistrates Court must consider before dismissing charges unconditionally or dismissing charges and requiring a defendant to submit to the jurisdiction of the tribunal;
- provide that the Magistrates Court may dismiss charges unconditionally or subject to the requirement that a defendant submit to the jurisdiction of the tribunal in relation to indictable offences which may be heard and determined summarily but only where the Director of Public Prosecutions consents; and

- change the terminology in Division 3 of Part 11A to refer to 'mental impairment' instead of 'mental illness' as 'mental illness' is now a defined term in the Mental Health (Treatment and Care) Act and, consequentially, the Crimes Act.

Financial implications

There are no financial implications arising from the Bill.

FORMAL PROVISIONS

Clauses 1, 2 and 3 - Formal provisions

Clauses 1, 2 and 3 are formal provisions dealing with the title of the bill once enacted, the commencement arrangements and making clear that references in the bill to 'Principal Act' are references to the *Crimes Act 1900*.

KEY AMENDMENTS

Clause 4 - Repeal of section 428A

Clause 4 repeals section 428A of the Act which is a 'sunset clause'. A similar sunset clause is in the Mental Health (Treatment and Care) Act. These clauses were included in the legislation to ensure that the provisions of the Mental Health (Treatment and Care) Act and Part 11A were reviewed before becoming entrenched as part of the ACT statute book. As the legislation has now been reviewed the section is to be removed.

Clause 5 - Definition of 'mental illness'

Clause 5 inserts a definition in section 428B of the Act of 'mental illness'. The term is given the same meaning as it has in the Mental Health (Treatment and Care) Act. This is consequential upon the changes in that Act which mean that the tribunal can make orders in respect of persons with a 'mental illness' as well as persons with a 'mental dysfunction'.

Definitions for the terms 'accused' and 'defendant' are also included to maintain the practice of using the latter term for persons being dealt with by the Magistrates Court in its criminal jurisdiction.

Clause 6 - Limitation on periods of detention

Clause 6 repeals section 428C of the Act and substitutes **new sections 428C, 428CA, 428CB, 428CC, 428CD, 428CE** and **428CF**. The present section 428C is to the effect that where the Supreme Court or Magistrates court is permitted by Part 11A to order the detention of a person in custody, the person cannot be detained for a period longer than the maximum period of imprisonment to which the person, if convicted of the relevant offence in normal criminal proceedings, could have been sentenced.

The change made by **new section 428C** is to limit the period for which a person can be detained pursuant to an order of the Supreme Court under subsection 428L(2) or 428M(2). These provisions enable the Supreme Court to make such orders as it considers appropriate in respect of an accused person who is not acquitted following a special hearing, including an order that such a person be detained until the tribunal otherwise orders. The change made by this new section is to limit the period for which such an accused person can be detained, not by reference to the maximum period of imprisonment to which the accused could have been sentenced but, by reference to the period of imprisonment which the court estimates would have been imposed on the accused if he or she had been dealt with in normal criminal proceedings and sentenced to a term of imprisonment. This change acknowledges that sentences of imprisonment are often imposed for terms which fall short of the maximum period of imprisonment which could be imposed. It would be unfair for a person who is ordered to be detained in custody, because he or she is unfit to plead and found to have committed the act constituting an offence, to be detained for a period substantially longer than the period of imprisonment to which he or she would have been sentenced had the person been convicted of the relevant offence in normal criminal proceedings.

The new section requires the court to indicate whether, in normal criminal proceedings, it would have imposed a sentence of imprisonment on the accused and, if so, nominate a term that is the best estimate of the sentence the court

would have imposed. That 'limiting period' is, by virtue of *new section 428CB*, the maximum period for which the Supreme Court can order that the accused can be detained in custody.

In determining the sentence the court would have imposed in normal criminal proceedings, the court will need to consider factors which it would ordinarily be required to consider in sentencing an offender. *New section 428CF* makes clear that the court may inform itself and consider such evidence and submissions as it would if it were determining the sentence it would impose in normal criminal proceedings. For example, the court may wish to have a pre-sentence report provided.

New section 428CA and *new section 428CB* apply the same approach to limiting the period for which an accused person may be detained, to the provisions of the Act which enable the Supreme Court to order the detention of a person who is acquitted on the grounds of mental impairment.

New sections 428CC, 428CD and 428CE put in place corresponding provisions applying to defendants before the Magistrates Court:

- against whom charges are dismissed on grounds of mental impairment; or
- who are unfit to plead and found to have committed the act constituting the offence.

Amendments are also being made to section 72 of the Mental Health (Treatment and Care) Act to give effect to the policy of limiting detention of persons, pursuant to court orders under Part 11A, to detention for no longer than the period of imprisonment which would have been imposed in normal criminal proceedings.

Clause 8 - New provisions for assessment of accused persons

Clause 8 inserts *new section 428DA* into the Act. This provision is intended to provide the Magistrates Court with a mechanism to arrange for the emergency assessment of a defendant who is before the Magistrates Court and who

appears to require immediate treatment or care for a mental illness or mental dysfunction.

The Magistrates Court is sometimes confronted with defendants who appear to be suffering from a mental dysfunction or mental illness and it is desirable for these persons to be able to be examined as a matter of urgency, without waiting for referral to the tribunal for it to order an assessment.

It is already possible under section 37 of the Mental Health (Treatment and Care) Act for police to apprehend a person who is thought to be mentally ill or dysfunctional and in need of immediate treatment or care and take such a person to an approved health facility, where the person may be detained for assessment and, for a limited period, treatment. **New section 428DA** will ensure that a defendant who appears to the Magistrates Court to be in need of urgent treatment or care can be conveyed to an approved treatment facility for assessment and, if necessary, treatment.

The provision avoids the difficulties associated with requiring that a defendant who appears to need immediate treatment or care agreeing, as a condition of bail, to attend at an approved health facility. A question arises as to the mental capacity of such persons to enter into bail conditions and there is also a question as to whether a condition of bail should impose detention or treatment on a person in the absence of determination by a medical practitioner that such treatment or detention is necessary.

New subsection 428DA(1) enables the Magistrates Court, where it has reasonable grounds for believing that a defendant requires immediate treatment or care because of mental illness or mental dysfunction, to order that:

- (a) the defendant be conveyed to an approved health facility for examination by a medical practitioner, to determine whether he or she is mentally ill or mentally dysfunctional; and

- (b) the defendant may only be released into the custody of a police officer, whether from an approved health facility or, if admitted to an approved mental health facility, such a facility.

In addition, the Magistrates Court will, as part of the order, require that once the defendant is released into the custody of a police officer one of three things will happen:

- (i) the defendant will be admitted to bail;
- (ii) the defendant will be held in custody and brought, as soon as practicable, before the court for it to consider the question of bail;
- (iii) an authorised officer, within the meaning of the *Bail Act 1992*, will consider whether to admit the defendant to bail in accordance with the provisions of the *Bail Act*.

New subsection 428DA(2) imposes an obligation on an authorised officer, within the meaning of the *Bail Act*, to impose any terms and conditions which the Magistrates Court specifies should apply to the grant of bail, if the Magistrates Court has ordered that the defendant should be admitted to bail upon release into police custody.

New subsection 428DA(3) applies where a defendant in respect of whom an order has been made under this section:

- is discharged or released from an approved health facility or approved mental health facility other than into the custody of a police officer; or
- otherwise leaves an approved health facility or approved mental health facility other than in the custody of a police officer .

The provision authorises the arrest of such a person without warrant in order to enable the terms of the order to be given effect.

Clause 9 - Referral to Tribunal

Clause 9 (a) amends section 428E of the Act to make it clear that the Supreme Court can order an accused person to submit to the jurisdiction of the tribunal, for a determination as to the accused's fitness to plead, at any time after the person has been committed for trial.

Clause 9 (b) amends section 428E to provide the Magistrates Court with power to require a defendant, in respect of whom an issue of fitness to plead arises, to submit to the jurisdiction of the tribunal to enable it to determine the person's fitness to plead.

Clause 10 - Action pending determination by Tribunal

Clause 10 inserts *new section 428FA* which enables the Supreme Court to discharge a jury in circumstances where the court has ordered the accused to submit to the jurisdiction of the tribunal for it to determine the accused's fitness to plead. The court may discharge a jury empanelled for the proceedings having regard to the time it is likely to take before the tribunal makes its determination.

Clauses 11, 12 and 13 - Discharge of juries

Clauses 11, 12 and 13 amend sections 428G, 428H and 428I, respectively. The amendments are consequential upon the amendments to section 428E enabling the Supreme Court to require a person to submit to the jurisdiction of the tribunal, for the purpose of determining fitness to plead, at any time after committal for trial, rather than after the empanelment of the jury.

Clause 14 - special hearing before single Judge

Clause 14 amends section 428J which provides for the nature and conduct of a special hearing before the Supreme Court where an accused person is not fit to plead. The amendments enable the special hearing to be conducted before a

judge sitting alone, rather than before a jury. In normal criminal proceedings an accused person can elect for a trial before a judge rather than trial by jury.

Because an accused person who is unfit to plead may be equally unable to make an election for a trial before a judge, *new subsections 428J(2), (2A), (2B) and (2C)* provide for:

- an accused person who is unfit to plead and whom the Supreme Court is satisfied is capable of making an election, to make such an election for himself or herself;
- a guardian to make such an election, if the court is satisfied that the accused person is incapable of making the election;
- the Supreme Court to order the appointment of a guardian for the purpose of considering whether a trial before a single judge would be in the accused's best interest;
- an accused person whom the court is satisfied becomes capable of making an election on his or her own behalf to override the views of a guardian.

Clauses 15, 16, 17 and 21(a) are consequential amendments resulting from the introduction of provisions enabling a special hearing to be held before a judge alone.

Clauses 18, 19(a) and (c), 20, 21(b), 22 and 23 - Acquittal on grounds of mental impairment

Clauses 18, 19(a) and (c), 20, 21(b), 22 and 23 amend the heading and provisions of Division 3 which deals with acquittals on the grounds of 'mental illness'. References to 'mental illness' are replaced with references to 'mental impairment'. This is necessary because 'mental illness' is now a defined term in the Mental Health (Treatment and Care) Act and a separate term is required for the purposes of Division 3. The basis upon which an accused can be acquitted

is the common law test known as the M'Naghten Rules which is set out in section 428N. This test is not altered by the change in the terminology used.

Clause 24 - Dismissal of charges on grounds of mental impairment in the Magistrates Court

Clause 24 inserts a *new Division 3A*, consisting of *new sections 428RA, 428RB, 428RC, 428RD and 428RE* so that the Magistrates Court is able to make orders in respect of a defendant against whom an information is dismissed by the Magistrates Court on the grounds of mental impairment, consistent with the orders the Supreme Court can make, where an accused is acquitted on grounds of mental impairment pursuant to Division 3.

Clause 27(c) - Referral to Tribunal

Clause 27(c) adds *new subsection 428T(4)* to the effect that a convicted person who is determined by the tribunal to be mentally dysfunctional or mentally ill cannot be sentenced to a period of imprisonment greater than the period of imprisonment which would have been imposed but for the finding the person is mentally dysfunctional or mentally ill.

Clause 30(b) - Powers of Magistrates Court

Clauses 30(b) and (d) amend section 428W of the Act by inserting *new subsections 428W(2A), (2B), (7) and (8)*.

Under section 428W, the Magistrates Court can dismiss a charge against a defendant who is mentally dysfunctional or mentally ill and require the person to submit to the jurisdiction of the tribunal.

New subsection 428W(2A) sets out matters to which the Magistrate is to have regard in deciding whether to dismiss a charge against a defendant who is

mentally dysfunctional or mentally ill, whether or not on condition that the person submit to the jurisdiction of the tribunal.

New subsection 428W(2B) is to the effect that the Magistrates Court may only make an order pursuant to section 428W in respect of a person charged with an indictable offence that may be heard and determined summarily if the Director of Public Prosecutions does not object.

New subsection 428W(7) requires that when the Magistrates Court orders a defendant to submit to the jurisdiction of the tribunal to enable it to advise the Magistrates Court about the defendant's mental state, the tribunal must provide specified information to the Magistrates Court, to the extent this is possible. This information is to assist the Magistrates Court to decide whether to make an order under section 428W.

New subsection 428W(8) sets out orders that the Magistrates Court may make where it is advised that a defendant is mentally dysfunctional or mentally ill.

Clause 31 - Fitness to plead - Magistrates Court .

Clause 31 inserts **new section 428WA** to give the Magistrates Court the capacity to conduct hearings where a defendant is unfit to plead and to make the same types of orders in respect of such persons as the Supreme Court can make in respect of an accused who is unfit to plead and found to have committed the act which constituted the offence with which he or she is charged.

New subsection 428WA(1) makes clear that the provisions of the section apply to indictable offences which may be heard and determined summarily only if the Magistrates Court is of the opinion that the case can be properly disposed of summarily.

New subsection 428WA(2) provides that where the Magistrates Court is satisfied that a defendant who is charged with a serious offence and unfit to

plead committed the act constituting the offence it shall order that the person be detained in custody until the tribunal otherwise orders, unless it would be more appropriate to require the person to submit to the jurisdiction of the tribunal.

New subsection 428WA(3) provides that where the Magistrates Court is satisfied that a defendant who is charged with an offence other than a serious offence and unfit to plead committed the act constituting the offence it may order that the person be detained in custody until the tribunal otherwise orders or require the person to submit to the jurisdiction of the tribunal.

To ensure consistency between proceedings in the Magistrates Court and the Supreme Court involving persons who are unfit to plead, ***new subsections 428WA(4), (5) and (6)*** correspond to provisions applying to special hearings for persons who are unfit to plead in the Supreme Court, apart from a qualification in ***new subsection 428WA(5)***.

New subsection 428WA(5) provides that in a hearing under ***new section 428WA*** if legal representation is available to the defendant, the defendant shall have legal representation unless the Magistrates Court otherwise orders. This differs from the corresponding provision applying to Supreme Court proceedings - subsection 428J(3) - which provides that the accused shall have legal representation unless the Supreme Court otherwise orders. ***New subsection 428WA(5)*** acknowledges that there may be circumstances in which legal representation will not be available to a defendant before the Magistrates Court.

Neither ***new subsection 428WA(5)*** or subsection 428J(3) is intended to impose an obligation for the provision of legal representation or prevent the hearing of a matter where legal representation is not available to an accused.

The provisions recognise that while an accused person who is unfit to plead will, generally, be incapable of instructing a legal representative the person should, nonetheless, be entitled to have legal representation in proceedings before the Supreme Court or the Magistrates Court.

The provisions may also assist the Supreme Court and Magistrates Court to ensure that an accused who is unfit to plead has adequate representation notwithstanding that the accused may purport to decline or reject that representation.

CONSEQUENTIAL AMENDMENTS

Clauses 7, 19(b), 25, 26, 27(a) and (b), 28, 29, 30(a) and (c) - consequential amendments

Clauses 7, 19(b), 25, 26, 27(a) and (b), 28, 29, 30(a) and (c) amend sections 428D, 428S, 428T, 428V and 428W of the Act consequentially on amendments to be made to the *Mental Health (Treatment and Care) Act 1994* which provide that the tribunal may make orders in respect of persons with a 'mental illness' as well as those with a 'mental dysfunction'. Presently, one term is used to cover both categories of person, but the amendments in the *Mental Health (Treatment and Care) (Amendment) Bill 1999* introduce a distinction between these two groups. This distinction necessitates consequential amendments to Part 11A.

Clause 32 - Amendment of Guardianship and Management of Property Act 1991

New subsection 428J(2A) gives the Supreme Court the power to direct the Guardianship and Management of Property Tribunal to appoint a guardian for an accused person who is unfit to plead. **Clause 32** makes an amendment to the *Guardianship and Management of Property Act 1991* requiring the Guardianship and Management of Property Tribunal to give effect to the court's direction.