

1994

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

**CRIMES (AMENDMENT) BILL 1994**

**EXPLANATORY MEMORANDUM**

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## CRIMES ( AMENDMENT ) BILL 1994

This Bill makes a series of amendments to the ACT Crimes Act 1900. This Bill provides the framework by which courts may refer matters to the new Mental Health Tribunal which will be established under the *Mental Health ( Treatment and Care ) Act 1994*.

The Tribunal will have jurisdiction over persons affected by a mental dysfunction, which will include people who are intellectually disabled, mentally ill or who may suffer from a personality disorder that creates substantial living difficulties.

The Bill together with the *Mental Health (Treatment and Care) Bill 1994* implements the Government's response to the recommendations of the ACT Mental Health Review Committee in its Report "Balancing Rights". Two Bills were tabled in the Legislative Assembly as the exposure draft Mental Welfare Bill and Crimes (Amendment) Bill in June 1993. A period of public consultation followed and many submissions were received by the Government during this period. In September 1993 the Standing Committee on Social Policy received a reference from the Legislative Assembly for inquiry and report. The Committee conducted an extensive inquiry and issued its Report in April 1994 which supported the general intent of the exposure draft Bills but recognised the need for changes to them based on submissions made to the Committee. These changes were largely accommodated in a revised version of the Mental Welfare Bill prepared for the Social Policy Committee. The Committee recommended that the ACT Assembly enact as soon as possible the amended draft Mental Health (Treatment and Care) Bill and the Crimes (Amendment) Bill with additional changes as recommended in that Report.

This package of legislation will reform the law to ensure that persons who suffer from a mental dysfunction do not become entangled in the criminal justice system if their needs could be more appropriately addressed within the health or welfare system.

This Bill also takes into account the views and recommendations put forward by the Australian Law Reform Commission, Report No. 44; the

Law Reform Commission of Victoria, Report No. 34, the Gibbs Committee Review of Commonwealth Criminal Law, the Model Criminal Code Officers Committee, the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, the Australian Health Ministers' Statement of rights and responsibilities and the Report of the National Inquiry into the Human Rights of People with Mental Illness.

The revised version of this Bill is based on the recommendations of the Legislative Assembly Standing Committee on Social Policy in its Report on the Inquiry into the Mental Welfare and Crimes ( Amendment) Exposure Draft Bills.

Details of the Bill are as follows.

*Clause 1 and 2 and 3* are formal. They contain the short title, the commencement date and a short reference to the Principal Act.

*Clause 4* provides for the insertion of a new Part XIA to be inserted after Part XI of the Crimes Act.

#### PART XIA - UNFITNESS TO PLEAD, MENTAL ILLNESS AND MENTAL DYSFUNCTION

Division 1 covers preliminary matters.

New section 428A provides for a sunset clause effective 24 months from the commencement of the legislation, with provision for a 24 month extension by disallowable instrument from the Minister. This section is inserted in accordance with Recommendation 3 of the Report of the Standing Committee on Social Policy.

New section 428B provides definitions. In particular, there is reference to the "Tribunal" and "mental health order" which are defined by reference to the Mental Health ( Treatment and Care ) Act 1994 and "mental dysfunction" which is defined in accordance with the same Act to mean "a disturbance or defect to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgement, memory,

motivation or emotion." There is a definition of "Court" as the Supreme Court. There is a definition of "serious offence" as an indictable offence involving actual or threatened violence or as an offence against subsection 27(3) or (4) which are provisions dealing with acts endangering life. The definition of "serious offence" will be relevant to certain sections of the Bill which deal with disposition options in relation to person who are acquitted on the grounds of mental illness or who are found unfit to plead and not acquitted following a special hearing. There is also a definition of special hearing which is a special trial for persons who are unfit to plead.

New section 428C provides for a limit on detention. In the past, persons who have been acquitted on the grounds of mental illness or who have been unfit to plead have often been subjected to indeterminate determination. The aim of this legislation is to make sure that these people are no longer detained for a period greater than periods of imprisonment that they would have received if they had not had a mental dysfunction. This provision is an additional protection to that provided by the regular review of such cases by the Mental Health Tribunal which has the power to order the release of such persons when certain criteria are satisfied. This provision will also ensure that diversion from the criminal justice system by the police or courts into the mental health system is not for indeterminate periods.

New section 428D sets out the criteria for the Courts when making a decision as to whether or not they should order detention. The Courts will now have greater options when considering how a person who has been charged with a criminal offence should be dealt with. This criteria will guide the Courts when it is making a decision as to whether a person should be imprisoned, or referred to the Mental Health Tribunal so that they may receive treatment and care, or in certain cases whether a person should be released.

Division 2 covers unfitness to plead.

*Under the proposed Mental Health (Treatment and Care) Act 1994 the functions of the Tribunal include to determine whether or not a person is*

*fit to plead to a criminal charge and if found unfit, to review these cases at 6 monthly intervals.*

New section 428E provides the mechanism by which a Court may order a person who has been charged with a criminal offence to submit to the jurisdiction of the Tribunal for a determination as to whether the person is fit to plead to the charge. The Court may do this if during the trial, the issue has been raised by any party to the proceedings or the Court and the Court is satisfied that there is a question as to the person's fitness to plead to the charge. Subsection(2) gives the Court the power to adjourn the proceedings and make any other appropriate order including the granting of bail to allow the Tribunal to make its determination.

New section 429F sets out what is to occur if a person is found fit to plead. When the Court is notified by the Tribunal of this finding, the proceedings recommence and continue in accordance with normal criminal procedure. The Court is given power to discharge the jury in appropriate cases particularly where the question as to fitness has been raised and this may influence the outcome of the ordinary trial if a fresh jury is not empanelled. The Court is given a discretion because the question may have been raised in the course of a long trial, and it may be seen to have no bearing on the jury's deliberations.

New section 428G sets out what may occur if a person is unfit to plead but is likely to become fit to plead within 12 months after the Tribunal's determination and the person has not been charged with a serious offence. The Court will now have the power to make whatever orders it considers appropriate. This includes the option of ensuring that the person has treatment or care by sending them to the Tribunal for the making of a mental health order or requiring the person to be detained in custody. When considering what is the best course of action to take, the Court shall consider any recommendations made by the Tribunal in relation to possible treatment of the person. Before ordering detention in custody, the Court has the criteria in 428D as its guide.

New section 428H sets out what is to occur if a person is charged with a serious offence and found unfit to plead but is likely to become fit to plead within 12 months. In these cases, the Court shall discharge the jury, order

that the person be detained in custody or released on bail and adjourn the proceedings. The criteria in 428D are referred to for the Court to consider in making a decision as to detention.

New section 428I makes provision for a special hearing to occur. These hearings will be for people who are unfit to plead and unlikely to become fit, or who were originally found unfit to plead but likely to become fit within 12 months and that time has passed and they remain unfit. A special hearing is held at this point so that a person is not detained for a long period of time simply because they are unfit to plead. New subsection(2) ensures that there will always be a fresh jury for a special hearing.

New section 428J tells the Court how the special hearing is to be conducted. A special hearing is a trial by jury. However special protections are built in to the process. The accused is taken to have pleaded not guilty. New subsection(6) outlines the explanation to be given to the jury at the beginning of a special hearing. This includes that the accused should be acquitted unless the offence is proved beyond reasonable doubt.

New section 428K outlines what happens at a special hearing. The special hearing is not a full trial because a person who is unfit to plead is unable to give instructions and make a defence and so such a person would be at a great disadvantage if a full trial proceeded. Therefore the following scheme has been adopted because it protects the rights of the person who is unfit to plead, gives the Court flexibility in deciding what options apart from prison are available in respect of disposition, and places the accused in the position of being involved in a lengthy and complex trial.

The sole question for the jury is:

did the accused carry out the acts constituting the *actus reus*  
of the offence charged?

If the accused did not do the acts, the verdict is not guilty and the accused is discharged. That is the end of the matter and there can be no further proceedings.

If the jury decides the accused did carry out the acts, the accused is not acquitted and the Court decides what is the most appropriate disposition option.

New section 428L gives the Court great flexibility in deciding what is the most appropriate disposition option if a person has not committed a serious offence.

New section 428M still gives the Court a discretion to decide what is the appropriate disposition option, but because the Court is dealing with a person who has committed a serious offence, the options are narrow and the Court must always order detention in custody unless it is satisfied that it is not appropriate in the particular case. The reference to the Tribunal ordering otherwise is a reference to the Mental Health Tribunal exercising its review function under the *Mental Health (Treatment and Care) Act 1994*.

Division 3 covers acquittal on the grounds of mental illness

*One of the functions of the Tribunal under the proposed Mental Health (Treatment and Care) Act 1994 is to make mental health orders where appropriate in respect of persons acquitted on the grounds of mental illness. The Tribunal will also review at 6 monthly intervals the cases of persons detained following an acquittal on the grounds of mental illness and if satisfied as to certain matters to order their release unconditionally or subject to conditions.*

New subsection 428N is a reformed statutory version of the defence of insanity. The basis of the insanity defence is the McNaghten Rules. Following consideration of the recommendations of the Gibbs Committee which recommended the definition of the necessary disability be broadened and the Victorian Law Reform Commission, this Bill uses the words "mental dysfunction" which broadens the category of people to whom the defence is available and is consistent with the proposed Mental Welfare Act 1993. Proof is on the balance of probabilities. Evidence adduced by the prosecution to establish the defence can only be admitted with the leave of the Court.

New section 428O covers a plea of not guilty by reason of mental illness and provides that a verdict can be entered by the Court if it considers the verdict appropriate and the prosecution agrees to the entering of the verdict. This provision means a "consent" verdict can be entered.

New section 428P provides that the Court shall explain to the jury the verdicts which may be returned and the consequences of those verdicts if the jury is considering an acquittal on the grounds of mental illness.

New section 428Q provides a range of options for the Court upon an acquittal on the grounds of mental illness for offences other than serious offences. Following the verdict, the Court may order a person to attend the Tribunal so that the Tribunal can make recommendations as to how the person could be appropriately treated or cared for. Upon receiving the Tribunal's recommendations, the Court make orders it considers appropriate including an order that the person to be detained in custody or to submit to the jurisdiction of the Tribunal for the making of a mental welfare order. The Court is to have regard to the Tribunal's recommendations, as well as to the health and safety factors and danger to the community if a person is released.

New section 428L provides for a narrower range of options if a person has been charged with a serious offence and must order detention in custody unless the Court is satisfied as to the criteria in 428D.

*Division 4 covers the referral of mentally dysfunctional persons to the Tribunal following conviction of a criminal offence in the Supreme Court or Magistrates Court.*

New section 428S is an Application provision and sets out when this Division applies. The Division applies following the conviction of a person for an offence where the relevant court is satisfied that the convicted person is mentally dysfunctional.

New section 428T allows the courts to have the assistance of the Tribunal in relation to the sentencing of persons convicted of a criminal offence. Upon a conviction, a court may refer a person to the Tribunal so that it can

determine whether or not the person is mentally dysfunctional and make recommendations to the court as to appropriate treatment or care. The court shall then consider the Tribunal's recommendations and if appropriate make a mental health order.

*Division 5 covers summary proceedings against mentally dysfunctional persons. The provisions in this section are designed to give the Magistrates Court flexibility when dealing with mentally dysfunctional persons and to refer them to the Tribunal for the making of a mental health order where appropriate.*

New sections 428U and 428V set out what proceedings this Division applies to. Section 428U is applicable in section 477 Crimes Act matters.

New section 429W provides for the Magistrates Court to have powers to refer persons to the Tribunal for the making of a mental health order where the person suffers from a mental dysfunction. The new section also gives the court the power to dismiss charges, adjourn proceedings and grant bail where appropriate.

New section 429X allows the court to inform itself as it thinks fit.

*Clause 5 repeals section 439 of the Principal Act.*