



New South Wales

# Mental Health (Criminal Procedure) Amendment Bill 2005

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Mental Health (Criminal Procedure) Act 1990* (*the Principal Act*):

- (a) to remove the role of the Attorney General in relation to an inquiry held by the District Court or Supreme Court as to the fitness of a person to be tried for an offence and in relation to directing the holding of a special hearing in respect of a person who is not fit to be tried for an offence, and
  - (b) to give the Court, the Mental Health Review Tribunal (*the Tribunal*) and the Director of Public Prosecutions certain functions in relation to the matters referred to in paragraph (a), and
  - (c) to provide that a Judge alone rather than a jury is to determine the question of a person's fitness to be tried for an offence, and
  - (d) to provide that a Judge alone is to determine a special hearing unless the defendant, the defendant's representative or the prosecutor elects to have the matter determined by a jury, and
  - (e) to extend the options available to a Magistrate when dealing with a person who was developmentally disabled or suffering from a mental illness or other
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- mental condition at the time he or she committed an offence but was not a “mentally ill” person within the meaning of the Act, and
- (f) to require a Magistrate and certain authorised officers to state reasons for certain decisions made in proceedings where it is alleged that the defendant is a person referred to in paragraph (e) or a mentally ill person, and
  - (g) to enable a person who, in accordance with an order of a Magistrate, assesses the mental condition of or provides treatment to a defendant who is a person referred to in paragraph (e) to report breaches of the order to certain officers of the Probation and Parole Service or the Department of Juvenile Justice (or another person or body prescribed by the regulations), and
  - (h) to remove a provision requiring a Magistrate, on application of the defendant in proceedings, to disqualify himself or herself from continuing to hear the proceedings in certain circumstances, and
  - (i) for the purposes of statute law revision.

The Bill also amends the *Mental Health Act 1990*:

- (a) in connection with the amendments made to the Principal Act, and
- (b) to prevent the Tribunal from recommending the release of a person who is a forensic patient if the person has been transferred to hospital while serving a sentence of imprisonment and has not finished serving the sentence (or non-parole period for the sentence, if applicable), and
- (c) to enable the Minister for Health (as the prescribed authority under the *Mental Health Act 1990*) to take action when a person breaches a condition of an order of a court under section 39 of the Principal Act releasing a person from custody after a finding of not guilty by reason of mental illness, and
- (d) for the purposes of statute law revision.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the Principal Act set out in Schedules 1 and 2.

**Clause 4** is a formal provision that gives effect to the amendments to the *Mental Health Act 1990* set out in Schedule 3.

## **Schedule 1      Principal amendments to Mental Health (Criminal Procedure) Act 1990**

### **Amendments relating to functions of Attorney General and Director of Public Prosecutions**

**Schedule 1 [1]** amends section 8 of the Principal Act to require the Court (rather than, as at present, the Attorney General) to determine whether an inquiry should be conducted as to a person's fitness to be tried for an offence where this question is raised before arraignment. The Court already has this power under section 9 of the Principal Act in circumstances where the question of a person's fitness is raised after arraignment. **Schedule 1 [2] and [3]** make consequential amendments.

**Schedule 1 [8]** omits section 18 of the Principal Act which requires the Attorney General, after receiving notification from the Tribunal that a person is unlikely to become fit to be tried for an offence within 12 months, to direct the Court to hold a special hearing in respect of the offence or to notify the Court and the Minister for Police that no further proceedings will be taken. **Schedule 1 [9]** substitutes section 19 of the Principal Act to require the Court to hold a special hearing after receiving such a notification unless the Director of Public Prosecutions advises that no further proceedings will be taken. **Schedule 1 [6] and [10]** make consequential amendments.

**Schedule 1 [15]** substitutes section 29 of the Principal Act to require the Court to hold a further inquiry into the fitness of a person to be tried for an offence if the Tribunal has notified that a person who was previously found to be unfit to be tried has become fit. However, the Court is not to hold a further inquiry if the Director of Public Prosecutions advises that no further proceedings will be taken. Currently, the Court holds such further inquiries at the request of the Attorney General.

### **Determination of questions of fitness and conduct of special hearings**

**Schedule 1 [4]** substitutes section 11 of the Principal Act and omits section 11A to provide that the question of a person's unfitness to be tried for an offence is to be determined by the Judge alone. At present, that question is determined by a jury unless the person, with the consent of the prosecutor, elects otherwise. **Schedule 1 [5]** makes a consequential amendment.

**Schedule 1 [7]** amends section 17 of the Principal Act to require that orders of the Court to grant bail or detain a person in a hospital or other place after an inquiry as to a person's fitness to be tried for an offence are to be notified to the Tribunal.

**Schedule 1 [12]** substitutes section 21A of the Principal Act to provide that a special hearing is to be determined by the Judge alone unless an election to have the special hearing determined by a jury is made in accordance with the section by the accused person, his or her legal representative or the prosecutor. At present, a special hearing is determined by a jury unless the accused person, with the consent of the prosecutor, elects otherwise. **Schedule 1 [11]** makes a consequential amendment.

**Schedule 1 [13]** inserts proposed section 22A into the Principal Act to enable the Director of Public Prosecutions to amend an indictment to which a special hearing relates (subject to specified restrictions) in a similar manner to the amendment of an indictment in ordinary criminal proceedings.

**Schedule 1 [14]** amends section 23 of the Principal Act to enable the Court when imposing a limiting term with respect to a person in a special hearing to impose the term so as to be served consecutively with, or partly concurrently and partly consecutively with, another limiting term applying to the person or a sentence of imprisonment imposed on the person.

### **Summary proceedings before Magistrate relating to persons affected by mental disorders**

**Schedule 1 [17]** amends section 32 of the Principal Act to extend its operation. Currently, section 32 enables a Magistrate in proceedings to apply provisions of that section to a defendant who, at the time of the proceedings, was not a mentally ill person (as defined by the Principal Act) but developmentally disabled or suffering from a mental illness or a mental condition for which treatment is available in a hospital. The amendment extends section 32 to a defendant who was such a person at the time of the alleged commission of the relevant offence. The provisions concerned give the Magistrate options to adjourn the proceedings, grant the defendant bail or make any other appropriate order. They also enable the Magistrate to dismiss the charges and to release the defendant unconditionally or into the care of a responsible person or subject to the condition that the defendant undertake specified treatment. **Schedule 1 [16]** makes a consequential amendment.

**Schedule 1 [18]** amends section 32 of the Principal Act to require a Magistrate to state reasons for the Magistrate's decision as to whether or not a defendant should be dealt with under the provisions referred to in the preceding paragraph.

**Schedule 1 [19]** inserts section 32A into the Principal Act to permit a person who, in accordance with an order releasing a defendant under section 32, assesses the mental condition of or provides treatment to the defendant to report failures to comply with the order and other associated information despite any law (for example, any duty of confidentiality).

**Schedule 1 [20]** amends section 33 of the Principal Act to require a Magistrate or an authorised officer to state reasons for the Magistrate's or authorised officer's decision as to whether or not to deal with the defendant under certain provisions of the section. The provisions concerned enable orders to be made for the detention of a defendant who appears to be mentally ill in a hospital for assessment and give a Magistrate the power to discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.

**Schedule 1 [21]** omits section 34 of the Principal Act which requires a Magistrate to disqualify himself or herself, on the application of the defendant in proceedings before the Magistrate, from hearing the proceedings if the Magistrate has refused to deal with the defendant concerned under section 32 or 33 of the Principal Act and

another Magistrate has not previously determined whether the defendant should be dealt with under those sections.

### **Defence of mental illness**

**Schedule 1 [22]** amends section 38 of the Principal Act to enable a Court, in proceedings for the trial of a person where a special verdict of not guilty by reason of mental illness is returned, to remand the person in custody pending an order being made by the Court under section 39 of the Principal Act as to whether the person is to be detained or released unconditionally or subject to conditions.

**Schedule 1 [23]** amends section 39 of the Principal Act to prevent the Court from making an order releasing a person unless the Court is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release. Section 39 is also amended to require the Registrar of the Court to notify the Minister for Health and the Tribunal of the terms of any order made under the section.

### **Savings and transitional provisions**

**Schedule 1 [24]** enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [25]** contains savings and transitional provisions consequent on the enactment of the proposed Act that specify which amendments made by Schedule 1 to the proposed Act will apply to existing as well as future proceedings and which amendments will apply only to future proceedings.

## **Schedule 2      Amendments to Mental Health (Criminal Procedure) Act 1990 by way of statute law revision**

**Schedule 2** makes amendments to the Principal Act by way of statute law revision. The amendments change out of date references to prisoners, the Prison Medical Service, solicitors and counsel and include references to detention centres for juveniles. The amendments also include references in certain provisions to the Director-General of the Department of Juvenile Justice and juvenile justice officers so as to involve them in certain matters relating to accused persons who are juveniles.

## **Schedule 3      Amendment of Mental Health Act 1990**

**Schedule 3 [1]** amends section 80 of the *Mental Health Act 1990 (the Act)* to require the Tribunal to review the case of a person, who has been found unfit to be tried for an offence by a court and has been granted bail, so as to determine whether the person has become fit to be tried and whether the safety of the person or any member of the public will be seriously endangered by the person's release.

**Schedule 3 [2]–[5]** amend sections 80 and 82 of the Act as a consequence of the amendments made to the Principal Act by Schedule 1 [8], namely to remove the role of the Attorney General from provisions relating to the holding of special hearings.

**Schedule 3 [6]** amends section 82 of the Act to prevent the Tribunal recommending the release of a forensic patient who has been transferred to a hospital while serving a sentence of imprisonment and has not served the term of the sentence or, if a non-parole period has been set in relation to the sentence, the non-parole period.

**Schedule 3 [9]–[11]** make consequential amendments.

**Schedule 3 [7]** amends section 93 of the Act to enable the prescribed authority, if it appears that a person has committed a breach of a condition of an order releasing the person from custody under section 39 of the Principal Act, to make an order for the person's apprehension and detention, care or treatment.

**Schedule 3 [8]** substitutes section 104 of the Act as a consequence of the amendments made to the Principal Act by Schedule 1 [8], namely to remove the role of the Attorney General from provisions relating to the holding of special hearings.

**Schedule 3 [12]** amends section 108 of the Act to provide that the Minister for Health may release certain forensic patients following advice from the Director of Public Prosecutions (rather than from the Attorney General, as is currently the case) that further proceedings will not be taken.

**Schedule 3 [13]** amends the definition of *forensic patient* in the Act to include a person who is granted bail pursuant to section 14 (b) (ii) or 17 (2) of the Principal Act.

**Schedule 3 [14]** enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 3 [15]** contains savings and transitional provisions consequent on the enactment of the proposed Act.

**Schedule 3 [16]** amends the Explanatory note to the Act to reflect the amendments outlined above.