

**Version No. 014**  
**Crimes (Mental Impairment and Unfitness to  
be Tried) Act 1997**

**Act No. 65/1997**

Version incorporating amendments as at 10 April 2002

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be Tried) Act 1997**

**Act No. 65/1997**

Version incorporating amendments as at 10 April 2002

**The Parliament of Victoria enacts as follows:**

**PART 1—PRELIMINARY**

**1. *Purposes***

The purposes of this Act are—

- (a) to define the criteria for determining if a person is unfit to stand trial;
- (b) to replace the common law defence of insanity with a statutory defence of mental impairment;
- (c) to provide new procedures for dealing with people who are unfit to stand trial or who are found not guilty because of mental impairment.

**2. *Commencement***

- (1) This Part comes into operation on the day on which this Act receives the Royal Assent.
- (2) Subject to sub-section (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.

- (3) If a provision referred to in sub-section (2) does not come into operation within a period of 5 months beginning on, and including, the day on which this Act receives the Royal Assent, it comes into operation on the first day after the end of that period.

### 3. Definitions

- (1) In this Act—

**"appropriate place"** means—

- (a) an approved mental health service; or
- (b) a residential service;

**"approved mental health service"** has the same meaning as in the **Mental Health Act 1986**;

**"authorised psychiatrist"** has the same meaning as in the **Mental Health Act 1986**;

**"chief psychiatrist"** has the same meaning as in the **Mental Health Act 1986**;

**"conduct"** includes doing an act and making an omission;

**"contracted service provider"** has the same meaning as in the **Intellectually Disabled Persons' Services Act 1986**;

**"court"** means Supreme Court or County Court;

**"custodial supervision order"** means a supervision order referred to in section 26(2)(a);

**"domestic partner"** of a person means an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their

S. 3  
 amended by  
 No. 72/2001  
 s. 3(Sch.  
 item 5.2) (ILA  
 s. 39B(1)).

S. 3(1) def. of  
 "domestic  
 partner"  
 inserted by  
 No. 72/2001  
 s. 3(Sch.  
 item 5.1(a)).

genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—

- (a) for fee or reward; or
- (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

**"extended leave"** has the meaning given in section 56;

**"family member"** of a person means—

- (a) a spouse or domestic partner, parent, guardian or sibling of the person; or
- (b) a child of the person or of the person's spouse or domestic partner;

S. 3(1) def. of "family member" substituted by No. 72/2001 s. 3(Sch. item 5.1(b)).

**"forensic patient"** means—

- (a) a person—
  - (i) remanded in custody in an approved mental health service; or
  - (ii) committed to custody in an approved mental health service by a supervision order—

under this Act; or

- (b) a person transferred from a prison to an approved mental health service under section 17 of the **Mental Health Act 1986**;

**"forensic resident"** means—

(a) a person—

(i) remanded in custody in a residential service; or

(ii) committed to custody in a residential service by a supervision order—

under this Act; or

(b) a person transferred from a prison to a residential service under section 21A of the **Intellectually Disabled Persons' Services Act 1986**;

**"investigation"** means investigation under Part 2;

**"judicial member"** of the Panel means a member referred to in section 59(2)(a) or (b);

**"limited off-ground leave"** has the meaning given in section 53;

**"non-custodial supervision order"** means a supervision order referred to in section 26(2)(b);

**"offence"** includes conduct that would, but for the perpetrator's mental impairment or unfitness to be tried, have constituted an offence;

**"on-ground leave"** has the meaning given in section 51;

**"Panel"** means Forensic Leave Panel established by section 59;

**"President"** means President of the Panel;

**"prison"** has the same meaning as in the **Corrections Act 1986**;



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s. 3
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**"registered medical practitioner"** has the same meaning as in the **Medical Practice Act 1994**;

**"registered psychologist"** means a psychologist registered under section 6 of the **Psychologists Registration Act 2000**;

S. 3(1) def. of "registered psychologist" substituted by No. 41/2000 s. 102(Sch. item 2).

**"residential service"** means—

- (a) a registered residential service, a residential institution or a residential program within the meaning of the **Intellectually Disabled Persons' Services Act 1986**; or
- (b) a residential service provided under that Act by a contracted service provider;

**"special hearing"** means a hearing under Part 3;

**"special leave"** means leave of absence granted under section 50;

**"spouse"** of a person means a person to whom the person is married;

S. 3(1) def. of "spouse" inserted by No. 72/2001 s. 3(Sch. item 5.1(a)).

**"supervision order"** means an order made under section 26;

**"surrounds"** has the meaning given in section 52;

**"victim"**, in relation to an offence, means a person who suffered injury, loss or damage as a direct result of the offence.

S. 3(2)  
 inserted by  
 No. 72/2001  
 s. 3(Sch.  
 item 5.2).

(2) For the purposes of the definition of "domestic partner" in sub-section (1)—

- (a) in determining whether persons are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case;
- (b) a person is not a domestic partner of another person only because they are co-tenants.

#### ***4. Application to courts and proceedings***

Except as provided by sections 5 and 25(1), this Act applies only in relation to trials of indictable offences in the Supreme Court or the County Court and proceedings ancillary or incidental to, or connected with or arising out of, those trials, including committal proceedings.

#### ***5. Application to Magistrates' Court***

The defence of mental impairment as provided for in section 20(1) and the presumption in section 21(1) apply to summary offences and to indictable offences tried summarily.

## PART 2—UNFITNESS TO STAND TRIAL

### 6. *When is a person unfit to stand trial?*

- (1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be—
  - (a) unable to understand the nature of the charge; or
  - (b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
  - (c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
  - (d) unable to follow the course of the trial; or
  - (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
  - (f) unable to give instructions to his or her legal practitioner.
- (2) A person is not unfit to stand trial only because he or she is suffering from memory loss.

### 7. *Presumptions, standard of proof, etc.*

- (1) A person is presumed to be fit to stand trial.
- (2) The presumption is rebutted only if it is established, on an investigation under this Part, that the person is unfit to stand trial.
- (3) The question of a person's fitness to stand trial—
  - (a) is a question of fact; and

- (b) is to be determined on the balance of probabilities by a jury empanelled for that purpose.
- (4) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness.
- (5) If the question is raised by the trial judge, the prosecution has carriage of the matter, but no party bears any onus of proof in relation to it.

#### **8. Committals**

- (1) If the question of a defendant's fitness to stand trial arises at a committal hearing for an indictable offence—
  - (a) the committal hearing must be completed in accordance with Schedule 5 to the **Magistrates' Court Act 1989**; and
  - (b) the defendant must not be discharged only because the question has been raised; and
  - (c) if the defendant is committed for trial, the question must be reserved for consideration by the trial judge.
- (2) Subject to sub-section (3), if a defendant is committed for trial and the question of his or her fitness to stand trial has been reserved under sub-section (1)(c)—
  - (a) a presentment or indictment must be filed in respect of the offence; and
  - (b) the issue of whether there is a real and substantial question as to the defendant's fitness to stand trial must be determined by the trial judge; and

- (c) if the judge determines that there is a real and substantial question, an investigation must be held under this Part—

within 3 months after the committal.

- (3) The court before which the defendant is to be tried may at any time, whether or not the period referred to in sub-section (2) has expired, extend the period for a further period not exceeding 3 months.
- (4) The period referred to in sub-section (2) may be extended under sub-section (3) more than once.

**9. *Reservation of question of fitness to stand trial by court***

- (1) At any time after a presentment or indictment has been filed, if it appears to the court before which the defendant is to be tried that there is a real and substantial question as to the defendant's fitness to stand trial, the court must reserve the question of the defendant's fitness to stand trial for investigation under this Part.
- (2) At any time during a trial, if it appears to the trial judge that there is a real and substantial question as to the defendant's fitness to stand trial, the judge must adjourn or discontinue the trial and proceed with an investigation under this Part.
- (3) Nothing in this Act prevents the question of a defendant's fitness to stand trial from being raised more than once in the same proceedings.
- (4) For the purposes of sections 353(3) and 359A of the **Crimes Act 1958**, time ceases to run from the time that the question of a defendant's fitness to be tried is reserved for investigation until the investigation has been completed.

**10. Court may make orders pending investigation into fitness**

- (1) A court that reserves for investigation the question of a defendant's fitness to stand trial may make any one or more of the following orders—
  - (a) an order granting the defendant bail;
  - (b) subject to sub-section (2), an order remanding the defendant in custody in an appropriate place for a specified period;
  - (c) subject to sub-section (3), an order remanding the defendant in custody in a prison for a specified period;
  - (d) if it is of the opinion that it is in the interests of justice to do so, an order—
    - (i) that the defendant undergo an examination by a registered medical practitioner or registered psychologist; and
    - (ii) that the results of the examination be put before the court;
  - (e) any other order the court thinks appropriate.
- (2) The court must not make an order remanding a defendant in custody in an appropriate place unless it has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
- (3) The court must not make an order remanding a defendant in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

### 11. *Procedure on investigation*

- (1) On an investigation into a defendant's fitness to stand trial—
  - (a) the court must hear any relevant evidence and submissions put to the court by the prosecution or the defence;
  - (b) if of the opinion that it is in the interests of justice to do so, the trial judge may—
    - (i) call evidence on his or her own initiative;
    - (ii) require the defendant to undergo an examination by a registered medical practitioner or registered psychologist;
    - (iii) require the results of any such examination to be put before the court.
- (2) The **Juries Act 2000** applies to an investigation as if the investigation were a criminal trial.
- (3) At the commencement of the investigation, the judge must explain to the jury—
  - (a) the reason for the investigation; and
  - (b) the findings which may be made; and
  - (c) that the standard of proof required in relation to the defendant's fitness to stand trial is the balance of probabilities.
- (4) If the jury finds that the defendant is unfit to stand trial, the judge must—
  - (a) determine, by reference to any relevant evidence and on the balance of probabilities, whether or not the defendant is likely to become fit to stand trial within the next 12 months; and

S. 11(2)  
 substituted by  
 No. 53/2000  
 s. 95(1).

- (b) if the judge determines that the defendant is likely to become fit within the next 12 months, specify the period by the end of which the defendant is likely to be fit to stand trial.
- (5) For the purposes of sub-section (4) the judge may call further evidence on his or her own initiative.
- (6) The jury empanelled to decide the question of a defendant's fitness to stand trial must not decide any other matter in relation to the proceedings for the offence.

**12. *What happens after an investigation?***

- (1) If the jury finds that the defendant is fit to stand trial, the trial must be commenced or resumed in accordance with usual criminal procedures.
- (2) If the jury finds that the defendant is not fit to stand trial and the judge determines that the defendant is likely to become fit within the next 12 months, the judge must adjourn the matter for the period specified under section 11(4)(b) and may—
  - (a) grant the defendant bail; or
  - (b) subject to sub-section (3), remand the defendant in custody in an appropriate place for a specified period (not exceeding the period specified under section 11(4)(b)); or
  - (c) subject to sub-section (4), remand the defendant in custody in a prison for a specified period (not exceeding the period specified under section 11(4)(b)); or
  - (d) make any other order the judge thinks appropriate.



- (3) The judge must not remand a defendant in custody in an appropriate place unless it has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
- (4) The judge must not remand a defendant in custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances.
- (5) If the jury finds that the defendant is not fit to stand trial and the judge determines that the defendant is not likely to become fit within the next 12 months, the court must proceed to hold a special hearing under Part 3 within 3 months.

### **13. *Abridgment of adjournment***

- (1) At any time during a period of adjournment under section 12(2) the defendant or the Director of Public Prosecutions may apply to the court—
  - (a) for an order that the trial commence or resume, if the defendant or the Director of Public Prosecutions is of the opinion that the defendant has become fit to stand trial; or
  - (b) for an order that the court proceed to hold a special hearing, if the defendant or the Director of Public Prosecutions is of the opinion that the defendant will not become fit to stand trial by the end of the period of 12 months after the first finding of unfitness.
- (2) An application under sub-section (1) must be accompanied by a report on the mental condition of the defendant by a registered medical practitioner or registered psychologist.
- (3) On an application under sub-section (1) the court must—
  - (a) dismiss the application; or

- (b) if satisfied that the defendant has become fit to stand trial, make an order that the trial commence or resume; or
- (c) if satisfied that the defendant will not become fit to stand trial by the end of the period of 12 months after the first finding of unfitness, make an order that the court proceed to hold a special hearing within 3 months.

**14. *What happens at the end of an adjournment?***

- (1) At the end of the period of adjournment under section 12(2), the defendant is presumed to be fit to stand trial unless a real and substantial question of fitness is raised again.
- (2) If a real and substantial question of fitness is raised again, the judge must—
  - (a) extend the period of adjournment for a further period, but not so that the total period since the first finding of unfitness exceeds 12 months; or
  - (b) proceed to hold a special hearing under Part 3 within 3 months.
- (3) If the judge extends the period of adjournment under sub-section (2)(a), the judge may make any order referred to in section 12(2) or vary any order already made under that section (and for that purpose section 12(3) and (4) apply accordingly).
- (4) At the end of the period of adjournment—
  - (a) if the trial of the defendant has commenced, it must be resumed as soon as practicable in accordance with usual criminal procedures; or
  - (b) subject to sub-section (5), if the trial has not commenced, it must be commenced within 3 months.

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- (5) The court before which the defendant is to be tried may at any time, whether or not the period referred to in sub-section (4)(b) has expired, extend that period for a further period not exceeding 3 months.
  - (6) The period for commencement of a trial may be extended under sub-section (5) more than once.
  - (7) An extension of time under sub-section (5) also serves, if necessary, as an extension of time for the purposes of section 353(5) or 359A(2) of the **Crimes Act 1958** (as the case may be).
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### PART 3—SPECIAL HEARINGS

#### 15. *Purpose of special hearings*

The purpose of a special hearing is to determine whether, on the evidence available, the defendant—

- (a) is not guilty of the offence; or
- (b) is not guilty of the offence because of mental impairment; or
- (c) committed the offence charged or an offence available as an alternative.

#### 16. *Procedure at special hearings*

S. 16(1)  
substituted by  
No. 53/2000  
s. 95(2).

- (1) A special hearing is to be conducted as nearly as possible as if it were a criminal trial and, for that purpose, the **Juries Act 2000** applies, subject to this section.
- (2) Without limiting sub-section (2), at a special hearing—
  - (a) the defendant must be taken to have pleaded not guilty to the offence; and
  - (b) the defendant's legal representative (if any) may exercise the defendant's rights to challenge jurors (either for cause or peremptorily) or the jury;
  - (c) the defendant may raise any defence that could be raised if the special hearing were a criminal trial, including the defence of mental impairment;
  - (d) the rules of evidence apply;
  - (e) section 360A of the **Crimes Act 1958** (adjournment or stay of trial) applies as if the special hearing were a criminal trial;

- (f) any alternative verdict that would be available if the special hearing were a criminal trial is available to the jury.
- (3) At the commencement of a special hearing, the judge must explain to the jury—
  - (a) that the defendant is unfit to be tried in accordance with the usual procedures of a criminal trial; and
  - (b) the meaning of being unfit to stand trial; and
  - (c) the purpose of the special hearing; and
  - (d) the findings that are available; and
  - (e) the standard of proof required for those findings.

#### **17. *Findings at special hearings***

- (1) The following findings are available to the jury at a special hearing—
  - (a) not guilty of the offence charged;
  - (b) not guilty of the offence because of mental impairment;
  - (c) the defendant committed the offence charged or an offence available as an alternative.
- (2) To make a finding under sub-section (1)(c) the jury must be satisfied beyond reasonable doubt, on the evidence available, that the defendant committed the offence charged or an offence available as an alternative.

#### **18. *Effect of findings***

- (1) If a jury makes a finding under section 17(1)(a), the defendant is to be taken for all purposes to have been found not guilty at a criminal trial.

- (2) A finding under section 17(1)(b) is to be taken for all purposes to be a finding at a criminal trial of not guilty because of mental impairment.
- (3) A finding under section 17(1)(c)—
  - (a) constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates; and
  - (b) constitutes a bar to further prosecution in respect of the same circumstances; and
  - (c) is subject to appeal in the same manner as if the defendant had been convicted of the offence in a criminal trial.
- (4) If a jury makes a finding under section 17(1)(c)<sup>1</sup>, the judge must—
  - (a) declare that the defendant is liable to supervision under Part 5; or
  - (b) order the defendant to be released unconditionally<sup>2</sup>.

**19. *Court may make orders pending making of supervision order***

- (1) If the judge declares a defendant liable to supervision, the judge may make any one or more of the following orders pending the making of a supervision order—
  - (a) an order granting the defendant bail;
  - (b) subject to sub-section (2), an order remanding the defendant in custody in an appropriate place;
  - (c) subject to sub-section (3), an order remanding the defendant in custody in a prison;

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- (d) if he or she is of the opinion that it is in the interests of justice to do so, an order—
- (i) that the defendant undergo an examination by a registered medical practitioner or registered psychologist; and
  - (ii) that the results of the examination be put before the court;
- (e) any other order the judge thinks appropriate.
- (2) The judge must not make an order remanding a defendant in custody in an appropriate place unless the court has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
- (3) The judge must not make an order remanding a defendant in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.
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#### **PART 4—DEFENCE OF MENTAL IMPAIRMENT**

##### **20. *Defence of mental impairment***

- (1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that—
  - (a) he or she did not know the nature and quality of the conduct; or
  - (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).
- (2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

##### **21. *Presumptions, standard of proof, etc.***

- (1) A person is presumed not to have been suffering from a mental impairment having the effect referred to in section 20(1) until the contrary is proved.
- (2) The question whether a person was suffering from a mental impairment having the effect referred to in section 20(1)—
  - (a) is a question of fact; and
  - (b) is to be determined by a jury on the balance of probabilities.
- (3) If the defence of mental impairment is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption.



**22. *When may the question of mental impairment be raised?***

- (1) The question of mental impairment may be raised at any time during a trial by the defence or, with the leave of the trial judge, by the prosecution.
- (2) If there is admissible evidence that raises the question of mental impairment—
  - (a) the judge must direct the jury to consider the question and explain to the jury the findings which may be made and the legal consequences of those findings; and
  - (b) if the jury finds the defendant not guilty, it must specify in its verdict whether or not it so finds because of mental impairment.
- (3) A defendant must not be discharged at a committal hearing only because the defence of mental impairment has been raised.

**23. *Effect of finding of not guilty because of mental impairment***

If a defendant is found not guilty because of mental impairment, the court must—

- (a) declare that the defendant is liable to supervision under Part 5; or
- (b) order the defendant to be released unconditionally<sup>3</sup>.

**24. *Court may make orders pending making of supervision order***

- (1) If the court declares a defendant liable to supervision, the court may make any one or more of the following orders pending the making of a supervision order—
  - (a) an order granting the defendant bail;

- (b) subject to sub-section (2), an order remanding the defendant in custody in an appropriate place;
  - (c) subject to sub-section (3), an order remanding the defendant in custody in a prison;
  - (d) if it is of the opinion that it is in the interests of justice to do so, an order—
    - (i) that the defendant undergo an examination by a registered medical practitioner or registered psychologist; and
    - (ii) that the results of the examination be put before the court;
  - (e) any other order the court thinks appropriate.
- (2) The court must not make an order remanding a defendant in custody in an appropriate place unless the court has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
- (3) The court must not make an order remanding a defendant in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

**25. *Abrogation of defence of insanity***

- (1) The common law defence of insanity is abrogated.
- (2) A jury is not entitled in any criminal trial to return a verdict of not guilty on account of insanity.

**PART 5—DISPOSITION OF PEOPLE DECLARED TO BE  
 LIABLE TO SUPERVISION**

**26. *Supervision orders***

- (1) If a court declares that a person is liable to supervision under this Part, the court must make a supervision order in respect of the person<sup>4</sup>.
- (2) A supervision order may—
  - (a) commit the person to custody ("**custodial supervision order**")—
    - (i) subject to sub-section (3), in an appropriate place; or
    - (ii) subject to sub-section (4), in a prison; or
  - (b) release the person on conditions decided by the court and specified in the order ("**non-custodial supervision order**").
- (3) The court must not make a supervision order—
  - (a) committing a person to custody in an appropriate place; or
  - (b) providing for a person to receive services in an appropriate place or from a contracted service provider or the Secretary to the Department of Human Services—

unless it has received a certificate under section 47 stating that the facilities or services necessary for the order are available.
- (4) The court must not make a supervision order committing a person to custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances.

- (5) A supervision order is subject to appeal by the person in respect of whom it was made or the Director of Public Prosecutions in the same manner as a sentence<sup>5</sup>.
- (6) In addition to sub-section (5), the Secretary to the Department of Human Services may appeal to the Court of Appeal against a supervision order if the Secretary considers that a different supervision order should have been made and that an appeal should be brought in the public interest.
- (7) On an appeal under sub-section (6) the Court of Appeal, if it thinks that a different supervision order should have been made, may quash the supervision order and make another supervision order in substitution for it.
- (8) A person who is detained in custody in an appropriate place under a supervision order is deemed to be in the custody of the Secretary to the Department of Human Services<sup>6</sup>.

**27. *How long does a supervision order last?***

- (1) A supervision order is for an indefinite term.
- (2) In the case of a non-custodial supervision order, the court may direct when making the order that the matter be brought back to the court for review at the end of the period specified by the court<sup>7</sup>.

**28. *Nominal term of supervision order***

- (1) The court must set a nominal term of a supervision order in accordance with the following table—

<i>Offence person found not guilty of because of mental impairment or found at special hearing to have committed</i>	<i>Nominal term</i>
(a) murder or treason	25 years

*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*  
*Act No. 65/1997*

s. 28

<i>Offence person found not guilty of because of mental impairment or found at special hearing to have committed</i>	<i>Nominal term</i>
(b) a serious offence (within the meaning of the <b>Sentencing Act 1991</b> ) other than— (i) murder; or (ii) an offence against section 20 of the <b>Crimes Act 1958</b> (threats to kill)	a period equivalent to the maximum term of imprisonment available for the offence
(c) any other offence for which there is a statutory maximum term of imprisonment	a period equivalent to half the maximum term of imprisonment available for the offence
(d) any other offence punishable by imprisonment but for which there is no statutory maximum term	a period specified by the court

(2) If a person—

- (a) is found not guilty because of mental impairment of more than one offence; or
- (b) is found at a special hearing to have committed more than one offence—

the nominal term must be calculated by reference to the offence that carries the longest maximum term of imprisonment.

(3) For the purpose of sub-section (2), the maximum term of imprisonment—

- (a) for murder or treason is to be taken to be 25 years;

- (b) for any other offence punishable by imprisonment for which there is no statutory maximum term, is a period specified by the court.

**29. *Non-compliance with non-custodial supervision order***

- (1) If at any time it appears to a person having the supervision of a person under a non-custodial supervision order that the person subject to the order has failed to comply with it, he or she may apply to the court that made the order for a variation of the order.
- (2) Notice of an application under sub-section (1) must be given, at least 14 days before the hearing, to the person subject to the order.
- (3) The court may order that a warrant to arrest be issued against the person subject to the order if he or she does not attend before the court on the hearing of the application.
- (4) If the court is satisfied by evidence on oath, whether orally or by affidavit, or by the admission of the person subject to the order that the person has failed to comply with the order, the court must, by order—
  - (a) confirm the order; or
  - (b) vary the conditions of the order; or
  - (c) vary the order to a custodial supervision order.
- (5) If the court varies the order to a custodial supervision order before the end of the nominal term, that nominal term continues to run.
- (6) If the court varies the order to a custodial supervision order, any direction under section 27(2) with respect to the order lapses, unless the court directs otherwise.

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**30. Emergency power of apprehension**

- (1) A person subject to a non-custodial supervision order may be apprehended by an appropriate person if the appropriate person reasonably believes—
    - (a) that the person subject to the order has failed to comply with it; and
    - (b) that the safety of the person subject to the order or members of the public will be seriously endangered if the person is not apprehended.
  - (2) Subject to sub-section (4), a person who is apprehended under sub-section (1) is to be taken and detained in an appropriate place and treated or provided with services, if necessary, for his or her condition.
  - (3) For the purpose of apprehending a person and taking them to an appropriate place, the appropriate person may with such assistance as is required and such force as may be reasonably necessary—
    - (a) enter any premises in which he or she has reasonable grounds for believing that the person to be apprehended may be found; and
    - (b) if necessary to enable that person to be so apprehended and taken safely, use such restraint as may be reasonably necessary.
  - (4) A person who is apprehended under this section must be released from detention within 48 hours unless, within that period, an application is made under section 29(1) for variation of the person's supervision order.
  - (5) The court must hear an application referred to in sub-section (4) as soon as possible.
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(6) In this section—

**"appropriate person"**, in relation to a person subject to a supervision order, means—

- (a) a person having supervision of the person under the order; or
- (b) a member of the police force; or
- (c) an ambulance officer; or
- (d) a person who is a member of a class prescribed for the purposes of this section.

**31. *Application for variation or revocation of supervision order***

- (1) Any of the following may apply to the court that made a supervision order for a variation of the order (in the case of a custodial supervision order) or a variation or revocation of the order (in the case of a non-custodial supervision order)—
  - (a) the person subject to the order;
  - (b) a person having the custody, care, control or supervision of that person;
  - (c) the Director of Public Prosecutions.
- (2) If the court refuses an application under this section by a person who is subject to a custodial supervision order, a later application cannot be made by that person for 3 years or such lesser period as the court directs.
- (3) An applicant under this section must give notice of the application, at least 14 days before the hearing, to—
  - (a) the person subject to the order (unless he or she is the applicant); and



- (b) a family member (if any) of the person subject to the order; and
- (c) the Director of Public Prosecutions (unless he or she is the applicant).
- (4) A court that receives an application under this section must give notice of the application, at least 14 days before the hearing, to the victims (if any) of the offence with which the person subject to the order was charged.
- (5) Notice need not be given under sub-section (3)(b) or (4) to a person whose whereabouts have not, after reasonable inquiry, been ascertained.

### **32. *Variation of custodial supervision orders***

- (1) On an application under section 31 for variation of a custodial supervision order, the court must, by order—
  - (a) confirm the order; or
  - (b) vary the place of custody; or
  - (c) subject to this section, vary the order to a non-custodial supervision order.
- (2) The court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person on a non-custodial supervision order.
- (3) In the case of a forensic patient or forensic resident—
  - (a) the court must not vary a custodial supervision order to a non-custodial supervision order (whether during or after the nominal term) unless the forensic patient or forensic resident has completed a period

of at least 12 months extended leave granted by the court under section 57; and

- (b) in deciding an application to vary a custodial supervision order to a non-custodial supervision order, the court must take into account whether or not the forensic patient or forensic resident has complied with any conditions of their extended leave.
- (4) If the court varies a custodial supervision order to a non-custodial supervision order before the end of the nominal term, that nominal term continues to run.
- (5) Section 27(2) applies to a variation of a custodial supervision order to a non-custodial supervision order.

**33. *Variation or revocation of non-custodial supervision orders***

On an application under section 31 for variation or revocation of a non-custodial supervision order or on a review directed under section 27(2), the court must, by order—

- (a) confirm the order; or
- (b) vary the conditions of the order; or
- (c) vary the order to a custodial supervision order; or
- (d) revoke the order.

**34. *Appeals against variations or revocations of supervision orders***

An order confirming or varying a supervision order is subject to appeal in the same manner as a supervision order<sup>8</sup>.

### **35. Major reviews**

- (1) At least 3 months before the end of the nominal term of a supervision order, the court that made the order must undertake a major review.
- (2) The purpose of a major review is to determine whether the person subject to the order is able to be released from it.
- (3) On a major review, the court—
  - (a) if the supervision order is a custodial supervision order—
    - (i) must vary the order to a non-custodial supervision order, unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order; or
    - (ii) if so satisfied, must confirm the order or vary the place of custody;
  - (b) if the supervision order is a non-custodial supervision order—
    - (i) may confirm the order; or
    - (ii) may vary the conditions of the order; or
    - (iii) may revoke the order.

### **36. Defendant to be present at hearings**

- (1) Unless sub-section (4) applies, at any hearing in which a court is considering making, varying or revoking a supervision order, the person who is to be, or is, subject to the order has the right to appear before the court in person.

- (2) If the person decides not to appear before the court, the court must satisfy itself that they have been informed of their right to appear.
- (3) The person may be legally represented at any hearing referred to in sub-section (1).
- (4) If the court is satisfied that the appearance of the person before the court would be detrimental to the person's health, the court may order that the person not appear at the hearing in person.
- (5) If the person is in custody, the court may order the person in charge of the place in which they are in custody to cause them to be brought before the court for the purposes of the hearing.
- (6) Section 360A of the **Crimes Act 1958** (adjournment or stay of trial) applies to a hearing referred to in sub-section (1) as if the hearing were a criminal trial.
- (7) Nothing in Part IIA of the **Evidence Act 1958** applies to a hearing referred to in sub-section (1).

**37. Other parties may appear**

- (1) At any hearing referred to in section 36(1)—
  - (a) the State or the Director of Public Prosecutions or both are entitled to appear before the court if the State or Director of Public Prosecutions considers that they have a legitimate interest in the matter; and
  - (b) the court may allow any other person having a substantial interest in the matter to appear in person and, if the court gives leave, to be legally represented.
- (2) A person who is entitled or allowed to appear in a matter is a party to that matter.

**38. Rules of evidence not to apply in certain cases**

In a major review or a hearing of an application for variation or revocation of a supervision order, the court is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit.

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**PART 6—PRINCIPLES ON WHICH COURT IS TO ACT,  
 REPORTS AND CERTIFICATES**

**39. *Principle to be applied***

In deciding whether to make, vary or revoke a supervision order or to remand a person in custody under this Act, the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

**40. *Matters to which the court is to have regard***

- (1) In deciding whether or not to make, vary or revoke an order under Part 3, 4 or 5 in relation to a person, the court must have regard to—
  - (a) the nature of the person's mental impairment or other condition or disability; and
  - (b) the relationship between the impairment, condition or disability and the offending conduct; and
  - (c) whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment; and
  - (d) the need to protect people from such danger; and
  - (e) whether there are adequate resources available for the treatment and support of the person in the community; and
  - (f) any other matters the court thinks relevant.

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- (2) The court cannot order a person to be released unconditionally or otherwise release a person from custody under Part 3, 4 or 5, or significantly reduce the degree of supervision to which a person is subject, unless it—
- (a) has obtained and considered the report of at least one registered medical practitioner or registered psychologist, who has personally examined the person, on—
    - (i) the person's mental condition; and
    - (ii) the possible effect of the proposed order on the person's behaviour; and
  - (b) has considered the report submitted to the court under section 41(1) or (3) (as the case may be); and
  - (c) is satisfied that the person's family members and the victims of the offence with which the person was charged (if any), have been given reasonable notice of the hearing at which the release or reduction is proposed to be ordered; and
  - (d) has considered any report of the family members or victims made under section 42; and
  - (e) has obtained and considered any other reports the court considers necessary.
- (3) Notice need not be given under sub-section (2)(c) to a person whose whereabouts have not, after reasonable inquiry, been ascertained.

**41. *Reports on mental condition of defendants***

- (1) If a person is declared to be liable to supervision under Part 5, the appropriate person must arrange to have prepared and filed with the court that made the declaration a report, prepared by a registered medical practitioner or registered
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psychologist, on the mental condition of the person containing—

- (a) a diagnosis and prognosis of the condition or an outline of the person's behavioural problems; and
  - (b) the person's response to treatment, therapy or counselling (if any); and
  - (c) a suggested treatment or other plan for managing the condition.
- (2) The report must be filed within 30 days after the declaration or within such longer period as the court allows.
- (3) If a supervision order is made in relation to the person, the appropriate person must arrange to have prepared and filed with the court that made the order, at intervals of not more than 12 months for the duration of the order, a report containing—
- (a) a statement of any treatment, therapy or counselling that the person has undergone, or any services that the person has received, since the making of the order or the last report; and
  - (b) any changes to the prognosis of the person's condition or the person's behavioural problems and the plan for managing the condition or problems.
- (4) In this section—
- "appropriate person"** means—
- (a) the Secretary to the Department of Justice if the person declared liable to supervision, or subject to a supervision order, is in custody in a prison; or



- (b) the Secretary to the Department of Human Services if the person is—
  - (i) in custody in an approved mental health service or a residential service; or
  - (ii) receiving treatment or services under a supervision order from an approved mental health service, a residential service, a contracted service provider or the Secretary to the Department of Human Services.

**42. *Reports of family members and victims***

- (1) For the purpose of—
  - (a) assisting counselling and treatment processes for all people affected by an offence; and
  - (b) assisting the court in determining any conditions it may impose on an order made against a person under this Act—

a family member of the person or a victim of the offence may make a report to the court.
- (2) A report by a family member is to contain the views of the family member on the conduct of the person and the impact of that conduct on the family member.
- (3) A report by a victim is to contain particulars of any injury, loss or damage suffered by the victim as a direct result of the offence.
- (4) A report may be made by another person on behalf of a family member or victim—
  - (a) who is under the age of 18 years; or
  - (b) who the court is satisfied is incapable of making the report because of mental impairment or any other reason.

#### **43. *When and how is a report to be made?***

- (1) A report under section 42 may be made to the court—
  - (a) before the court makes an order under Part 3, 4 or 5 in respect of a person; or
  - (b) whenever an application is made for variation or revocation of such an order; or
  - (c) on a major review.
- (2) A report may be made—
  - (a) in writing by statutory declaration; or
  - (b) in writing by statutory declaration and orally by sworn evidence.

#### **44. *Distribution of report***

A person who makes a report under section 42 must, a reasonable time before the hearing is to take place—

- (a) file a copy with the court; and
- (b) provide a copy to the person who is, or is to be made subject to, the order or his or her legal practitioner.

#### **45. *Admissibility of report***

- (1) The court may rule as inadmissible the whole or any part of a report under section 42.
- (2) A report under section 42 is not admissible in any civil or criminal proceeding, other than the proceeding in relation to which it was made, except—
  - (a) a proceeding for an offence against section 314(1) of the **Crimes Act 1958** (perjury) or for any other offence that involves an interference with the due administration of justice; or

(b) with the consent of the person who made the report.

- (3) A court, tribunal or person acting judicially may rule as admissible in a proceeding before them any matter inadmissible because of sub-section (2) if satisfied, on the application of a party to the proceeding, that it is in the interests of justice to do so.

**46. *Examination of victim or family member***

- (1) The court, at the request of any party to the proceedings, may call a person who has made a report under section 42 to give evidence.
- (2) A person who gives evidence under sub-section (1) may be cross-examined and re-examined.

**47. *Certificate of available services***

- (1) A court must request the Secretary to the Department of Human Services to provide the court with a certificate of available services if the court is considering—
- (a) imposing a supervision order on a person; or
  - (b) making another order under this Act—
    - (i) that a person be placed in custody in an appropriate place; or
    - (ii) that a person otherwise receive treatment or services in an appropriate place or services from a contracted service provider or the Secretary to the Department of Human Services.
- (2) A certificate of available services must—
- (a) state whether or not there are facilities or services available for the custody, care or treatment of the person (as the case requires); and

- (b) if there are, give an outline of those facilities or services.
  - (3) If there are no facilities or services available, the certificate may contain any other options the Secretary considers it appropriate for the court to consider in making the proposed order.
  - (4) The Secretary must provide a certificate to the court within 7 days after receiving a request under sub-section (1) or within such longer period as the court allows.
  - (5) The court may require the Secretary to give evidence or to provide the court with a further certificate to clarify or expand on the matters dealt with in a certificate under this section.
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## PART 7—LEAVE OF ABSENCE

### Division 1—Leave of absence

#### 48. *Application of Division*

This Division applies only in relation to forensic patients and forensic residents who are subject to a supervision order.

#### 49. *What types of leave may be granted?*

The types of leave of absence that may be granted to a forensic patient or forensic resident are—

- (a) special leave of absence;
- (b) on-ground leave;
- (c) limited off-ground leave;
- (d) extended leave.

#### 50. *Special leave*

- (1) A forensic patient or forensic resident, or a person on their behalf, may apply for special leave of absence, specifying the special circumstances for which the leave is required.
- (2) An application is to be made—
  - (a) in the case of a forensic patient, to the authorised psychiatrist for the approved mental health service;
  - (b) in the case of a forensic resident, to the Secretary to the Department of Human Services.
- (3) The authorised psychiatrist or Secretary to the Department of Human Services must grant an application for special leave of absence if satisfied that—
  - (a) there are special circumstances; and

- (b) the safety of members of the public will not be seriously endangered.
- (4) If the authorised psychiatrist or Secretary to the Department of Human Services refuses to grant special leave of absence to a forensic patient or forensic resident, the forensic patient or forensic resident may appeal to the Panel.
- (5) On an appeal, the Panel may—
  - (a) confirm the decision of the authorised psychiatrist or Secretary to the Department of Human Services; or
  - (b) direct that the forensic patient or forensic resident be allowed special leave of absence.
- (6) Special leave of absence—
  - (a) cannot exceed 24 hours; and
  - (b) may be subject to such conditions as the authorised psychiatrist or Secretary to the Department of Human Services or the Panel may specify.

**51. *What is on-ground leave?***

On-ground leave allows a forensic patient or forensic resident to be absent from the place of custody but within the surrounds.

**52. *What are the surrounds?***

- (1) The "**surrounds**", in relation to an approved mental health service or a residential service, is the area declared under sub-section (2) to be the surrounds in relation to that service.
- (2) The Governor-in-Council, by notice published in the Government Gazette, may declare an area surrounding or adjacent to an approved mental health service or a residential service to be the surrounds in relation to that approved mental health service or residential service.

**53. *What is limited off-ground leave?***

Limited off-ground leave allows a forensic patient or forensic resident to be absent from the place of custody—

- (a) between the hours of 7.30 am and 7.30 pm;  
and
- (b) outside those hours on a maximum of  
3 consecutive days in any 7 day period.

**54. *Granting of on-ground or limited off-ground leave***

- (1) A forensic patient or forensic resident may apply to the Panel for on-ground leave or limited off-ground leave.
- (2) The Panel must not grant an application under sub-section (1) unless satisfied on the evidence available that the safety of the applicant or members of the public will not be seriously endangered as a result of the applicant being allowed leave.
- (3) The Panel may impose any conditions it considers appropriate on on-ground leave or limited off-ground leave, including a condition that the person on leave comply with any direction of the authorised psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident).
- (4) On-ground leave or limited off-ground leave may be granted for the period, not exceeding 6 months, specified by the Panel.
- (5) A person may apply for, and be granted, on-ground leave or limited off-ground leave more than once.

**55. *Suspension of special leave, on-ground leave or limited off-ground leave***

- (1) Special leave of absence, on-ground leave or limited off-ground leave may be suspended at any time by the chief psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident) if the chief psychiatrist or Secretary is satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if leave is not suspended.
- (2) If leave is suspended, the chief psychiatrist or Secretary must confirm the suspension in writing to the person formerly on leave.
- (3) If the chief psychiatrist or Secretary is satisfied that the reason for the suspension no longer exists, he or she must lift the suspension immediately.
- (4) The chief psychiatrist or Secretary must give notice to the person or body that granted the leave of any suspension or lifting of suspension under this section (except where the Secretary suspends special leave that he or she granted).
- (5) A person whose leave is suspended under this section is deemed not to have leave of absence during the period of suspension.

**56. *What is extended leave?***

Extended leave is leave for a forensic patient or forensic resident to be absent from the place of custody—

- (a) for the period, not exceeding 12 months; and
- (b) subject to the conditions (if any)—  
specified by the court.



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**57. *Granting of extended leave***

- (1) A forensic patient or forensic resident may apply to the court that made the supervision order to which they are subject for extended leave.
- (2) The court must not grant an application under subsection (1) unless satisfied on the evidence available that the safety of the applicant or members of the public will not be seriously endangered as a result of the applicant being allowed leave.
- (3) In considering an application for extended leave the court must have regard to any proposed plan of leave submitted to the court by—
  - (a) in the case of a forensic patient, the authorised psychiatrist for the approved mental health service;
  - (b) in the case of a forensic resident, the Secretary to the Department of Human Services.
- (4) A person may apply for, and be granted, extended leave more than once.

**58. *Suspension of extended leave***

- (1) Extended leave may be suspended at any time by the chief psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident) if the chief psychiatrist or Secretary is satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if leave is not suspended.
  - (2) If extended leave is suspended, the chief psychiatrist or Secretary must—
    - (a) confirm the suspension in writing to the person formerly on leave; and
-

- 
- (b) subject to sub-section (5), within 48 hours after the suspension—
    - (i) make an application to the court that granted the leave for revocation of the leave; or
    - (ii) lift the suspension.
  - (3) The court must hear an application referred to in sub-section (2)(b)(i) as soon as possible.
  - (4) On an application under sub-section (2)(b)(i) the court may—
    - (a) if satisfied on the evidence available that the safety of the forensic patient or forensic resident or members of the public will be seriously endangered if the suspension is not confirmed or leave is not revoked, revoke the leave; or
    - (b) if not satisfied, lift the suspension.
  - (5) If the chief psychiatrist or Secretary is satisfied that the reason for the suspension no longer exists, he or she must lift the suspension immediately.
  - (6) A person whose leave is suspended under this section is deemed not to have leave of absence during the period of suspension.

## **Division 2—Forensic Leave Panel**

### **59. *Establishment of Panel***

- (1) The Forensic Leave Panel is established.
- (2) The Panel consists of—
  - (a) one or more judges of the Supreme Court, nominated by the Chief Justice of the Supreme Court;

- (b) one or more judges of the County Court, nominated by the Chief Judge of the County Court;
  - (c) the chief psychiatrist or his or her nominee;
  - (d) such other members as are necessary from time to time for the proper functioning of the Panel.
- (3) Schedule 1 has effect with respect to members of the Panel.
- (4) If there is only one Supreme Court judge on the Panel, he or she is the President of the Panel.
- (5) If the Chief Justice nominates more than one Supreme Court judge to the Panel, the Chief Justice must nominate one of the judges as President of the Panel.

#### **60. *Functions of the Panel***

The functions of the Panel are—

- (a) to hear applications for leave of absence, and appeals in respect of special leave of absence applications, by forensic patients and forensic residents who are subject to supervision orders;
- (b) any other functions conferred on the Panel by or under this or any other Act.

#### **61. *Staff***

Any employees that are necessary for the purposes of the Panel may be employed under Part 3 of the **Public Sector Management and Employment Act 1998**.

S. 61  
substituted by  
No. 46/1998  
s. 7(Sch. 1).

#### **62. *Secrecy***

- (1) A person who—
  - (a) is or has at any time been a member or acting member of the Panel; or

- (b) is or has been present at any proceeding of the Panel—

must not, either directly or indirectly, make a record of, or divulge or communicate to any person, any information that is or was acquired by the person by reason of being or having been a member or acting member of the Panel or present at a proceeding of the Panel, except as permitted by this section.

Penalty: 10 penalty units.

- (2) A person referred to in sub-section (1) may make a record of, or divulge or communicate information referred to in sub-section (1)—
- (a) to the extent necessary to perform his or her official duties or to perform a function or exercise a power under this Act; or
  - (b) in the case of information relating to the personal affairs of another person, if that other person has given written consent to the making of the record or the divulging or communicating of the information.
- (3) Sub-section (1) does not prevent a person producing a document or divulging information to a court in the course of criminal proceedings or proceedings under this Act.

### **63. *Annual Report***

- (1) As soon as practicable after the end of each calendar year, the Panel must submit a report to the Minister that includes the following information—
- (a) the number and type of leave applications—
    - (i) made to the Panel during that year; and
    - (ii) granted by the Panel during that year; and

- (iii) refused by the Panel during that year;  
and
- (b) the number of suspensions during that year of leave granted by the Panel and the type of leave suspended.
- (2) The Minister must cause each report under subsection (1) to be laid before each House of the Parliament within 14 sitting days of that House after it is received by the Minister.

### **Division 3—Procedure of Panel**

#### **64. *Procedure of the Panel***

- (1) The Panel—
  - (a) in hearing any matter, must act according to equity and good conscience without regard to technicalities or legal forms;
  - (b) is bound by the rules of natural justice;
  - (c) is not required to conduct any proceedings in a formal manner.
- (2) Schedule 2 has effect with respect to the procedure of the Panel.

#### **65. *Evidence***

- (1) The Panel is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit.
- (2) Evidence before the Panel—
  - (a) may be given orally or in writing or partly orally and partly in writing; and
  - (b) may be given on oath or by declaration.
- (3) A member of the Panel may administer an oath or take an affirmation or declaration for the purposes of this Act.

- (4) The Panel, on its own initiative or on the application of an applicant for leave, may cause to be served on any person a summons to appear before the Panel to give evidence or produce documents specified in the summons.
- (5) The Panel may make an order for the manner of service, including substituted service, of a summons under sub-section (4).
- (6) A person must not, without reasonable excuse, fail to comply with a summons.

Penalty: 5 penalty units.

#### **66. Reasons**

- (1) The Panel must give reasons for any determination made in relation to a matter before it.
- (2) If the Panel gives oral reasons, the applicant may request it to put them in writing.
- (3) The Panel must comply with a request under sub-section (2) within 14 days after the request is made.
- (4) If the Panel rejects an application for leave, it must inform the applicant in writing of the applicant's right to request written reasons for the rejection.

#### **67. Appointment of people to assist the Panel**

The Panel may appoint a legal practitioner, an interpreter approved under section 25 of the **Mental Health Act 1986**, a registered medical practitioner or a registered psychologist to assist it in any proceeding before it.

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**68. Notice of hearings**

- (1) The Panel must cause notice of a hearing to be given to the applicant for leave.
- (2) A notice of hearing must contain information with respect to—
  - (a) the time and place of the hearing; and
  - (b) the procedure of the Panel; and
  - (c) the right for the applicant to be legally represented.
- (3) The notice required to be given to an applicant under this section must be given personally to the applicant in accordance with this section unless the Panel determines otherwise.
- (4) The contents of the notice must be explained by the person giving it to the applicant to the maximum extent possible to the applicant in the language, mode of communication and terms which the applicant is most likely to understand.
- (5) An explanation given under sub-section (4) must, if possible, be given both orally and in writing.

**69. Hearing not invalidated due to lack of notice**

A hearing or determination of the Panel is not invalidated or affected by reason only of a failure to give notice to a person other than the applicant for leave.

**70. Appearance and representation at Panel hearings**

- (1) An applicant for leave is entitled to appear in person before the Panel and may be represented by a legal practitioner or any other person authorised to that effect by the applicant.
  - (2) If an applicant decides not to appear, the Panel must satisfy itself that the applicant has made the decision of their own free will.
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- (3) At any hearing of the Panel—
- (a) a person other than the applicant for leave who is given notice of the hearing may appear before the Panel in person and be heard or, if the person is unable to be present at the hearing and the Panel allows, may be represented before the Panel by any person authorised to that effect by the person; and
  - (b) any other person who wishes to be heard and whom the Panel agrees to hear may appear before the Panel in person and be heard.
- (4) Unless the Panel makes an order under sub-section (5), the applicant or a person representing the applicant is entitled to inspect any documents to be given to the Panel in connection with the hearing at least 24 hours before the commencement of the hearing.
- (5) On an application made by or on behalf of the authorised psychiatrist or Secretary to the Department of Human Services, the Panel may order that the applicant is not entitled to inspect any document or part of a document personally, if the Panel is satisfied that inspection would—
- (a) cause serious harm to the applicant's health or the health or safety of another person; or
  - (b) involve the unreasonable disclosure of information relating to the personal affairs of any person; or
  - (c) breach a confidentiality provision imposed by a person who supplied information that is contained in the document.
- (6) The Panel may permit a person representing the applicant before the Panel to inspect a document, or part of a document, to which an order made under sub-section (5) applies.
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**71. *Proceedings to be closed to public***

- (1) Unless sub-section (2) applies, proceedings before the Panel are closed to members of the public.
- (2) The Panel may direct that particular proceedings or any part of them are to be open to the public if the Panel is satisfied that it would be in the best interests of the applicant for leave or in the public interest.
- (3) A direction under sub-section (2) may be given subject to any conditions the Panel considers appropriate.

S. 71(3)  
 amended by  
 No. 43/1998  
 s. 40(a).

**72. *Protection of members etc.***

- (1) A member or acting member of the Panel has, in the exercise of powers or performance of functions or duties as a member or acting member, the same protection and immunity as a judge of the Supreme Court.
- (2) A legal practitioner or other person appearing before the Panel on behalf of a party has the same protection and immunity as a legal practitioner has in appearing for a party in proceedings in the Supreme Court.
- (3) A person summoned to attend or appearing before the Panel as a witness has the same protection and is, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the Supreme Court.

**73. *Offences***

A person must not—

- (a) insult a member of the Panel in or in relation to the exercise of the powers or functions as a member; or
- (b) repeatedly interrupt the proceedings of the Panel; or

- (c) create a disturbance or take part in creating a disturbance in or near a place where the Panel is sitting; or
- (d) do any other act or thing that would, if the Panel were a court of record, constitute a contempt of that court.

Penalty: 10 penalty units.

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## PART 8—GENERAL

### **74. *Service of notices of hearings to family members and victims***

A notice of a hearing required to be given to a family member or victim under this Act must be sent to the person by registered post.

### **75. *Suppression orders***

- (1) In any proceeding before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order—
  - (a) that any evidence given in the proceeding;
  - (b) that the content of any report or other document put before the court in the proceeding;
  - (c) that any information that might enable a defendant or another person who has appeared or given evidence in the proceeding to be identified—

must not be published except in the manner and to the extent (if any) specified in the order.

- (2) An order under this section may be made on the application of a party or on the court's own initiative.
- (3) A person must not publish or cause to be published any material in contravention of an order under this section.

Penalty: 500 penalty units in the case of a body corporate;

120 penalty units or imprisonment for 1 year or both in any other case.

**76. Inadmissibility of evidence in other proceedings**

(1) In this section—

**"hearing"** means—

- (a) an investigation;
  - (b) a special hearing;
  - (c) a hearing referred to in section 36(1);
  - (d) a hearing of the Panel under Part 7.
- (2) Evidence of anything said on a hearing, or of any document prepared solely for the purpose of a hearing, is not admissible in any civil or criminal proceeding except—
- (a) a proceeding arising out of the hearing; or
  - (b) a proceeding for an offence against section 314(1) of the **Crimes Act 1958** (perjury) or for any other offence that involves an interference with the due administration of justice; or
  - (c) with the consent of the person to whom the words or document principally refers or relates.
- (3) A court, tribunal or person acting judicially may rule as admissible in a proceeding before them any matter inadmissible because of sub-section (2) if satisfied, on the application of a party to the proceeding, that it is in the interests of justice to do so.

**77. Delegation by Secretary to the Department of Human Services**

The Secretary to the Department of Human Services, by instrument, may delegate to any person employed or engaged in the administration of the **Intellectually Disabled Persons' Services Act 1986** any power, duty or function of the

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Secretary under this Act other than this power of delegation.

**78. *Abolition of Governor's pleasure orders***

- (1) A court does not have jurisdiction or power to order that a person be kept in strict custody until the Governor's pleasure is known.
- (2) The Governor does not have authority to make an order directing that a person be kept in strict custody during the Governor's pleasure.

**79. *Supreme Court—limitation of jurisdiction***

It is the intention of section 78(1) to alter or vary section 85 of the **Constitution Act 1975**.

**80. *Regulations***

The Governor in Council may make regulations for or with respect to any matter or thing authorised or required to be prescribed or necessary to be prescribed for carrying this Act into effect.

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**Pt 9**  
**(Heading and**  
**ss 81–88)**  
**repealed by**  
**No. 7/2002**  
**s. 50.**

**PART 10—SAVINGS AND TRANSITIONAL PROVISIONS**

**89. *Savings and transitional provisions***

Schedule 3 has effect.

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## SCHEDULES

### SCHEDULE 1

Section 59(3)

#### PROVISIONS WITH RESPECT TO MEMBERS OF THE PANEL

##### 1. *Judicial members*

- (1) The judicial members—
  - (a) are to be appointed by the Governor in Council; and
  - (b) hold office for a period of 5 years; and
  - (c) are eligible for re-appointment at the end of the term of office; and
  - (d) are not in respect of the office of member subject to the provisions of the **Public Sector Management and Employment Act 1998**.
- (2) The appointment of a judge to the Panel does not affect his or her tenure of office as a judge or rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of an office as a judge and, for all purposes, service as a member of the Panel is to be taken to be service as the holder of an office as a judge.
- (3) For the purposes of sections 80A(5A)(a) and 83(4) of the **Constitution Act 1975** and sections 13A(5A)(a) and (5C) of the **County Court Act 1958**, the office of judicial member is not to be taken to be a judicial office or an office or place of profit under the Crown.

Sch. 1  
 cl. 1(1)(d)  
 amended by  
 No. 46/1998  
 s. 7(Sch. 1).

##### 2. *Other members*

- (1) Each member of the Panel (other than the judicial members and the chief psychiatrist or his or her nominee)—
  - (a) is to be appointed by the Governor in Council on the nomination of the Minister; and
  - (b) holds office for the term specified in his or her instrument of appointment, which must be no longer than 4 years; and

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Sch. 1  
 cl. 2(1)(e)  
 amended by  
 No. 46/1998  
 s. 7(Sch. 1).

- (c) is eligible for re-appointment at the end of the term of office; and
  - (d) is entitled to be paid—
    - (i) the remuneration that is fixed from time to time by the Governor in Council; and
    - (ii) the travelling and other expenses that are fixed by the Governor in Council; and
  - (e) is not in respect of the office of member subject to the provisions of the **Public Sector Management and Employment Act 1998**.
- (2) In nominating people for appointment to the Panel, the Minister must have regard to—
- (a) the matters that the Panel has jurisdiction to hear and determine; and
  - (b) the need for the Panel to be comprised of both males and females so qualified by knowledge and experience that the Panel is capable of exercising the jurisdiction and performing the functions conferred on it.
- (3) In the case of the first appointment of members of the Panel—
- (a) as nearly as possible to half the number of members appointed are to hold office for a term of 2 years from their respective appointments; and
  - (b) the remainder of members first appointed are to hold office for a term of 4 years from their respective appointments.

**3. Acting members**

- (1) If a member is unable, whether on account of illness or otherwise, to perform the duties of office, the Governor in Council may appoint an eligible person to act as that member during the period of inability.
- (2) If an acting member has been appointed and the member for whom he or she is acting ceases to hold office without having resumed the performance of the duties of office, the appointment of the acting member continues until—
  - (a) it is terminated by the Governor in Council; or



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*Act No. 65/1997*

Sch. 1
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(b) 12 months after the member ceases to hold office—  
 whichever occurs first.

(3) An acting member—

- (a) has all the powers and may perform all the duties of the member for whom they are acting; and
- (b) except in the case of an acting judicial member, is entitled to be paid—
  - (i) the remuneration that is fixed from time to time by the Governor in Council; and
  - (ii) the travelling and other expenses that are fixed by the Governor in Council.

- (4) If the appointment of an acting member expires (whether because of effluxion of time, the resumption of duty by the member for whom they are acting or the filling of the relevant vacancy) at a time when the acting member is engaged in a hearing of a matter by the Panel, the acting member's appointment continues until the matter has been finally determined by the Panel.

**4. *Judicial members***

A judicial member ceases to hold office on ceasing to hold the office of judge.

**5. *General provisions as to members***

- (1) The Governor in Council may specify terms and conditions of appointment in the instrument of appointment of a member.
- (2) The Governor in Council, on the recommendation of the Minister after consultation with the judicial members, may remove or suspend any member (other than the judicial members or the chief psychiatrist or his or her nominee) from office.
- (3) A member may resign from the office of member by writing signed by the member and delivered to the Governor in Council.
- (4) If any member (other than the judicial members or the chief psychiatrist or his or her nominee)—
  - (a) becomes bankrupt; or

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*Act No. 65/1997*

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- (b) is convicted of an indictable offence or an offence that, if committed in Victoria, would be an indictable offence; or
  - (c) becomes incapable of performing the duties of a member—
- the office held by that member becomes vacant.
- (5) If the appointment of any member expires at a time when that member is engaged in the hearing of a matter by the Panel, the appointment continues until the matter has been finally determined by the Panel.
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## SCHEDULE 2

Section 64(2)

### PROVISIONS WITH RESPECT TO THE PROCEDURE OF THE PANEL

#### 1. *Constitution of Panel for hearings*

- (1) For the purposes of a hearing, the Panel is to be constituted by—
  - (a) a judicial member, being—
    - (i) a Supreme Court judge in the case of an applicant for leave whose supervision order was made by the Supreme Court; or
    - (ii) a County Court judge in the case of an applicant for leave whose supervision order was made by the County Court—

who is to be chairperson of the Panel for that hearing;  
and
  - (b) a member appointed to the Panel to represent the views and opinions of members of the community;  
and
  - (c) if the applicant for leave is a forensic patient—
    - (i) the chief psychiatrist or his or her nominee; and
    - (ii) a member of the Panel who is a registered medical practitioner with experience in forensic psychiatry; and
  - (d) if the applicant for leave is a forensic resident, a member of the Panel who is a registered psychologist with experience in the field of intellectual disabilities and with forensic experience.
- (2) The member of the Panel referred to in sub-clause (1)(c) or (d) must not be a person who is primarily responsible for the treatment or care of the applicant for leave.
- (3) The members to constitute the Panel for a hearing are to be selected by the President.

## **2. Procedure of the Panel**

- (1) Unless clause 3 applies, a matter arising for determination by the Panel in a hearing is to be determined by the opinions of a majority of the members constituting the Panel for the purposes of that hearing, but if the Panel is evenly divided, the matter is to be determined by the opinion of the chairperson.
- (2) An act or decision of the Panel is not invalidated only because—
  - (a) of a defect or irregularity—
    - (i) in the appointment of a member; or
    - (ii) in the selection of a member for a particular hearing; or
  - (b) in the case of an acting member, the occasion for acting had not arisen or had ceased.
- (3) Subject to this Act, the procedure of the Panel is in its discretion.

## **3. Determination of questions of law**

- (1) A question of law that arises in proceedings before the Panel is to be decided by the chairperson.
- (2) The Panel, of its own motion or at the request of a party, may refer a question of law arising in a proceeding before it to the Court of Appeal for decision.
- (3) A question of law may be referred under sub-clause (2) only if the chairperson of the Panel agrees to the referral.
- (4) If a question of law is referred under sub-clause (2), the Panel must not, in the proceeding—
  - (a) give a decision to which the question is relevant while the referral is pending; or
  - (b) proceed in a manner or make a decision that is inconsistent with the opinion of the Court of Appeal.

## **4. Directions as to arrangement of business and procedure**

The President, after consultation with the other members of the Panel, may give directions as to—

- (a) the arrangement of the business of the Panel; and
- (b) the procedure of the Panel.

*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*  
*Act No. 65/1997*

<b>Sch. 2</b>
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**5. *Sittings of the Panel***

- (1) The Panel is to sit—
  - (a) at such times as the President determines; and
  - (b) at the place where the applicant for leave is detained, unless the President determines otherwise.
- (2) The President may determine that there is to be a special sitting of the Panel in the case of an emergency.

**6. *Powers of Panel***

The Panel has power to—

- (a) order that any person who in the opinion of the Panel ought to be a party in any proceedings be added as a party or substituted for a party; and
- (b) order that any person who in the opinion of the Panel is not a proper or a necessary party in any proceedings cease to be a party; and
- (c) adjourn the hearing of any proceedings—
  - (i) to any time and place; and
  - (ii) for any purpose; and
  - (iii) on any terms as to costs or otherwise—
 as the Panel considers necessary or just in the circumstances; and
- (d) reserve its decision in any proceedings to a date to be advised by the Panel; and
- (e) make an order that operates at a date after the making of the order as is specified in the order.

**7. *Reasons to be signed***

- (1) Written reasons for determinations of the Panel (if requested under section 66) must be signed by the members constituting the Panel that made the determination.
- (2) If one or more members of the Panel are unavailable for the purpose of signing the reasons, it is sufficient if one of the members signs the reasons.
- (3) The production in any proceedings of a document purporting to be a copy of reasons for a determination made by the Panel and purporting to be signed by a member or members of the Panel is conclusive evidence of the reasons

for the determination and of the due making and existence of the determination.

**8. *Power to amend determination***

- (1) The Panel may at any time make a determination correcting a determination made by it if there is in the determination—
    - (a) a clerical mistake or an error arising from any accidental slip or omission; or
    - (b) any evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the determination.
  - (2) A determination under sub-clause (1) may be made on the application of any person or on the Panel's own initiative.
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### SCHEDULE 3

Section 89

#### SAVINGS AND TRANSITIONAL PROVISIONS

##### 1. *Definitions*

In this Schedule—

**"commencement day"** means the day on which this Schedule comes into operation;

**"existing detainee"** means a person who, immediately before the commencement day, was subject to an order under section 393 or 420 of the **Crimes Act 1958** (whether by the court or by the Governor).

##### 2. *Existing detainees*

- (1) Each existing detainee is, on and after the commencement day, deemed to be subject to a custodial supervision order under this Act.
- (2) The nominal term of the custodial supervision order is to be determined in accordance with section 28 as if the maximum penalty for the offence which led to the person becoming an existing detainee were the maximum penalty attaching to that offence on the commencement day.
- (3) If the offence referred to in sub-section (2) no longer exists—
  - (a) the Supreme Court, on application by the existing detainee or the Director of Public Prosecutions, must determine whether there is an existing offence, as at the commencement day, with which the existing detainee could have been charged had it existed at the time of the original charge; and
  - (b) if there is such an offence, the nominal term is to be determined by reference to the maximum penalty for that offence as at the commencement day.
- (4) The nominal term runs from the day on which the existing detainee was made subject to the order under section 393 or 420 of the **Crimes Act 1958**.
- (5) If the nominal term has expired, a major review must be held within 6 months after the commencement day.

Sch. 3 cl. 2(5)  
 amended by  
 No. 43/1998  
 s. 40(b)(i).

Sch. 3 cl. 3(2)  
 amended by  
 No. 43/1998  
 s. 40(b)(ii).

### **3. Leave**

- (1) Subject to this clause, an existing detainee who, immediately before the commencement day, was on leave from the place of detention that corresponds to leave that may be granted under Part 7 is deemed to be on the corresponding leave as if granted under that Part, and any conditions to which the leave was subject immediately before the commencement day continue to apply.
- (2) Sub-clause (1) applies for the period of 12 months commencing on, and including, the commencement day.
- (3) For the purposes of this clause, leave granted before the commencement day corresponds to leave that may be granted under Part 7 if it is substantially similar to that leave.

### **4. Revocation of supervision order**

- (1) Despite anything to the contrary in Part 5, an existing detainee who has been, or is deemed to have been, on extended leave for a period of at least 12 months may apply to the court that made the original order under which he or she was detained for revocation of his or her supervision order.
- (2) On an application under sub-clause (1) the court may revoke the supervision order if satisfied on the evidence available that the safety of the existing detainee or members of the public will not be seriously endangered as a result of the revocation of the order.
- (3) In considering an application for revocation of a supervision order in respect of an existing detainee the court may take into account any reports on the existing detainee made by, or submitted to, the Adult Parole Board before the commencement day.

### **5. Persons released under section 498 of Crimes Act 1958**

Despite the repeal of section 498 of the **Crimes Act 1958**, any conditions imposed on a person under that section that were in force immediately before the commencement day continue to apply on and after the commencement day.

### **6. Unfitness to stand trial**



*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*  
*Act No. 65/1997*

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- (1) Part 2 applies with respect to an offence that is alleged to have been committed, whether before, on or after the commencement day.
  - (2) If a person has been found unfit to stand trial but no order has been made in respect of the person before the commencement day, the court must proceed to hold a special hearing under Part 3 in respect of the person.

**7. *Mental impairment and insanity***

- (1) Despite section 25, the defence of insanity continues to apply with respect to any offence alleged to have been committed before the commencement day.
  - (2) If a jury returns a verdict of not guilty on account of insanity in relation to a person charged with an offence alleged to have been committed before the commencement day, that verdict is to be taken for all purposes to be a finding of not guilty because of mental impairment under Part 4.
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## ENDNOTES

### 1. General Information

*Minister's second reading speech—*

*Legislative Assembly: 18 September 1997*

*Legislative Council: 15 October 1997*

The long title for the Bill for this Act was "A Bill to reform the law relating to fitness to stand trial for criminal offences and to the defence of insanity, to amend the **Corrections Act 1986**, the **Crimes Act 1958**, the **Intellectually Disabled Persons' Services Act 1986** and the **Mental Health Act 1986** and for other purposes."

#### **Constitution Act 1975:**

*Section 85(5) statement:*

*Legislative Assembly: 18 September 1997*

*Legislative Council: 15 October 1997*

*Absolute majorities:*

*Legislative Assembly: 8 October 1997 and 11 November 1997*

*Legislative Council: 28 October 1997*

The **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** was assented to on 18 November 1997 and came into operation as follows: Part 1 (sections 1–5) on 18 November 1997: section 2(1); rest of Act on 18 April 1998: section 2(3).

*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*  
*Act No. 65/1997*

Endnotes
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## 2. Table of Amendments

This Version incorporates amendments made to the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** by Acts and subordinate instruments.

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### **Miscellaneous Acts (Omnibus No. 1) Act 1998, No. 43/1998**

*Assent Date:* 26.5.98  
*Commencement Date:* S. 40 on 18.4.98: s. 2(3)  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

### **Public Sector Reform (Miscellaneous Amendments) Act 1998, No. 46/1998**

*Assent Date:* 26.5.98  
*Commencement Date:* S. 7(Sch. 1) on 1.7.98: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

### **Psychologists Registration Act 2000, No. 41/2000**

*Assent Date:* 6.6.00  
*Commencement Date:* S. 102(Sch. item 2) on 1.6.01: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

### **Juries Act 2000, No. 53/2000**

*Assent Date:* 12.9.00  
*Commencement Date:* S. 95 on 1.8.01: s. 2(3)  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

### **Statute Law Further Amendment (Relationships) Act 2001, No. 72/2001**

*Assent Date:* 7.11.01  
*Commencement Date:* S. 3(Sch. item 5) on 20.12.01: Government Gazette 20.12.01 p. 3127  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

### **Forensic Health Legislation (Amendment) Act 2002, No. 7/2002**

*Assent Date:* 9.4.02  
*Commencement Date:* S. 50 on 10.4.02: s. 2(1)  
*Current State:* This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

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### 3. Explanatory Details

<sup>1</sup> S. 18(4): Section 23 provides similarly to this sub-section in relation to a finding of not guilty because of mental impairment under section 17(1)(b).

<sup>2</sup> S. 18(4)(b): Section 40(2) applies to an order under this section.

<sup>3</sup> S. 23(b): See note 2.

<sup>4</sup> S. 26(1): Part 6 applies to a supervision order.

<sup>5</sup> S. 26(5): Sections 567(d) and 567A of the **Crimes Act 1958** provide for appeals against sentences.

<sup>6</sup> S. 26(8): Section 4 of the **Corrections Act 1986** deems a person in custody in a prison to be in the custody of the Secretary to the Department of Justice.

<sup>7</sup> S. 27(2): Section 33 provides for the court's power on review.

<sup>8</sup> S. 34: Section 26(5) provides that a supervision order is subject to appeal in the same manner as a sentence and section 26(6) gives a right of appeal to the Secretary to the Department of Human Services.

*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*  
*Act No. 65/1997*

**Guide to Court Processes**

