

Version No. 020
**Crimes (Mental Impairment and Unfitness to
be Tried) Act 1997**

Act No. 65/1997

Version incorporating amendments as at 1 July 2002

TABLE OF PROVISIONS

<i>Section</i>	<i>Page</i>
PART 1—PRELIMINARY	1
1. Purposes	1
2. Commencement	1
3. Definitions	2
4. Application to courts and proceedings	7
5. Application to Magistrates' Court	7
PART 2—UNFITNESS TO STAND TRIAL	8
6. When is a person unfit to stand trial?	8
7. Presumptions, standard of proof, etc.	8
8. Committals	9
9. Reservation of question of fitness to stand trial by court	10
10. Court may make orders pending investigation into fitness	11
11. Procedure on investigation	12
12. What happens after an investigation?	13
13. Abridgment of adjournment	14
14. What happens at the end of an adjournment?	15
PART 3—SPECIAL HEARINGS	17
15. Purpose of special hearings	17
16. Procedure at special hearings	17
17. Findings at special hearings	18
18. Effect of findings	18
19. Court may make orders pending making of supervision order	19
19A. Appeal against unconditional release	20
PART 4—DEFENCE OF MENTAL IMPAIRMENT	22
20. Defence of mental impairment	22
21. Presumptions, standard of proof, etc.	22

<i>Section</i>	<i>Page</i>
22. When may the question of mental impairment be raised?	23
23. Effect of finding of not guilty because of mental impairment	23
24. Court may make orders pending making of supervision order	23
24A. Appeal against unconditional release	24
25. Abrogation of defence of insanity	25
PART 5—DISPOSITION OF PEOPLE DECLARED TO BE LIABLE TO SUPERVISION	26
26. Supervision orders	26
27. How long does a supervision order last?	27
28. Nominal term of supervision order	27
28A. Appeal against supervision order	29
29. Non-compliance with non-custodial supervision order	31
30. Emergency power of apprehension	32
30A. Warrant to arrest person breaching non-custodial supervision order who leaves Victoria	33
30B. Warrant to arrest person subject to custodial supervision order who leaves Victoria	34
31. Application for variation or revocation of supervision order	35
32. Variation of custodial supervision orders	35
33. Variation or revocation of non-custodial supervision orders	37
34. Appeal against confirmation or variation of supervision orders	37
34A. Appeal against revocation of non-custodial supervision orders	39
35. Major reviews	40
36. Defendant to be present at hearings	41
37. Other parties may appear	42
38. Rules of evidence not to apply in certain hearings	43
38A. Notice of hearings to persons subject to supervision orders	43
38B. Notice of hearings to DPP, Attorney-General and Secretary to Department of Human Services	44
38C. Notice of hearings to family members and victims	44
38D. Appointment of person to receive notice on behalf of child	46
38E. Provision of information to family members and victims	47
38F. List of family members	48
PART 6—PRINCIPLES ON WHICH COURT IS TO ACT, REPORTS AND CERTIFICATES	49
39. Principle to be applied	49
40. Matters to which the court is to have regard	49
41. Reports on mental condition of defendants	51
42. Reports of family members and victims	53
43. When and how is a report to be made?	54
44. Distribution of report	54
45. Admissibility of report	55
46. Examination of victim or family member	55
47. Certificate of available services	55

<i>Section</i>	<i>Page</i>
PART 7—LEAVE OF ABSENCE	57
Division 1—Leave of absence	57
48. Application of Division	57
49. What types of leave may be granted?	57
50. Special leave	57
51. What is on-ground leave?	58
52. What are the surrounds?	58
53. What is limited off-ground leave?	59
54. Granting of on-ground or limited off-ground leave	59
54A. Applicant profile	61
54B. Leave plan or statement	62
55. Suspension of special leave, on-ground leave or limited off-ground leave	63
56. What is extended leave?	64
57. Granting of extended leave	64
57A. Leave plan for extended leave	65
57B. Appeals regarding extended leave	65
58. Suspension and revocation of extended leave	67
58A. Appeals regarding revocation of extended leave	68
Division 2—Forensic Leave Panel	69
59. Establishment of Panel	69
60. Functions of the Panel	70
61. Staff	70
62. Secrecy	70
63. Annual Report	71
Division 3—Procedure of Panel	72
64. Procedure of the Panel	72
65. Evidence	72
66. Reasons	73
67. Appointment of people to assist the Panel	73
68. Notice of hearings	74
69. Hearing not invalidated due to lack of notice	74
70. Appearance and representation at Panel hearings	74
71. Proceedings to be closed to public	76
72. Protection of members etc.	76
73. Offences	76
PART 7A—INTERSTATE TRANSFER OF PERSONS SUBJECT TO SUPERVISION ORDERS	78
73A. Definitions	78
73B. Corresponding laws and orders	79
73C. Informed consent	79
73D. Transfer of persons from Victoria to a participating State	79

<i>Section</i>	<i>Page</i>
73E. Transfer of persons from a participating State to Victoria	80
73F. Review of persons transferred to Victoria	82
73G. Nominal term of supervision order	83
73H. Appeal against unconditional release	84
PART 7B—PERSONS ABSCONDING TO VICTORIA FROM INTERSTATE	87
73I. Definitions	87
73J. Warrant to arrest person who absconds to Victoria	88
73K. Interim disposition order	89
73L. Review of interim disposition order	91
73M. Nominal term of supervision order	92
73N. Appeal against unconditional release	93
PART 8—GENERAL	96
74. Service of notices of hearings to family members and victims	96
75. Suppression orders	96
76. Inadmissibility of evidence in other proceedings	97
76A. Directions	97
76B. Court rules for appeals	98
77. <i>Repealed</i>	98
78. Abolition of Governor's pleasure orders	98
79. Supreme Court—limitation of jurisdiction	98
80. Regulations	99
PART 9—<i>Repealed</i>	99
81–88. <i>Repealed</i>	99
PART 10—SAVINGS AND TRANSITIONAL PROVISIONS	100
89. Savings and transitional provisions	100
—————	
SCHEDULES	101
SCHEDULE 1—Provisions with respect to members of the Panel	101
SCHEDULE 2—Provisions with respect to the procedure of the Panel	105
SCHEDULE 3—Savings and transitional provisions	109
=====	
ENDNOTES	113
1. General Information	113
2. Table of Amendments	114
3. Explanatory Details	115

Version No. 020

**Crimes (Mental Impairment and Unfitness to
be Tried) Act 1997**

Act No. 65/1997

Version incorporating amendments as at 1 July 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.

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

Part 1—Preliminary

s. 3

- (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 and in section 47 includes Magistrates' Court;

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

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

Part 1—Preliminary

s. 3

"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 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—

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

- (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—

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

- (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;

"forensic patient" means—

S. 3(1) def. of "forensic patient" amended by No. 7/2002 s. 3(1)(b).

- (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

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

Part 1—Preliminary

s. 3

S. 3(1) def. of
"forensic
resident"
amended by
No. 7/2002
s. 3(1)(c).

- (ab) a person detained in an approved mental health service under section 30(2) or 30A(3); or
- (ac) a person deemed to be a forensic patient by section 73E(4) or 73K(8); 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

- (ab) a person detained in a residential service under section 30(2) or 30A(3); or
- (ac) a person deemed to be a forensic resident by section 73E(4) or 73K(8); 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;

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

Part 1—Preliminary

s. 3

"major review" means a review under section 35;

S. 3(1) def. of "major review" inserted by No. 7/2002 s. 3(1)(d).

"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;

"parent" of a child includes a person who has day to day care and control of the child and with whom the child is ordinarily resident;

S. 3(1) def. of "parent" inserted by No. 7/2002 s. 3(1)(e).

"President" means President of the Panel;

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

"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).

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

Part 1—Preliminary

s. 3

"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.

(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.

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

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

Part 1—Preliminary

s. 4

4. Application to courts and proceedings

- (1) Except as provided by sections 5 and 25(1) and Parts 7A and 7B, 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.
- (2) If an appeal is made under this Act to the Court of Appeal—
 - (a) a reference in this Act to the court, in respect of the making or confirming of a supervision order by the Court of Appeal on the appeal, is a reference to the Court of Appeal; and
 - (b) if the Court of Appeal makes or confirms a supervision order on the appeal, a reference in this Act to the court that made the supervision order is a reference to the court from which the appeal was made to the Court of Appeal.
- (3) Sub-section (2) does not apply so as to allow a person to appeal to the Court of Appeal against a supervision order made by the Court of Appeal.

S. 4 amended by No. 7/2002 s. 3(2)(3) (ILA s. 39B(1)).

S. 4(2) inserted by No. 7/2002 s. 3(3).

S. 4(3) inserted by No. 7/2002 s. 3(3).

5. Application to Magistrates' Court

- (1) 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.
- (2) If the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence tried summarily, the Magistrates' Court must discharge the person.

S. 5 amended by No. 7/2002 s. 4 (ILA s. 39B(1)).

S. 5(2) inserted by No. 7/2002 s. 4.

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

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

Part 2—Unfitness to Stand Trial

s. 8

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- (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

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

Part 2—Unfitness to Stand Trial

s. 9

(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.

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

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

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

Part 2—Unfitness to Stand Trial

s. 12

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- (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

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

Part 2—Unfitness to Stand Trial

s. 14

- (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.

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

Part 2—Unfitness to Stand Trial

s. 14

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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

- (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;

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

- (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.

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

Part 3—Special Hearings

s. 19

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- (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)¹, the judge must—
 - (a) declare that the defendant is liable to supervision under Part 5; or
 - (b) order the defendant to be released unconditionally².

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;

- (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.

19A. Appeal against unconditional release

- (1) The Director of Public Prosecutions may appeal to the Court of Appeal against an order for unconditional release under section 18(4)(b) if he or she considers that—
 - (a) the order should not have been made; and
 - (b) an appeal should be brought in the public interest.
- (2) On an appeal under sub-section (1), the Court of Appeal may—
 - (a) confirm the order; or
 - (b) quash the order and by order declare that the defendant is liable to supervision under Part 5.

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

Part 3—Special Hearings

s. 19A

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- (3) If the Court of Appeal declares a defendant liable to supervision, the Court of Appeal may—
 - (a) remit the matter, with or without directions, to the court that made the order for unconditional release; or
 - (b) make a supervision order in respect of the defendant.
 - (4) If the Court of Appeal remits a matter to a court under sub-section (3)(a), that court must make a supervision order in respect of the defendant in accordance with this Act and any directions given by the Court of Appeal.
 - (5) The Court of Appeal may make any order that the judge could have made under section 19 pending the making of a supervision order in respect of the defendant.
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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 unconditionally³.

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;

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

Part 4—Defence of Mental Impairment

s. 24A

- (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.

24A. Appeal against unconditional release

- (1) The Director of Public Prosecutions may appeal to the Court of Appeal against an order for unconditional release under section 23(b) if he or she considers that—
- (a) the order should not have been made; and
 - (b) an appeal should be brought in the public interest.

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

Part 4—Defence of Mental Impairment

s. 25

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- (2) On an appeal under sub-section (1), the Court of Appeal may—
 - (a) confirm the order; or
 - (b) quash the order and by order declare that the defendant is liable to supervision under Part 5.
 - (3) If the Court of Appeal declares a defendant liable to supervision, the Court of Appeal may—
 - (a) remit the matter, with or without directions, to the court that made the order for unconditional release; or
 - (b) make a supervision order in respect of the defendant.
 - (4) If the Court of Appeal remits a matter to a court under sub-section (3)(a), that court must make a supervision order in respect of the defendant in accordance with this Act and any directions given by the Court of Appeal.
 - (5) The Court of Appeal may make any order that the court could have made under section 24 pending the making of a supervision order in respect of the defendant.

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.
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**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 person⁴.
- (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.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 27

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S. 26(5)–(7)
repealed by
No. 7/2002
s. 7(1).

- (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 Services⁵.

27. How long does a supervision order last?

- (1) A supervision order is for an indefinite term.
- (2) When making a supervision order, the court may direct that the matter be brought back to the court for review at the end of the period specified by the court.

S. 27(2)
substituted by
No. 7/2002
s. 7(2).

Note: The court's powers on review are contained in section 32 (for custodial supervision orders) and section 33 (for non-custodial supervision orders).

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
(b) a serious offence (within the meaning of the Sentencing Act 1991) other than—	a period equivalent to the maximum term of imprisonment available for the offence
(i) murder; or	
(ii) an offence against section 20 of the Crimes Act 1958 (threats to kill)	

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

Part 5—Disposition of People Declared to be Liable to Supervision

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>
(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.

(4) In setting a nominal term for a supervision order, the court must declare the day from which the nominal term runs.

S. 28(4)
inserted by
No. 7/2002
s. 7(3).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 28A

- (5) For the purpose of declaring a day under subsection (4), the court may take into account any period of time during which the person subject to the order was held in custody or detained in an appropriate place in relation to proceedings for the offence which led to the making of the supervision order or proceedings arising from those proceedings (including proceedings under this Act and appeals).

S. 28(5)
 inserted by
 No. 7/2002
 s. 7(3).

28A. Appeal against supervision order

S. 28A
 inserted by
 No. 7/2002
 s. 8.

- (1) A person in respect of whom a supervision order is made may appeal to the Court of Appeal against the supervision order.
- (2) The Director of Public Prosecutions, the Attorney-General or the Secretary to the Department of Human Services may appeal to the Court of Appeal against a supervision order if he or she considers that—
- (a) a different supervision order should have been made; and
 - (b) an appeal should be brought in the public interest.
- (3) On an appeal under this section, the Court of Appeal may—
- (a) confirm the supervision order; or
 - (b) quash the supervision order and make another supervision order in substitution for it; or
 - (c) quash the supervision order and remit the matter, with or without directions, to the court that made it; or
 - (d) quash the supervision order and order the defendant to be released unconditionally.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 28A

- (4) If the Court of Appeal remits a matter to a court under sub-section (3)(c), that court must make another supervision order in accordance with this Act and any directions given by the Court of Appeal.
- (5) The Court of Appeal may make any one or more of the following orders pending the making of a supervision order under this section—
 - (a) an order granting the defendant bail;
 - (b) subject to sub-section (6), an order remanding the defendant in custody in an appropriate place;
 - (c) subject to sub-section (7), 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 that is to make the supervision order;
 - (e) any other order the court thinks appropriate.
- (6) The Court of Appeal must not make an order remanding a person in custody in an appropriate place unless the Court of Appeal has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
- (7) The Court of Appeal must not make an order remanding a person in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 29

29. Non-compliance with non-custodial supervision order

(1) A person having the supervision of a person under a non-custodial supervision order ("**the supervisor**") or the Secretary to the Department of Human Services may apply to the court that made the order for a variation of the order if it appears to the supervisor or the Secretary that the person subject to the order has failed to comply with it.

S. 29(1) substituted by No. 7/2002 s. 9(1).

* * * * *

S. 29(2) repealed by No. 7/2002 s. 9(1).

(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.

* * * * *

S. 29(6) repealed by No. 7/2002 s. 9(2).

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.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 30A

(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.

30A. Warrant to arrest person breaching non-custodial supervision order who leaves Victoria

S. 30A
 inserted by
 No. 7/2002
 s. 10.

- (1) If, at any time, it appears to a person having the supervision of a person under a non-custodial supervision order or to the Secretary to the Department of Human Services that the person subject to the order—
 - (a) has failed to comply with the order; and
 - (b) is no longer in Victoria—
 the person having supervision or the Secretary may apply to the Supreme Court, County Court or Magistrates' Court for a warrant to arrest the person subject to the order.
- (2) If the court to which the application is made is satisfied by evidence on oath, whether orally or by affidavit, of the matters specified in paragraphs (a) and (b) of sub-section (1), the court may order that a warrant to arrest be issued against the person subject to the order.
- (3) When a person arrested under a warrant issued under this section is returned to Victoria, he or she is to be taken to and detained in an appropriate place and treated or provided with services, if necessary, for his or her condition.

- (4) However, the person 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 to which an application referred to in sub-section (4) is made must hear it as soon as possible.

30B. Warrant to arrest person subject to custodial supervision order who leaves Victoria

- (1) If at any time it appears to a person having the supervision of a person under a custodial supervision order or to the Secretary to the Department of Human Services that the person subject to the order—
 - (a) is absent without leave from an approved mental health service or a residential service; and
 - (b) is no longer in Victoria—the person having supervision or the Secretary may apply to the Supreme Court, County Court or Magistrates' Court for a warrant to arrest the person subject to the order.
- (2) If the court to which the application is made is satisfied by evidence on oath, whether orally or by affidavit, of the matters specified in paragraphs (a) and (b) of sub-section (1), the court may order that a warrant to arrest be issued against the person subject to the order.
- (3) When a person arrested under a warrant issued under this section is returned to Victoria, he or she is to be returned to the approved mental health service or residential service from which he or she was absent without leave.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 31

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;
 - (d) the Attorney-General.

S. 31(1)(d)
inserted by
No. 7/2002
s. 11(a).

- (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.

* * * * *

S. 31(3)–(5)
repealed by
No. 7/2002
s. 11(b).

32. Variation of custodial supervision orders

- (1) On an application under section 31 for variation of a custodial supervision order or on a review of a custodial supervision order directed under section 27(2) or on a further review of a custodial supervision order directed under sub-section (5) or section 33(2), 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.

S. 32(1)
amended by
No. 7/2002
s. 12(1).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 32

- (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) Unless the court revokes the order, the court may direct that the matter be brought back to the court for further review at the end of the period specified by the court.
- (6) A direction may be given under sub-section (5) more than once.

S. 32(5)
substituted by
No. 7/2002
s. 12(2).

S. 32(6)
inserted by
No. 7/2002
s. 12(2).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 33

33. Variation or revocation of non-custodial supervision orders

S. 33
amended by
No. 7/2002
s. 12(3)(4) (LA
s. 39B(1)).

- (1) On an application under section 31 for variation or revocation of a non-custodial supervision order or on a review of a non-custodial supervision order directed under section 27(2) or on a further review of a non-custodial supervision order directed under sub-section (2) or section 32(5), 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.
- (2) Unless the court revokes the order, the court may direct that the matter be brought back to the court for further review at the end of the period specified by the court.
- (3) A direction may be given under sub-section (2) more than once.

S. 33(2)
inserted by
No. 7/2002
s. 12(4).

S. 33(3)
inserted by
No. 7/2002
s. 12(4).

34. Appeal against confirmation or variation of supervision orders

S. 34
substituted by
No. 7/2002
s. 13.

- (1) A person who is subject to a supervision order may appeal to the Court of Appeal against an order confirming or varying the supervision order.
- (2) The Secretary to the Department of Human Services may appeal to the Court of Appeal against an order confirming or varying a supervision order if he or she considers that—
 - (a) the supervision order should not have been confirmed or varied; and
 - (b) an appeal should be brought in the public interest.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 34

- (3) The Director of Public Prosecutions or the Attorney-General may appeal to the Court of Appeal against an order confirming or varying a supervision order if he or she—
 - (a) was a party to the proceeding in which the order confirming or varying the supervision order was made; and
 - (b) considers that the supervision order should not have been confirmed or varied; and
 - (c) considers that an appeal should be brought in the public interest.
- (4) On an appeal against a confirmation of a supervision order, the Court of Appeal may—
 - (a) confirm the supervision order; or
 - (b) quash the supervision order and make any order that the court could have made under section 29, 32, 33 or 35 (as the case requires); or
 - (c) quash the supervision order and remit the matter, with or without directions, to the court that made it.
- (5) On an appeal against a variation of a supervision order, the Court of Appeal may—
 - (a) confirm the order for variation; or
 - (b) quash the order for variation and make any order that the court could have made under section 29, 32, 33 or 35 (as the case requires); or
 - (c) quash the order for variation and remit the matter, with or without directions, to the court that made it.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 34A

- (6) If the Court of Appeal remits a matter to a court under sub-section (4)(c) or (5)(c), that court must hear and determine the matter in accordance with this Act and any directions given by the Court of Appeal.
- (7) If the Court of Appeal quashes a supervision order under this section, the Court of Appeal may make any order that it could make under section 28A(5) pending the making of another supervision order in respect of the defendant.

34A. Appeal against revocation of non-custodial supervision orders

S. 34A
 inserted by
 No. 7/2002
 s. 13.

- (1) The Secretary to the Department of Human Services may appeal to the Court of Appeal against the revocation of a non-custodial supervision order if he or she considers that—
 - (a) the supervision order should not have been revoked; and
 - (b) an appeal should be brought in the public interest.
- (2) The Director of Public Prosecutions or the Attorney-General may appeal to the Court of Appeal against the revocation of a non-custodial supervision order if he or she—
 - (a) was a party to the proceeding in which the order for revocation was made; and
 - (b) considers that the supervision order should not have been revoked; and
 - (c) considers that an appeal should be brought in the public interest.
- (3) On an appeal under this section, the Court of Appeal may—
 - (a) confirm the order revoking the supervision order; or

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 35

- (b) quash the order revoking the supervision order and, by order—
 - (i) confirm the supervision order; or
 - (ii) vary the conditions of the supervision order; or
 - (iii) vary the supervision order to a custodial supervision order; or
 - (c) quash the order for revoking the supervision order and remit the matter, with or without directions, to the court that made it.
- (4) If the Court of Appeal remits a matter to a court under sub-section (3)(c), that court must hear and determine the matter in accordance with this Act and any directions given by the Court of Appeal.

35. Major reviews

- (1) The court that made a supervision order must undertake a major review of the order—
 - (a) at least 3 months before the end of the nominal term of the order; and
 - (b) thereafter at intervals not exceeding 5 years for the duration of the order.
- (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

S. 35(1)
substituted by
No. 7/2002
s. 14(1).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 36

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.
- (4) If the court confirms a custodial supervision order on a major review, the court may grant extended leave to the person subject to the order, without the need for a separate application for leave, if the court could have granted extended leave to the person on an application under section 57.

S. 35(4)
 inserted by
 No. 7/2002
 s. 14(2).

36. Defendant to be present at hearings

- (1) Unless sub-section (4) applies, a person has the right to appear before the court in person at any hearing in which the court is considering—
 - (a) making, varying or revoking a supervision order in respect of the person; or
 - (b) granting extended leave to the person; or
 - (c) revoking a grant of extended leave to the 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.

S. 36(1)
 substituted by
 No. 7/2002
 s. 15(1).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 37

- (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 Attorney-General and the Director of Public Prosecutions are entitled to appear before the court; 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.

- (1A) The person having the custody, care, control or supervision of a person who is subject to a supervision order is entitled to appear before the court at any hearing in which the court is considering—
 - (a) varying or revoking the supervision order; or
 - (b) granting extended leave to the person subject to the order; or
 - (c) revoking a grant of extended leave to the person.
- (2) A person who is entitled or allowed to appear in a matter is a party to that matter.

S. 37(1)(a)
substituted by
No. 7/2002
s. 15(2).

S. 37(1A)
inserted by
No. 7/2002
s. 15(3).

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 38

38. Rules of evidence not to apply in certain hearings

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 in the hearing of—

- (a) a major review;
- (b) a review directed under section 27(2), 32(5) or 33(2);
- (c) an application for variation or revocation of a supervision order;
- (d) an application for extended leave or for revocation of extended leave;
- (e) an application for an order under section 38C(8);
- (f) an application under section 38D(1).

S. 38
 substituted by
 No. 7/2002
 s. 16.

38A. Notice of hearings to persons subject to supervision orders

- (1) Notice of any court hearing under this Act in relation to a person who is subject to a supervision order must be given to the person (unless the person is the applicant)—
 - (a) in the case of a major review or a review directed by a court under section 27(2), 32(5) or 33(2)—as directed by the court; or
 - (b) in any other case—by the applicant.
- (2) The notice must be given at least 14 days (or such lesser period as the court directs) before the day of the hearing.
- (3) Sub-section (1) does not require notice to be given of the hearing of an application for a warrant under section 30A or 30B.

S. 38A
 inserted by
 No. 7/2002
 s. 17.

s. 38B

S. 38B
inserted by
No. 7/2002
s. 17.

38B. Notice of hearings to DPP, Attorney-General and Secretary to Department of Human Services

- (1) Notice of any court hearing under this Act in relation to a person who is subject to a supervision order must be given to—
 - (a) the Director of Public Prosecutions; and
 - (b) the Attorney-General; and
 - (c) the Secretary to the Department of Human Services; and
 - (d) the person having the custody, care, control or supervision of the person subject to the supervision order.
- (2) The notice must be given—
 - (a) in the case of a major review or a review directed by a court under section 27(2), 32(5) or 33(2)—as directed by the court; or
 - (b) in any other case—by the applicant.
- (3) The notice must be given at least 14 days (or such lesser period as the court directs) before the day of the hearing.
- (4) This section does not apply so as to require an applicant to give notice to themselves.

38C. Notice of hearings to family members and victims

- (1) The Director of Public Prosecutions must give notice of any court hearing referred to in subsection (2) in relation to a person who is subject to a supervision order to—
 - (a) each family member of the person; and
 - (b) each victim of the offence with which the person was charged.

S. 38C
inserted by
No. 7/2002
s. 17.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 38C

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- (2) The hearings of which notice is required to be given under this section are hearings of—
 - (a) a major review;
 - (b) a review directed under section 27(2), 32(5) or 33(2);
 - (c) an application under section 31 for variation or revocation of a supervision order;
 - (d) an application for extended leave, if the granting of the application would significantly reduce the degree of supervision to which the person is subject.
 - (3) The notice must be given at least 14 days (or such lesser period as the court directs) before the day of the hearing.
 - (4) Notice to a family member or victim who is under the age of 18 years is to be given to—
 - (a) a parent or guardian of the person; or
 - (b) if the court makes an order under section 38D, the person named in the order.
 - (5) Notice is not to be given to a family member or victim who has given notice to the Director of Public Prosecutions that he or she does not wish to be notified of any hearing in relation to the person who is subject to the supervision order, and has not withdrawn that notice.
 - (6) Notice to the Director of Public Prosecutions under sub-section (5) may be given on behalf of a family member or victim who is under the age of 18 years by—
 - (a) a parent or guardian; or
 - (b) if the court makes an order under section 38D, the person named in the order.
-

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 38D

- (7) Notice of a hearing need not be given to a person—
 - (a) whose whereabouts have not, after reasonable enquiry, been ascertained; or
 - (b) if an order is made under sub-section (8) or (10).
- (8) On application by the Director of Public Prosecutions, the Attorney-General or the Secretary to the Department of Human Services, the court may order that notice of a particular hearing need not be given to a family member or victim if the court is satisfied that giving such notice to them would be detrimental to their mental or physical health.
- (9) If the court makes an order under sub-section (8), it may order that notice of the hearing be given to another person on their behalf.
- (10) If the court adjourns a hearing, the court may order that notice of the resumption of the hearing is not required to be given to a family member or victim.
- (11) If a person is both a family member and a victim, notice may be given to them in either of those capacities.

38D. Appointment of person to receive notice on behalf of child

- (1) The Director of Public Prosecutions may apply to the court for an order that notice under section 38C to a family member or victim under the age of 18 years be given to a person other than a parent or guardian if—
 - (a) the Director of Public Prosecutions considers that the parents or guardians may not be acting in the best interests of the family member or victim; or

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 38E

- (b) the only parents or guardians are persons who are liable to supervision or subject to a supervision order; or
 - (c) there are no parents or guardians or their identity or whereabouts cannot, after reasonable enquiry, be ascertained.
- (2) On an application under sub-section (1), the court may order that notice under section 38C be given to a person named in the order on behalf of the family member or victim instead of to the parent or guardian.

38E. Provision of information to family members and victims

S. 38E
 inserted by
 No. 7/2002
 s. 17.

- (1) As soon as practicable after becoming aware that a hearing referred to in section 38C(2) is to be held in relation to a person who is subject to a supervision order, a person having the supervision of the person must give the following information to the Director of Public Prosecutions—
- (a) whether the supervision order is a custodial supervision order or a non-custodial supervision order; and
 - (b) if it is a custodial supervision order, whether or not the person is on extended leave; and
 - (c) if the person is on extended leave or is subject to a non-custodial supervision order, the person's current level of supervision.
- (2) The Director of Public Prosecutions must give the information to each family member and victim of the offence with which the person subject to the supervision order was charged, unless section 38C provides that notice of the hearing is not to be given, or need not be given, to the family member or victim.

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

Part 5—Disposition of People Declared to be Liable to Supervision

s. 38F

- (3) If a family member or victim is under the age of 18 years, the information must be given to a parent or guardian or a person appointed under section 38D on behalf of the family member or victim.
- (4) The information must be given to a family member or victim a reasonable time before the hearing.

38F. List of family members

- (1) A person who is subject to a supervision order must give to the Director of Public Prosecutions a list of the person's family members, containing their names and, if known, their addresses.
- (2) The list may be given to the Director of Public Prosecutions at any time after the supervision order is made, but must be given—
 - (a) on or before the making by the person subject to the order of an application referred to in section 38C(2)(c) or (d); or
 - (b) not later than 14 days after the person subject to the order receives notice of a hearing referred to in section 38C(2)(a) or (b) or of an application referred to in section 38C(2)(c) or (d) made by another person—whichever first occurs.
- (3) Nothing in this section requires a list to be given more than once during the life of a supervision order.

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 39

**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, to remand a person in custody, to grant a person extended leave or to revoke a grant of extended leave 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.

S. 39
 amended by
 No. 7/2002
 s. 18.

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, to grant extended leave to a person or to revoke a grant of extended leave, 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.

S. 40(1)
 amended by
 No. 7/2002
 s. 19(1).

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 40

S. 40(2)(ab)
inserted by
No. 7/2002
s. 19(2)(a).

S. 40(2)(da)
inserted by
No. 7/2002
s. 19(2)(b).

- (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
 - (ab) in the case of a person who is subject to a supervision order, has obtained and considered the report of a person having the supervision of the person subject to the order; 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
 - (da) in the case of an application for extended leave—has considered the leave plan filed under section 57A; and
 - (e) has obtained and considered any other reports the court considers necessary.

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 41

- (3) Sub-section (2)(c) does not apply if section 38C provides that notice is not to be given, or need not be given, to a family member or victim. **S. 40(3) substituted by No. 7/2002 s. 19(3).**
- (4) The court cannot make a further grant of extended leave for a person who is on extended leave at the time of the application unless the court has obtained and considered— **S. 40(4) inserted by No. 7/2002 s. 19(3).**
- (a) 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 further grant on the person's behaviour; and
- (b) the leave plan filed under section 57A.

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 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.

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 41

- (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.

- (3A) The purpose of a report under sub-section (3) is to assist the court in determining any application or undertaking any review in respect of the person to whom the report relates.

Note: Section 40(2)(b) requires the court to consider the report before it can make certain orders or other determinations in respect of the person to whom it relates.

- (3B) The appropriate person must give the Attorney-General a copy of each report filed with the court under sub-section (3).

- (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

S. 41(3A)
inserted by
No. 7/2002
s. 20.

S. 41(3B)
inserted by
No. 7/2002
s. 20.

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 42

- (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 in respect of a person under this Act or in determining whether or not to grant a person extended leave—

S. 42(1)(b)
 amended by
 No. 7/2002
 s. 21(1)(a).

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 or victim is to contain the views of the family member or victim on the conduct of the person and the impact of that conduct on the family member or victim.

S. 42(2)
 amended by
 No. 7/2002
 s. 21(1)(b).

* * * * *

S. 42(3)
 repealed by
 No. 7/2002
 s. 21(1)(c).

- (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

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 43

- (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; or
 - (d) whenever an application is made for extended leave which, if granted, would significantly reduce the degree of supervision to which the person is subject.
- (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

- (1) A person who makes a report under section 42 must give the report to the Director of Public Prosecutions a reasonable time before the hearing is to take place.
- (2) The Director of Public Prosecutions must, as soon as practicable—
 - (a) file a copy of the report with the court; and
 - (b) give a copy of the report to the person who is, or is to be made subject to, the order or his or her legal practitioner.

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 45

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

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

Part 6—Principles on Which Court is to Act, Reports and Certificates

s. 47

- (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.

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—

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

Part 7—Leave of Absence

s. 51

- (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—
 - (i) 7 days in the case of special leave of absence for medical treatment; or
 - (ii) 24 hours in any other case; 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.

S. 50(6)(a)
substituted by
No. 7/2002
s. 23.

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.

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

Part 7—Leave of Absence

s. 53

- (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 6.00 am and 9.00 pm;
 and

S. 53(a)
 substituted by
 No. 7/2002
 s. 24(a).

- (b) outside those hours on a maximum of 3 days
 in any 7 day period.

S. 53(b)
 amended by
 No. 7/2002
 s. 24(b).

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

S. 54
 substituted by
 No. 7/2002
 s. 25.

- (1) An application may be made to the Panel for on-ground leave or limited off-ground leave for a forensic patient or forensic resident, or for variation of that leave—
- (a) in the case of a forensic patient, by the forensic patient or the authorised psychiatrist for the approved mental health service;
- (b) in the case of a forensic resident, by the forensic resident or the Secretary to the Department of Human Services.
- (2) The Panel may grant an application for on-ground leave or limited off-ground leave if satisfied on the evidence available that—
- (a) the proposed leave will contribute to the person's rehabilitation; and

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

Part 7—Leave of Absence

s. 54

- (b) the safety of the person or members of the public will not be seriously endangered as a result of the person being allowed leave.
- (3) The Panel may grant an application for variation of on-ground leave or limited off-ground leave if satisfied on the evidence available that—
 - (a) the proposed variation will contribute to the person's rehabilitation; and
 - (b) the safety of the person or members of the public will not be seriously endangered as a result of the leave being varied; and
 - (c) there has been a significant alteration in the person's circumstances since leave was granted or last varied.
- (4) In determining whether or not to grant an application for leave or variation of leave, the Panel must—
 - (a) have regard primarily to the person's current mental condition or pattern of behaviour; and
 - (b) consider the person's clinical history and social circumstances; and
 - (c) have regard to the applicant profile provided under section 54A and the leave plan or statement provided under section 54B.
- (5) The Panel may impose any conditions it considers appropriate on a grant or variation of 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).

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- (6) The maximum period for which on-ground or limited off-ground leave can be granted is 6 months.
 - (7) An application for on-ground or limited off-ground leave can be made and granted under this section more than once, and that leave can be varied more than once, but only one grant or variation can be in force at any one time in respect of a forensic patient or forensic resident.

54A. Applicant profile

S. 54A
inserted by
No. 7/2002
s. 25.

- (1) If an application is made for on-ground leave or limited off-ground leave, or for variation of that leave, an applicant profile must be provided to the Panel by—
 - (a) the Clinical Director of the Victorian Institute of Forensic Mental Health, in the case of a forensic patient detained in that Institute; or
 - (b) the authorised psychiatrist for the approved mental health service, in the case of a forensic patient detained in any other approved mental health service; or
 - (c) the Secretary to the Department of Human Services, in the case of a forensic resident.
- (2) The applicant profile must include information concerning—
 - (a) the person's impairment, condition or disability; and
 - (b) the relationship between the impairment, condition or disability and the offending conduct; and
 - (c) the person's clinical history and social circumstances; and

- (d) the person's current mental state or pattern of behaviour; and
- (e) the offence that led to the supervision order being made; and
- (f) the date of the supervision order, its nominal term and the day from which the nominal term had been declared to run.

54B. Leave plan or statement

- (1) If an application is made for on-ground leave or limited off-ground leave, or for variation of that leave, a leave plan must be provided to the Panel by—
 - (a) the Clinical Director of the Victorian Institute of Forensic Mental Health, in the case of a forensic patient detained in that Institute; or
 - (b) the authorised psychiatrist for the approved mental health service, in the case of a forensic patient detained in any other approved mental health service; or
 - (c) the Secretary to the Department of Human Services, in the case of a forensic resident—unless the Clinical Director, authorised psychiatrist or Secretary considers that the application should not be granted.
- (2) The leave plan must include information concerning—
 - (a) the purpose of the leave applied for and how it will contribute to the person's rehabilitation; and
 - (b) any proposed conditions of leave; and
 - (c) any other information the Clinical Director, authorised psychiatrist or Secretary considers relevant; and

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

Part 7—Leave of Absence

s. 55

- (d) any other information requested by the Panel.
- (3) If the Clinical Director, authorised psychiatrist or Secretary considers that the application should not be granted, he or she must provide a written statement to the Panel containing—
 - (a) the reasons why the application should not be granted; and
 - (b) any other information the Clinical Director, authorised psychiatrist or Secretary considers relevant; and
 - (c) any other information requested by the Panel.

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 wholly or partly 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, or part of the leave is not suspended.
- (2) If leave is suspended, the chief psychiatrist or Secretary must confirm the suspension in writing to the person in respect of whom the leave is suspended.
- (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.

S. 55(1)
 amended by
 No. 7/2002
 s. 26(1)(a)(b).

S. 55(2)
 amended by
 No. 7/2002
 s. 26(2)(a).

S. 55(5)
amended by
No. 7/2002
s. 26(2)(b).

S. 55(6)
inserted by
No. 7/2002
s. 26(3).

S. 57
substituted by
No. 7/2002
s. 27.

- (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 wholly suspended under this section is deemed not to have leave of absence during the period of suspension.
- (6) A person whose leave is partly suspended under this section is deemed not to have the suspended part of the 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.

57. Granting of extended leave

- (1) An application for extended leave for a forensic patient or forensic resident may be made to the court that made the supervision order to which they are subject by—
 - (a) in the case of a forensic patient, by the forensic patient or the authorised psychiatrist for the approved mental health service;
 - (b) in the case of a forensic resident, by the forensic resident or the Secretary to the Department of Human Services.
- (2) The court may grant an application under subsection (1) if satisfied on the evidence available that the safety of the forensic patient or forensic resident or members of the public will not be

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

Part 7—Leave of Absence

s. 57A

seriously endangered as a result of the forensic patient or forensic resident being allowed extended leave.

Note: Sections 39 and 40 set out certain other principles and matters that the court must apply and have regard to in considering applications for extended leave.

- (3) An application for extended leave can be made and granted more than once.
- (4) This section does not apply to a forensic patient or forensic resident who is detained in an approved mental health service or a residential service under section 30(2) or 30A(3).

57A. Leave plan for extended leave

If an application is made to the court for extended leave, a leave plan must be prepared and filed with 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.

S. 57A
inserted by
No. 7/2002
s. 27.

57B. Appeals regarding extended leave

- (1) A person may appeal to the Court of Appeal against a refusal to grant the person extended leave.
- (2) The Secretary to the Department of Human Services may appeal to the Court of Appeal against a grant of extended leave if he or she considers that—
 - (a) extended leave should not have been granted; and
 - (b) an appeal should be brought in the public interest.

S. 57B
inserted by
No. 7/2002
s. 27.

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

Part 7—Leave of Absence

s. 57B

- (3) The Director of Public Prosecutions or the Attorney-General may appeal to the Court of Appeal against a grant of extended leave if he or she—
 - (a) was a party to the proceeding in which extended leave was granted; and
 - (b) considers that extended leave should not have been granted; and
 - (c) considers that an appeal should be brought in the public interest.
- (4) On an appeal against a refusal to grant extended leave, the Court of Appeal may—
 - (a) confirm the refusal to grant extended leave; or
 - (b) grant extended leave in accordance with section 57; or
 - (c) remit the matter, with or without directions, to the court that refused to grant extended leave.
- (5) On an appeal against a grant of extended leave, the Court of Appeal may—
 - (a) confirm the grant of extended leave; or
 - (b) quash the grant and order that extended leave be refused; or
 - (c) quash the grant and remit the matter, with or without directions, to the court that made the grant.
- (6) If the Court of Appeal remits a matter to a court under sub-section (4)(c) or (5)(c), that court must hear and determine the matter in accordance with this Act and any directions given by the Court of Appeal.

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

Part 7—Leave of Absence

s. 58

58. Suspension and revocation of extended leave

S. 58
 (Heading)
 inserted by
 No. 7/2002
 s. 28(1).

- (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.

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

Part 7—Leave of Absence

s. 58A

S. 58(6)
amended by
No. 7/2002
s. 28(2).

- (6) A person whose leave is suspended under this section is deemed not to have leave of absence during the period of suspension.

Note: There are provisions for the apprehension of persons absent without leave in section 53AD of the **Mental Health Act 1986** (for forensic patients) and section 43E of the **Intellectually Disabled Persons' Services Act 1986** (for forensic residents). See also section 30B of this Act, which provides for warrants to be issued for the arrest of a person who is no longer in Victoria.

58A. Appeals regarding revocation of extended leave

- (1) A person may appeal to the Court of Appeal against a revocation of that person's extended leave.
- (2) The Secretary to the Department of Human Services may appeal to the Court of Appeal against a refusal to revoke extended leave if he or she considers that—
- (a) the extended leave should have been revoked; and
 - (b) an appeal should be brought in the public interest.
- (3) The Director of Public Prosecutions or the Attorney-General may appeal to the Court of Appeal against a refusal to revoke extended leave if he or she—
- (a) was a party to the proceeding for revocation of extended leave; and
 - (b) considers that the extended leave should have been revoked; and
 - (c) considers that an appeal should be brought in the public interest.

S. 58A
inserted by
No. 7/2002
s. 29.

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

Part 7—Leave of Absence

s. 59

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- (4) On an appeal against a revocation of extended leave, the Court of Appeal may—
 - (a) confirm the revocation of extended leave; or
 - (b) quash the revocation and restore the extended leave; or
 - (c) remit the matter, with or without directions, to the court that revoked the leave.
 - (5) On an appeal against a refusal to revoke extended leave, the Court of Appeal may—
 - (a) confirm the refusal to revoke extended leave; or
 - (b) revoke the extended leave in accordance with section 58(4)(a); or
 - (c) revoke the extended leave and remit the matter, with or without directions, to the court that made the grant.
 - (6) If the Court of Appeal remits a matter to a court under sub-section (4)(c) or (5)(c), that court must hear and determine the matter in accordance with this Act and any directions given by the Court of Appeal.

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;
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- (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**.

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

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

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

Part 7—Leave of Absence

s. 63

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.

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

Part 7—Leave of Absence

s. 66

- (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.

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.

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

Part 7—Leave of Absence

s. 70

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

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.

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

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

Part 7—Leave of Absence

s. 73

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- (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.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73A

Pt 7A
(Heading and
ss 73A–73H)
inserted by
No. 7/2002
s. 30.

S. 73A
inserted by
No. 7/2002
s. 30.

**PART 7A—INTERSTATE TRANSFER OF PERSONS
SUBJECT TO SUPERVISION ORDERS**

73A. Definitions

In this Part—

"corresponding law" means a law that, under an order in force under section 73B, is declared to be a corresponding law for the purposes of this Part;

"corresponding Minister", in relation to a participating State means the Minister or Ministers of that State who is or are responsible for the administration of the corresponding law of that State;

"interstate supervision order" means an order of a type that is declared to be an interstate supervision order under an order in force under section 73B, for the purposes of this Part;

"participating State" means a State in which a corresponding law is in force;

"State" includes Territory;

"Victorian Minister" means the Minister administering this Part or, if there is more than one Minister administering this Part, those Ministers acting jointly.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73B

73B. Corresponding laws and orders

The Governor in Council on the recommendation of the Victorian Minister, by Order published in the Government Gazette, may declare—

- (a) that a law of a State (other than this State) is a corresponding law for the purposes of this Part;
- (b) that a type of order under the law of a participating State is an interstate supervision order for the purposes of this Part.

S. 73B
inserted by
No. 7/2002
s. 30.

73C. Informed consent

For the purposes of this Part, a person is to be taken to have given informed consent to a transfer or interim disposition only if he or she gives written consent to the transfer or disposition (as the case requires) after—

- (a) he or she has been given a clear explanation of the process involved in the transfer or disposition and the reasons for the transfer or disposition, containing sufficient information to enable him or her to make a balanced judgment; and
- (b) any relevant questions asked by him or her have been answered and he or she has understood the answers.

S. 73C
inserted by
No. 7/2002
s. 30.

73D. Transfer of persons from Victoria to a participating State

- (1) A person who is subject to a supervision order may be transferred to a participating State if—
 - (a) the transfer is permitted by or under a corresponding law in that participating State; and
 - (b) the Victorian Minister makes an order under this section authorising the transfer.

S. 73D
inserted by
No. 7/2002
s. 30.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73E

- (2) The Victorian Minister may make an order under this section authorising a transfer if—
- (a) the chief psychiatrist has certified in writing that the transfer is for the benefit of the person subject to the supervision order; and
 - (b) the Victorian Minister is satisfied that the transfer is permitted by or under a corresponding law in the participating State; and
 - (c) the Victorian Minister is satisfied that—
 - (i) the person subject to the order has given informed consent to the transfer; or
 - (ii) if the person is incapable of giving informed consent—his or her guardian has given informed consent to the transfer.
- (3) On the transfer of a person from Victoria in accordance with an order under this section, the supervision order to which the person is subject is in force only if the person returns to Victoria and while the person is in Victoria.

73E. Transfer of persons from a participating State to Victoria

- (1) A person who is subject to an interstate supervision order may be transferred to Victoria if—
- (a) the transfer is permitted by or under a corresponding law in the participating State in which the supervision order was made; and
 - (b) the Victorian Minister has agreed to the transfer and determined an interim disposition for the person.

S. 73E
inserted by
No. 7/2002
s. 30.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73E

- (2) The Victorian Minister may agree to a transfer of a person to Victoria and determine an interim disposition if—
- (a) the chief psychiatrist has certified in writing that the transfer is for the benefit of the person and there are facilities or services available for the custody, care or treatment of the person (as the case requires); and
 - (b) the Victorian Minister is satisfied that the transfer is necessary for the maintenance or re-establishment of family relationships or relationships with people who can assist in supporting the person; and
 - (c) the Victorian Minister is satisfied that—
 - (i) the person subject to the order has given informed consent to the transfer and interim disposition; or
 - (ii) if the person is incapable of giving informed consent—his or her guardian has given informed consent to the transfer and interim disposition.
- (3) The interim dispositions that the Victorian Minister may determine under this section are—
- (a) that the person be detained in an appropriate place determined by the Victorian Minister as if the person were subject to a custodial supervision order;
 - (b) that the person be absent on leave from an appropriate place determined by the Minister, on any conditions determined by the Minister, as if the person were subject to a custodial supervision order and had been granted extended leave.

Note: An "appropriate place" is an approved mental health service or a residential service—see section 3.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73F

- (4) On the transfer of a person to Victoria under this section—
- (a) if the interim disposition is that the person be detained in an approved mental health service—the person is to be so detained and is deemed to be a forensic patient;
 - (b) if the interim disposition is that the person be detained in a residential service—the person is to be so detained and is deemed to be a forensic resident;
 - (c) if the interim disposition is that the person be absent on leave from an approved mental health service—the person is deemed to be a forensic patient absent from the approved mental health service on extended leave;
 - (d) if the interim disposition is that the person be absent on leave from a residential service—the person is deemed to be a forensic resident absent from the residential service on extended leave.
- (5) Nothing in this section is to be taken as requiring the Victorian Minister to agree to a transfer of a person to Victoria.

73F. Review of persons transferred to Victoria

- (1) Within 6 months after a person has been transferred to Victoria under section 73E, the Secretary to the Department of Human Services must apply to the Supreme Court for a review.
- (2) The purpose of the review is to determine the appropriate disposition for the person.
- (3) The Supreme Court may undertake the review itself or refer the matter to the County Court.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73G

- (4) On a review, the court may—
- (a) make a supervision order in respect of the person as if the person had been declared to be liable to supervision under Part 5; or
 - (b) order the person to be released unconditionally.
- (5) The court cannot make a supervision order that is more restrictive on the person's freedom and personal autonomy than the interstate supervision order to which the person was subject, unless satisfied that the safety of the person or members of the public would be seriously endangered if a more restrictive order is not made.
- (6) If the court makes a supervision order, the court must set a nominal term for the order in accordance with section 28 as modified by section 73G.
- (7) If the court makes a custodial supervision order, the court may grant extended leave to the person if the court could have granted them extended leave on an application under section 57.

73G. Nominal term of supervision order

- (1) The court must set the nominal term of a supervision order made under section 73F in accordance with section 28 as if—
- (a) the offence that led to the person being made subject to the interstate supervision order had been committed in Victoria; and
 - (b) the maximum penalty for that offence were the maximum penalty attaching to that offence at the date of the person's transfer to Victoria.

S. 73G
inserted by
No. 7/2002
s. 30.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73H

- (2) If the offence referred to in sub-section (1) no longer exists at the date referred to in sub-section (1)(b)—
 - (a) the court must determine whether there is an existing offence, as at that date, with which the person could have been charged had it existed at the time of the original charge;
 - (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 date referred to in sub-section (1)(b);
 - (c) if there is no such offence, the court must set the nominal term as 5 years.
- (3) If there never was an equivalent offence in Victoria to the offence that led to the person being made subject to the interstate supervision order, the court must set the nominal term of the supervision order as 5 years.
- (4) Despite section 28(4), the nominal term of the supervision order runs from the day on which the person was first made subject to the interstate supervision order.
- (5) If the nominal term of the supervision order has expired, the first major review must be undertaken within 12 months after the review under section 73F.

73H. Appeal against unconditional release

- (1) The Attorney-General may appeal to the Court of Appeal against an order for unconditional release under section 73F(4)(b) if he or she considers that—
 - (a) the order should not have been made; and
 - (b) an appeal should be brought in the public interest.

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73H

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- (2) On an appeal under sub-section (1), the Court of Appeal may—
- (a) confirm the order; or
 - (b) quash the order and make a supervision order in respect of the person as if the person had been declared to be liable to supervision under Part 5; or
 - (c) quash the order and remit the matter, with or without directions, to the court that made the order for unconditional release.
- (3) If the Court of Appeal remits a matter to a court under sub-section (2)(c), that court must make a supervision order in respect of the person in accordance with this Act and any directions given by the Court of Appeal.
- (4) The Court of Appeal may make any one or more of the following orders pending the making of a supervision order under this section—
- (a) an order granting the person bail;
 - (b) subject to sub-section (5), an order remanding the person in custody in an appropriate place;
 - (c) subject to sub-section (6), an order remanding the person 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 person undergo an examination by a registered medical practitioner or registered psychologist; and
 - (ii) that the results of the examination be put before the court that is to make the supervision order;
 - (e) any other order the court thinks appropriate.
-

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

Part 7A—Interstate Transfer of Persons Subject to Supervision Orders

s. 73H

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- (5) The Court of Appeal must not make an order remanding a person in custody in an appropriate place unless the Court of Appeal has received a certificate under section 47 stating that the facilities or services necessary for that order are available.
 - (6) The Court of Appeal must not make an order remanding a person in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.
-

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73I

**PART 7B—PERSONS ABSCONDING TO VICTORIA FROM
 INTERSTATE**

Pt 7B
 (Heading and
 ss 73I–73N)
 inserted by
 No. 7/2002
 s. 30.

73I. Definitions

S. 73I
 inserted by
 No. 7/2002
 s. 30.

In this Part—

"interstate supervision order" means—

- (a) an order under the law of another State of a similar nature to a supervision order under the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; or
- (b) an order under the law of another State that a person be kept in custody during the Governor's pleasure;

"mental health facility" means a facility for the detention and treatment of persons who are mentally ill;

"relevant offence", in relation to a person found unfit to stand trial or not guilty because of mental impairment or other mental condition in another State, means the offence with which the person was charged that led to that finding;

"relevant State", in relation to a person found unfit to stand trial or not guilty because of mental impairment or other mental condition in another State, means the State in which they were subject to an interstate supervision order or in which they were on remand awaiting the making of an interstate supervision order;

"State" includes Territory.

s. 73J

s. 73J
inserted by
No. 7/2002
s. 30.

73J. Warrant to arrest person who absconds to Victoria

- (1) The Secretary may apply to the Magistrates' Court for a warrant to arrest a person if the Secretary reasonably believes that—
 - (a) the person—
 - (i) has, in another State, been found unfit to stand trial for, or not guilty because of mental impairment or other mental condition of, an offence that, if committed in Victoria, would be an indictable offence; and
 - (ii) is subject to an interstate supervision order or on remand awaiting the making of such an order; and
 - (b) the person is in Victoria; and
 - (c) the person could be apprehended in the relevant State, if the person were still in that State, because he or she—
 - (i) is absent without leave or other lawful authority from a mental health facility in the relevant State; or
 - (ii) is in breach of an interstate supervision order that is non-custodial in nature; and
 - (d) one of the following applies—
 - (i) the person cannot be lawfully apprehended in Victoria because a warrant to apprehend or arrest the person has not been or cannot be issued in the relevant State, or such a warrant cannot be executed in Victoria; or

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73K

- (ii) the person cannot be lawfully apprehended in Victoria under section 93K of the **Mental Health Act 1986**; or
 - (iii) although the person could be lawfully apprehended in Victoria, the person would not be able to be returned to the relevant State following the apprehension.
- (2) For the purposes of sub-section (1)(c)(i), a person is taken to be absent without lawful authority from a mental health facility in a relevant State if the person did not return to the facility when required to do so under a law of that State.
 - (3) If the Magistrates' Court is satisfied by evidence on oath, whether orally or by affidavit, of the matters specified in paragraphs (a) to (d) of sub-section (1), the court may order that a warrant to arrest be issued against the person who is the subject of the application.
 - (4) Despite section 64(2)(a) of the **Magistrates' Court Act 1989**, a person arrested under a warrant issued under this section must be brought before the Magistrates' Court on the day of his or her arrest or on the next sitting day of the court.

73K. Interim disposition order

- (1) When a person arrested under a warrant issued under section 73J is brought before the Magistrates' Court, the court must make an interim disposition order in respect of him or her in accordance with this section, unless the court is satisfied that the matters specified in paragraphs (a) to (d) of section 73J(1) are not made out.

S. 73K
 inserted by
 No. 7/2002
 s. 30.

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73K

- (2) The interim disposition orders that the court may make in respect of a person are—
 - (a) that the person be granted bail; or
 - (b) that the person be detained in an appropriate place determined by the court as if he or she were subject to a custodial supervision order; or
 - (c) that the person be remanded in custody in a prison.
- (3) The court may, from time to time, adjourn a proceeding in which it is considering making an interim disposition order for any reasonable period not exceeding 7 days on each occasion and remand the person on bail or in custody in an appropriate place or a prison during any period of adjournment.
- (4) The court must not make an order under sub-section (2)(b), or an order under sub-section (3) remanding a person 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.
- (5) The court must not make an order under sub-section (2)(c), or an order under sub-section (3) remanding a person in custody in a prison, unless satisfied that there is no practicable alternative in the circumstances.
- (6) If the court is satisfied that any of the matters specified in paragraphs (a) to (c) of section 73J(1) is not made out, the court must discharge the person.
- (7) If the court is satisfied that the matters specified in paragraphs (a) to (c) of section 73J(1) are made out, but that the person can be returned to the relevant State, the court must order the person to be released into the custody of a person who is

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73L

authorised to escort the person to the relevant State.

- (8) On the making of an interim disposition order under sub-section (2)(b) in respect of a person or an order under sub-section (3) remanding a person in custody in an appropriate place—
- (a) if the appropriate place is an approved mental health service—the person is deemed to be a forensic patient;
 - (b) if the appropriate place is a residential service—the person is deemed to be a forensic resident.

73L. Review of interim disposition order

- (1) Within 7 days after an interim disposition order has been made in respect of a person, the Secretary to the Department of Human Services must apply to the Supreme Court for a review.
- (2) The purpose of the review is to determine the appropriate disposition for the person.
- (3) The Supreme Court may undertake the review itself or refer the matter to the County Court.
- (4) On a review, the court may—
 - (a) make a supervision order in respect of the person as if the person had been declared to be liable to supervision under Part 5; or
 - (b) order the person to be released unconditionally—

unless the court is satisfied that the person can be returned to the relevant State.

- (5) If the court is satisfied that the person can be returned to the relevant State, the court must order the person to be released into the custody of a person who is authorised to escort the person to the relevant State.

S. 73L
 inserted by
 No. 7/2002
 s. 30.

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73M

- (6) If the court makes a supervision order, the court must set a nominal term for the order in accordance with section 28 as modified by section 73M.
- (7) If the court makes a custodial supervision order, the court may grant extended leave to the person if the court could have granted them extended leave on an application under section 57.

73M. Nominal term of supervision order

- (1) The court must set the nominal term of a supervision order made under section 73L in accordance with section 28 as if—
 - (a) the relevant offence had been committed in Victoria; and
 - (b) the maximum penalty for that offence were the maximum penalty attaching to that offence at the date the person was arrested in Victoria; and
 - (c) sub-section (2) of this section applied instead of section 28(5).
- (2) For the purpose of declaring a day under section 28(4), the court may take into account—
 - (a) any period of time during which the person was held in custody, or detained in a mental health facility, in the relevant State in relation to proceedings for the relevant offence; and
 - (b) any period of time during which the person was held in custody, or detained in a mental health facility, in the relevant State under an interstate supervision order; and

S. 73M
inserted by
No. 7/2002
s. 30.

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73N

- (c) any period of time during which the person was held in custody, or detained in an appropriate place, since the person was arrested under a warrant issued under section 73J.
- (3) If the nominal term of the supervision order has expired, the first major review must be undertaken within 12 months after the review under section 73L.

73N. Appeal against unconditional release

S. 73N
 inserted by
 No. 7/2002
 s. 30.

- (1) The Attorney-General may appeal to the Court of Appeal against an order for unconditional release under section 73L(4)(b) if he or she considers that—
- (a) the order should not have been made; and
- (b) an appeal should be brought in the public interest.
- (2) On an appeal under sub-section (1), the Court of Appeal may—
- (a) confirm the order; or
- (b) quash the order and make a supervision order in respect of the person as if the person had been declared to be liable to supervision under Part 5; or
- (c) quash the order and remit the matter, with or without directions, to the court that made the order for unconditional release; or
- (d) quash the order and, if satisfied that the person can be returned to the relevant State, order the person to be released into the custody of a person who is authorised to escort the person to the relevant State.

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73N

- (3) If the Court of Appeal remits a matter to a court under sub-section (2)(c), that court must—
 - (a) make a supervision order in respect of the person in accordance with this Act and any directions given by the Court of Appeal; or
 - (b) if satisfied that the person can be returned to the relevant State, order the person to be released into the custody of a person who is authorised to escort the person to the relevant State.
- (4) The Court of Appeal may make any one or more of the following orders pending the making of a supervision order under this section—
 - (a) an order granting the person bail;
 - (b) subject to sub-section (5), an order remanding the person in custody in an appropriate place;
 - (c) subject to sub-section (6), an order remanding the person 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 person undergo an examination by a registered medical practitioner or registered psychologist; and
 - (ii) that the results of the examination be put before the court that is to make the supervision order;
 - (e) any other order the court thinks appropriate.
- (5) The Court of Appeal must not make an order remanding a person in custody in an appropriate place unless the Court of Appeal has received a certificate under section 47 stating that the facilities or services necessary for that order are available.

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

Part 7B—Persons Absconding to Victoria from Interstate

s. 73N

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- (6) The Court of Appeal must not make an order remanding a person in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.
 - (7) Any rules of court that apply to an appeal against a conviction apply to an appeal under this section, subject to any necessary modification, as if that appeal were an appeal against a conviction.
 - (8) Sub-section (7) does not apply to the extent that the rules of court provide otherwise and nothing in this section affects the power of the court to make rules for or with respect to appeals under this section.
-

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.

76A. Directions

- (1) The court may give directions at any time in a proceeding under this Act and hold any hearings it considers necessary for the purpose of giving directions.

S. 76A
 inserted by
 No. 7/2002
 s. 31.

S. 76B
inserted by
No. 7/2002
s. 31.

S. 77
repealed by
No. 7/2002
s. 32.

- (2) The directions may include a direction that the Director of Public Prosecutions file an outline of the case with the court within the time specified in the direction.

76B. Court rules for appeals

- (1) Any rules of court that apply to an appeal against a conviction apply to an appeal under section 19A, 24A or 73H, subject to any necessary modification, as if that appeal were an appeal against a conviction.
- (2) Any rules of court that apply to an appeal against a sentence apply to an appeal under section 28A, 34, 34A, 57B or 58A, subject to any necessary modification, as if that appeal were an appeal against a sentence.
- (3) This section does not apply to the extent that the rules of court provide otherwise and nothing in this section affects the power of the court to make rules for or with respect to appeals under this Act.

* * * * *

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**.

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

Part 8—General

s. 80

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.

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

Part 10—Savings and Transitional Provisions

s. 89

PART 10—SAVINGS AND TRANSITIONAL PROVISIONS

89. Savings and transitional provisions

Schedule 3 has effect.

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

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

Sch. 1

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

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

Sch. 1

(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

(b) is convicted of an indictable offence or an offence that, if committed in Victoria, would be an indictable offence; or

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

Sch. 1

(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.

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

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

Sch. 2

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.

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).

Sch. 3 cl. 3(4)
inserted by
No. 7/2002
s. 33(1).

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) Sections 53 and 54, as in force immediately before the commencement of sections 24 and 25 of the **Forensic Health Legislation (Amendment) Act 2002**, continue to apply in relation to any limited off-ground leave granted before that commencement, until the expiry of 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.

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

Sch. 3

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

- (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.

8. Periodic major reviews

Section 35, as amended by section 14 of the **Forensic Health Legislation (Amendment) Act 2002**, applies to a supervision order made before, on or after the commencement of that section 14.

Sch. 3 cl. 8
inserted by
No. 7/2002
s. 33(2).

9. Notification requirements

Sections 38A, 38B, 38C and 38E, as inserted by section 17 of the **Forensic Health Legislation (Amendment) Act 2002**, apply to—

Sch. 3 cl. 9
inserted by
No. 7/2002
s. 33(2).

- (a) applications that are made after the commencement of that section 17; and
- (b) reviews that are listed by the court after the commencement of that section 17.

Sch. 3 cl. 10
inserted by
No. 7/2002
s. 33(2).

10. Appeals

- (1) An order for unconditional release can be appealed under section 19A or 24A (as the case may be) whether the order was made before or after the commencement of that section, unless—
 - (a) the order had been appealed before that commencement; or
 - (b) any time limit for appealing the order had expired before that commencement.
- (2) A supervision order can be appealed under section 28A whether the order was made before or after the commencement of that section, unless—
 - (a) the order had been appealed before that commencement; or
 - (b) any time limit for appealing the order had expired before that commencement.
- (3) An order confirming, varying or revoking a supervision order can be appealed under section 34 (as substituted by section 13 of the **Forensic Health Legislation (Amendment) Act 2002**) or section 34A (as the case may be) whether the order was made before or after the commencement of that section, unless—
 - (a) the order had been appealed before that commencement; or
 - (b) any time limit for appealing the order had expired before that commencement.
- (4) A refusal to grant extended leave or a grant of extended leave can be appealed under section 57B whether the refusal or grant was made before or after the commencement of that section.
- (5) A revocation of extended leave or a refusal to revoke extended leave can be appealed under section 58A whether the revocation or refusal was made before or after the commencement of that section.
- (6) Any appeal referred to in sub-clause (1)(a), (2)(a) or (3)(a) that has not been determined before the commencement referred to in that sub-clause is to be determined in accordance with this Act as in force immediately before that commencement.

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

Endnotes

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

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.

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); ss 3–33 on 1.7.02: 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**

3. Explanatory Details

¹ 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).

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

³ S. 23(b): See note 2.

⁴ S. 26(1): Part 6 applies to a supervision order.

⁵ S. 26(8): Section 6A 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.