

Version No. 037
**Crimes (Mental Impairment and Unfitness to
be Tried) Act 1997**

No. 65 of 1997

Version incorporating amendments as at
21 December 2011

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Version No. 037

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

No. 65 of 1997

Version incorporating amendments as at
21 December 2011

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 subsection (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in subsection (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.

s. 3

3 Definitions

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

(1) In this Act—

appropriate place means—

- (a) an approved mental health service; or
- (b) a residential treatment facility; or
- (c) a residential institution;

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;

S. 3(1) def. of
contracted service provider
repealed by
No. 23/2006
s. 237(1)(a).

* * * * *

S. 3(1) def. of
court
amended by
No. 7/2002
s. 3(1)(a).

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);

S. 3(1) def. of
disability service provider
inserted by
No. 29/2010
s. 18(b).

disability service provider has the same meaning as in the **Disability Act 2006**;

domestic partner of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) 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—
 - (i) for fee or reward; or
 - (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

S. 3(1) def. of *domestic partner* inserted by No. 72/2001 s. 3(Sch. item 5.1(a)), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 15.1).

extended leave has the meaning given in section 56;

family member of a person means—

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

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

federal forensic patient means a forensic patient referred to in paragraph (ad) of the definition of *forensic patient* in this subsection;

S. 3(1) def. of *federal forensic patient* inserted by No. 44/2004 s. 6(1).

s. 3

S. 3(1) def. of
*forensic
patient*
amended by
Nos 7/2002
s. 3(1)(b),
44/2004
s. 6(2).

forensic patient means—

- (a) a person—
 - (i) remanded in custody in an approved mental health service; or
 - (ii) committed to custody in an approved mental health service by a supervision order—
under this Act; or
- (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
- (ad) a person detained in an approved mental health service under section 20BJ(1) or 20BM of the Crimes Act 1914 of the Commonwealth; or
- (b) a person transferred from a prison to an approved mental health service under section 17 of the **Mental Health Act 1986**;

S. 3(1) def. of
*forensic
resident*
amended by
No. 7/2002
s. 3(1)(c),
substituted by
No. 23/2006
s. 237(1)(b).

forensic resident means a person who is—

- (a) remanded in custody in a residential treatment facility or a residential institution; or
- (b) committed to custody in a residential treatment facility or a residential institution by a supervision order; or
- (c) detained in a residential treatment facility or a residential institution under section 30(2) or 30A(3); or
- (d) deemed to be a forensic resident by section 73E(4) or 73K(8); or

(e) transferred from a prison to a residential treatment facility or a residential institution under section 180 of the **Disability Act 2006**;

investigation means investigation under Part 2;

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

legal practitioner means an Australian legal practitioner within the meaning of the **Legal Profession Act 2004**;

S. 3(1) def. of *legal practitioner* inserted by No. 18/2005 s. 18(Sch. 1 item 30).

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

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;

S. 3(1) def. of
*registered
medical
practitioner*
substituted by
Nos 97/2005
s. 182(Sch. 4
item 15(a)),
13/2010
s. 51(Sch.
item 18).

registered medical practitioner means a person
registered under the Health Practitioner
Regulation National Law to practise in the
medical profession (other than as a student);

S. 3(1) def. of
*registered
psychologist*
substituted by
No. 41/2000
s. 102(Sch.
item 2),
amended by
No. 97/2005
s. 182(Sch. 4
item 15(b)),
substituted by
No. 13/2010
s. 51(Sch.
item 18).

registered psychologist means a person registered
under the Health Practitioner Regulation
National Law to practise in the psychology
profession (other than as a student);

S. 3(1) def. of
*residential
institution*
inserted by
No. 23/2006
s. 237(1)(c).

residential institution has the same meaning as it
has in section 3(1) of the **Disability Act
2006;**

S. 3(1) def. of
*residential
service*
repealed by
No. 23/2006
s. 237(1)(c).

* * * * *

S. 3(1) def. of
*residential
treatment
facility*
inserted by
No. 23/2006
s. 237(1)(c).

residential treatment facility has the same
meaning as it has in section 3(1) of the
Disability Act 2006;

Secretary to the Department of Health means the Department Head (within the meaning of the **Public Administration Act 2004**) of the Department of Health;

S. 3(1) def. of *Secretary to the Department of Health* inserted by No. 29/2010 s. 18(b).

Secretary to the Department of Human Services means the Department Head (within the meaning of the **Public Administration Act 2004**) of the Department of Human Services;

S. 3(1) def. of *Secretary to the Department of Human Services* inserted by No. 29/2010 s. 18(b).

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 subsection (1)—

S. 3(2) inserted by No. 72/2001 s. 3(Sch. item 5.2), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 15.2).

(a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and

s. 4

- (b) in determining whether persons who are not in a registered relationship 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 35(2) of the **Relationships Act 2008** as may be relevant in a particular case; and
- (c) a person is not a domestic partner of another person only because they are co-tenants.

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

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) Subsection (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(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 heard and determined summarily.

S. 5
amended by
Nos. 7/2002
s. 4 (ILA
s. 39B(1)),
68/2009
s. 97(Sch.
item 39.1).

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

S. 5(2)
inserted by
No. 7/2002
s. 4,
amended by
No. 68/2009
s. 97(Sch.
item 39.1).

PART 2—UNFITNESS TO STAND TRIAL

6 When is a person unfit to stand trial?

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

7 Presumptions, standard of proof, etc.

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

-
- (4) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness.
- (5) If the question is raised by the trial judge, the prosecution has carriage of the matter, but no party bears any onus of proof in relation to it.

8 Committals

- (1) If the question of the fitness of an accused to stand trial arises in a committal proceeding for an indictable offence—
- S. 8(1) amended by No. 68/2009 s. 97(Sch. item 39.2(a)(b)).
- (a) the committal proceeding must be completed in accordance with Chapter 4 of the **Criminal Procedure Act 2009**; and
- S. 8(1)(a) substituted by No. 68/2009 s. 97(Sch. item 39.2(c)).
- (b) the accused must not be discharged only because the question has been raised; and
- S. 8(1)(b) amended by No. 68/2009 s. 97(Sch. item 39.2(d)).
- (c) if the accused is committed for trial, the question must be reserved for consideration by the trial judge.
- S. 8(1)(c) amended by No. 68/2009 s. 97(Sch. item 39.2(d)).
- (2) Subject to subsection (3), if an accused is committed for trial and the question of his or her fitness to stand trial has been reserved under subsection (1)(c)—
- S. 8(2) amended by No. 68/2009 s. 97(Sch. item 39.3(a)).
- (a) an indictment must be filed in respect of the offence; and
- S. 8(2)(a) amended by No. 68/2009 s. 97(Sch. item 39.3(b)).

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S. 8(2)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.3(c)).

(b) the issue of whether there is a real and substantial question as to the fitness of the accused to stand trial must be determined by the trial judge; and

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

within 3 months after the committal.

S. 8(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.4).

(3) The court before which the accused is to be tried may at any time, whether or not the period referred to in subsection (2) has expired, extend the period for a further period not exceeding 3 months.

(4) The period referred to in subsection (2) may be extended under subsection (3) more than once.

9 Reservation of question of fitness to stand trial by court

S. 9(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.5(a)–
(c)).

(1) At any time after an indictment has been filed, if it appears to the court before which the accused is to be tried that there is a real and substantial question as to the fitness of the accused to stand trial, the court must reserve the question of the fitness of the accused to stand trial for investigation under this Part.

S. 9(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.5(c)).

(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 fitness of the accused to stand trial, the judge must adjourn or discontinue the trial and proceed with an investigation under this Part.

S. 9(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.5(d)).

(3) Nothing in this Act prevents the question of the fitness of an accused to stand trial from being raised more than once in the same proceeding.

- (4) For the purposes of sections 211 and 212 of the **Criminal Procedure Act 2009**, time ceases to run from the time that the question of the fitness of an accused to stand trial is reserved for investigation until the investigation has been completed.

S. 9(4)
amended by
Nos 7/2009
s. 425(a) (as
amended by
No. 68/2009
s. 54(k)),
68/2009
s. 97(Sch.
item 39.5(e)).

10 Court may make orders pending investigation into fitness

- (1) A court that reserves for investigation the question of the fitness of an accused to stand trial may make any one or more of the following orders—

S. 10(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(a)).

- (a) an order granting the accused bail;

S. 10(1)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(b)).

- (b) subject to subsection (2), an order remanding the accused in custody in an appropriate place for a specified period;

S. 10(1)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(b)).

- (c) subject to subsection (3), an order remanding the accused in custody in a prison for a specified period;

S. 10(1)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(b)).

- (d) if it is of the opinion that it is in the interests of justice to do so, an order—

- (i) that the accused undergo an examination by a registered medical practitioner or registered psychologist; and

S. 10(1)(d)(i)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(b)).

- (ii) that the results of the examination be put before the court;

- (e) any other order the court thinks appropriate.

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
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Part 2—Unfitness to Stand Trial

s. 11

S. 10(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(c)).

(2) The court must not make an order remanding an accused 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.

S. 10(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.6(c)).

(3) The court must not make an order remanding an accused in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

11 Procedure on investigation

S. 11(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.7(a)).

(1) On an investigation into the fitness of an accused 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;

S. 11(1)(b)(ii)
amended by
No. 68/2009
s. 97(Sch.
item 39.7(b)).

- (ii) require the accused 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.

S. 11(1A)
inserted by
No. 69/2009
s. 54(Sch. Pt 1
item 13.1).

(1A) Nothing in subsection (1) prevents the application of Part 3.10 of the **Evidence Act 2008** to an investigation, and for the purposes of the application of Part 3.10 the investigation is taken to be a criminal proceeding.

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

(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 fitness of the accused to stand trial is the balance of probabilities. S. 11(3)(c) amended by No. 68/2009 s. 97(Sch. item 39.7(c)).
- (4) If the jury finds that the accused 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 accused is likely to become fit to stand trial within the next 12 months; and S. 11(4) amended by No. 68/2009 s. 97(Sch. item 39.7(b)).
 - (a) determine, by reference to any relevant evidence and on the balance of probabilities, whether or not the accused is likely to become fit to stand trial within the next 12 months; and S. 11(4)(a) amended by No. 68/2009 s. 97(Sch. item 39.7(b)).
 - (b) if the judge determines that the accused is likely to become fit within the next 12 months, specify the period by the end of which the accused is likely to be fit to stand trial. S. 11(4)(b) amended by No. 68/2009 s. 97(Sch. item 39.7(b)).
- (5) For the purposes of subsection (4) the judge may call further evidence on his or her own initiative.
- (6) The jury empanelled to decide the question of the fitness of an accused to stand trial must not decide any other matter in relation to the proceedings for the offence. S. 11(6) amended by No. 68/2009 s. 97(Sch. item 39.7(a)).

12 What happens after an investigation?

- (1) If the jury finds that the accused is fit to stand trial, the trial must be commenced or resumed in accordance with usual criminal procedures. S. 12(1) amended by No. 68/2009 s. 97(Sch. item 39.8(a)).

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
No. 65 of 1997
Part 2—Unfitness to Stand Trial

s. 12

S. 12(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(a)).

(2) If the jury finds that the accused is not fit to stand trial and the judge determines that the accused 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—

S. 12(2)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(a)).

(a) grant the accused bail; or

S. 12(2)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(a)).

(b) subject to subsection (3), remand the accused in custody in an appropriate place for a specified period (not exceeding the period specified under section 11(4)(b)); or

S. 12(2)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(a)).

(c) subject to subsection (4), remand the accused 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.

S. 12(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(b)).

(3) The judge must not remand an accused 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.

S. 12(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(b)).

(4) The judge must not remand an accused in custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances.

S. 12(5)
amended by
No. 68/2009
s. 97(Sch.
item 39.8(a)).

(5) If the jury finds that the accused is not fit to stand trial and the judge determines that the accused 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 accused or the Director of Public Prosecutions may apply to the court—
- S. 13(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).
- (a) for an order that the trial commence or resume, if the accused or the Director of Public Prosecutions is of the opinion that the accused has become fit to stand trial; or
- S. 13(1)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).
- (b) for an order that the court proceed to hold a special hearing, if the accused or the Director of Public Prosecutions is of the opinion that the accused will not become fit to stand trial by the end of the period of 12 months after the first finding of unfitness.
- S. 13(1)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).
- (2) An application under subsection (1) must be accompanied by a report on the mental condition of the accused by a registered medical practitioner or registered psychologist.
- S. 13(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).
- (3) On an application under subsection (1) the court must—
- (a) dismiss the application; or
- (b) if satisfied that the accused has become fit to stand trial, make an order that the trial commence or resume; or
- S. 13(3)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).
- (c) if satisfied that the accused 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.
- S. 13(3)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.9).

14 What happens at the end of an adjournment?

S. 14(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.10).

- (1) At the end of the period of adjournment under section 12(2), the accused 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 subsection (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—

S. 14(4)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.10).

- (a) if the trial of the accused has commenced, it must be resumed as soon as practicable in accordance with usual criminal procedures; or
- (b) subject to subsection (5), if the trial has not commenced, it must be commenced within 3 months.

S. 14(5)
amended by
No. 68/2009
s. 97(Sch.
item 39.10).

- (5) The court before which the accused is to be tried may at any time, whether or not the period referred to in subsection (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 subsection (5) more than once.
- (7) An extension of time under subsection (5) also serves, if necessary, as an extension of time for the purposes of section 211 or 212 of the **Criminal Procedure Act 2009** (as the case may be).

S. 14(7)
amended by
No. 7/2009
s. 425(b) (as
amended by
No. 68/2009
s. 54(k)).

14A Appeal in relation to fitness to plead

- (1) In a criminal proceeding in the County Court or the Trial Division of the Supreme Court, if the question has arisen whether an accused is unfit to stand trial and on an investigation under this Part a jury finds that the accused is unfit to stand trial, the accused may appeal to the Court of Appeal against the finding on any ground of appeal, with the leave of the Court of Appeal.
- (2) An application for leave to appeal under subsection (1) is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the finding is made or any extension of that period granted under section 76C.
- (3) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.
- (4) On an appeal under subsection (1), the Court of Appeal must allow the appeal if the appellant satisfies the court that—
 - (a) the finding of unfitness to stand trial is unreasonable or cannot be supported having regard to the evidence; or
 - (b) the trial judge made a material error of law;
or

S. 14A
inserted by
No. 7/2009
s. 423 (as
amended by
No. 68/2009
ss 44, 54(f)).

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- (c) for any other reason the court considers that the finding should not stand.
- (5) In any other case, the Court of Appeal must dismiss an appeal under subsection (1).
- (6) If the Court of Appeal allows an appeal under subsection (1), it must set aside the finding of unfitness to stand trial and either—
- (a) refer the matter to the Trial Division of the Supreme Court or to the County Court for trial and the accused may be tried for the offence charged against the accused; or
 - (b) remit the matter for a rehearing of the investigation under this Part as to whether the accused is fit to stand trial.
- (7) Despite subsection (6), if the Court of Appeal allows an appeal under subsection (1) but considers that the accused is unfit to stand trial, it may affirm the finding and refer the matter to the Trial Division of the Supreme Court or to the County Court.
- (8) If the Court of Appeal remits a matter under subsection (6)(b)—
- (a) it may give directions concerning the manner and scope of the rehearing, including a direction as to whether the rehearing is to be conducted by the same judge or a different judge; and
 - (b) the court conducting the rehearing, whether constituted by the same judge or a different judge, must hear and determine the matter in accordance with the directions, if any.
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Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
No. 65 of 1997
Part 2—Unfitness to Stand Trial

s. 14A

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- (9) On remitting or referring a matter under this section, the Court of Appeal may remand the accused in custody or grant bail to the accused or make any other order that the court considers appropriate for the safe custody of the accused.
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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 accused—

- (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 subsection (2), at a special hearing—

- (a) the accused must be taken to have pleaded not guilty to the offence; and
- (b) the legal representative (if any) of the accused may exercise the rights of the accused to challenge jurors (either for cause or peremptorily) or the jury;
- (c) the accused 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 197 of the **Criminal Procedure Act 2009** (Order for legal representation for accused) applies as if the special hearing were a criminal trial;

S. 15
amended by
No. 68/2009
s. 97(Sch.
item 39.11).

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

S. 16(2)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.12(a)).

S. 16(2)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.12(b)
(c)).

S. 16(2)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.12(a)).

S. 16(2)(e)
amended by
No. 68/2009
s. 97(Sch.
item 39.12(d)).

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- (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 accused 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.

S. 16(3)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.12(a)).

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 accused committed the offence charged or an offence available as an alternative.
- (2) To make a finding under subsection (1)(c) the jury must be satisfied beyond reasonable doubt, on the evidence available, that the accused committed the offence charged or an offence available as an alternative.

S. 17(1)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.13).

S. 17(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.13).

18 Effect of findings

S. 18(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.14).

- (1) If a jury makes a finding under section 17(1)(a), the person is to be taken for all purposes to have been found not guilty at a criminal trial.
- (2) A finding under section 17(1)(b) is to be taken for all purposes to be a finding at a criminal trial of not guilty because of mental impairment.

Note to
s. 18(2)
inserted by
No. 7/2009
s. 425(c) (as
amended by
No. 68/2009
s. 54(k)).

Note

Section 24AA provides for appeals against a verdict 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 person had been convicted of the offence in a criminal trial.

S. 18(3)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.14).

- (4) If a jury makes a finding under section 17(1)(c)¹, the judge must—
 - (a) declare that the person is liable to supervision under Part 5; or
 - (b) order the person to be released unconditionally².

S. 18(4)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.14).

S. 18(4)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.14).

19 Court may make orders pending making of supervision order

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| (1) If the judge declares a person liable to supervision, the judge may make any one or more of the following orders pending the making of a supervision order— | S. 19(1) amended by No. 68/2009 s. 97(Sch. item 39.15). |
| (a) an order granting the person bail; | S. 19(1)(a) amended by No. 68/2009 s. 97(Sch. item 39.15). |
| (b) subject to subsection (2), an order remanding the person in custody in an appropriate place; | S. 19(1)(b) amended by No. 68/2009 s. 97(Sch. item 39.15). |
| (c) subject to subsection (3), an order remanding the person in custody in a prison; | S. 19(1)(c) amended by No. 68/2009 s. 97(Sch. item 39.15). |
| (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 person undergo an examination by a registered medical practitioner or registered psychologist; and | S. 19(1)(d)(i) amended by No. 68/2009 s. 97(Sch. item 39.15). |
| (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 person 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. | S. 19(2) amended by No. 68/2009 s. 97(Sch. item 39.15). |

s. 19A

S. 19(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.15).

- (3) The judge must not make an order remanding a person in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

S. 19A
inserted by
No. 7/2002
s. 5.

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.

S. 19A(1A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.17).

- (1A) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is made or any extension of that period granted under section 76C.

S. 19A(1B)
inserted by
No. 68/2009
s. 97(Sch.
item 39.17).

- (1B) A notice of appeal under subsection (1A) must be signed by the Director of Public Prosecutions personally.

S. 19A(1C)
inserted by
No. 68/2009
s. 97(Sch.
item 39.17).

- (1C) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed.

S. 19A(1D)
inserted by
No. 68/2009
s. 97(Sch.
item 39.17).

- (1D) The Director of Public Prosecutions must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the special hearing, if that legal practitioner can reasonably be identified.
- (2) On an appeal under subsection (1), the Court of Appeal may—
- (a) confirm the order; or

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
No. 65 of 1997
Part 3—Special Hearings

s. 19A

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| (b) set aside the order and by order declare that the person is liable to supervision under Part 5. | S. 19A(2)(b) amended by No. 68/2009 s. 97(Sch. item 39.16). |
| (3) If the Court of Appeal declares a person liable to supervision, the Court of Appeal may— | S. 19A(3) amended by No. 68/2009 s. 97(Sch. item 39.16(b)). |
| (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 person. | S. 19A(3)(b) amended by No. 68/2009 s. 97(Sch. item 39.16(b)). |
| (4) If the Court of Appeal remits a matter to a court under subsection (3)(a), 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. | S. 19A(4) amended by No. 68/2009 s. 97(Sch. item 39.16(b)). |
| (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 person. | S. 19A(5) amended by No. 68/2009 s. 97(Sch. item 39.16(b)). |
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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) subject to subsection (4), 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.

S. 21(2)(b)
amended by
No. 77/2005
s. 10(1).

- (4) If a person is charged with an indictable offence and, before the empanelment of a jury, the prosecution and the defence agree that the proposed evidence establishes the defence of mental impairment, the trial judge may hear the evidence and—
- (a) if the trial judge is satisfied that the evidence establishes the defence of mental impairment, may direct that a verdict of not guilty because of mental impairment be recorded; or
 - (b) if the trial judge is not so satisfied, must direct that the person be tried by a jury.
- S. 21(4) inserted by No. 77/2005 s. 10(2).
- S. 21(4)(b) amended by No. 68/2009 s. 97(Sch. item 39.18).

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 and a jury has been empanelled—
- (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 accused not guilty, it must specify in its verdict whether or not it so finds because of mental impairment.
- (3) An accused must not be discharged in a committal proceeding only because the defence of mental impairment has been raised.
- S. 22(2) amended by No. 77/2005 s. 10(3).
- S. 22(2)(b) amended by No. 68/2009 s. 97(Sch. item 39.19).
- S. 22(3) amended by No. 68/2009 s. 97(Sch. item 39.20).

s. 23

S. 23
amended by
No. 68/2009
s. 97(Sch.
item 39.21).

23 Effect of finding of not guilty because of mental impairment

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

S. 23(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.21).

(a) declare that the person is liable to supervision under Part 5; or

S. 23(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.21).

(b) order the person to be released unconditionally³.

24 Court may make orders pending making of supervision order

S. 24(1)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(1) If the court declares a person liable to supervision, the court may make any one or more of the following orders pending the making of a supervision order—

S. 24(1)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(a) an order granting the person bail;

S. 24(1)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(b) subject to subsection (2), an order remanding the person in custody in an appropriate place;

S. 24(1)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(c) subject to subsection (3), an order remanding the person in custody in a prison;

S. 24(1)(d)(i)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(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;

(e) any other order the court thinks appropriate.

(2) The court must not make an order remanding a person 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.

S. 24(2)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

(3) The court must not make an order remanding a person in custody in a prison unless satisfied that there is no practicable alternative in the circumstances.

S. 24(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.22).

24AA Appeal against mental impairment verdict

S. 24AA
inserted by
No. 7/2009
s. 424 (as
amended by
No. 68/2009
ss 45, 54(j)).

(1) In a criminal proceeding in the County Court or the Trial Division of the Supreme Court, if a verdict of not guilty because of mental impairment is recorded against a person, the person may appeal to the Court of Appeal against the verdict on any ground of appeal, with the leave of the Court of Appeal.

(2) An application for leave to appeal under subsection (1) is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the verdict is recorded or any extension of that period granted under section 76C.

(3) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

(4) On an appeal under subsection (1), the Court of Appeal must allow the appeal if the appellant satisfies the court that—

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- (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
 - (b) as a result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
 - (c) for any other reason there has been a substantial miscarriage of justice.
- (5) Despite subsection (4), the Court of Appeal may dismiss an appeal that would otherwise be allowed under that subsection if—
- (a) none of the grounds for allowing the appeal relates to the issue of the mental impairment of the appellant; and
 - (b) the court considers that, but for the mental impairment of the appellant, the proper verdict would have been that the appellant was guilty of an offence other than the offence charged.
- (6) In any other case, the Court of Appeal must dismiss an appeal under subsection (1).
- (7) If the Court of Appeal—
- (a) allows an appeal under subsection (1) on a ground that the verdict of not guilty because of mental impairment ought not to stand; and
 - (b) considers that the proper verdict would have been guilty of an offence, whether the offence charged or an offence available as an alternative verdict—

the Court of Appeal must substitute for the verdict a verdict of guilty of that offence and may make any order, or exercise any power, that the court from which the appeal was brought could have made or exercised.

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- (8) Subject to subsection (7), if the Court of Appeal allows an appeal under subsection (1), it must set aside the verdict and either—
- (a) enter a judgment and verdict of acquittal; or
 - (b) order a new trial.
- (9) If the Court of Appeal orders a new trial, it may make any order referred to in section 24(1)(a), (b), (c) or (e) pending the new trial.

24A Appeal against unconditional release

S. 24A
inserted by
No. 7/2002
s. 6.

- (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.
- (1A) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is made or any extension of that period granted under section 76C.
- (1B) A notice of appeal under subsection (1A) must be signed by the Director of Public Prosecutions personally.
- (1C) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed.
- (1D) The Director of Public Prosecutions must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in

S. 24A(1A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.24).

S. 24A(1B)
inserted by
No. 68/2009
s. 97(Sch.
item 39.24).

S. 24A(1C)
inserted by
No. 68/2009
s. 97(Sch.
item 39.24).

S. 24A(1D)
inserted by
No. 68/2009
s. 97(Sch.
item 39.24).

the proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.

(2) On an appeal under subsection (1), the Court of Appeal may—

(a) confirm the order; or

(b) set aside the order and by order declare that the person is liable to supervision under Part 5.

S. 24A(2)(b) amended by No. 68/2009 s. 97(Sch. item 39.23).

(3) If the Court of Appeal declares a person 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 person.

S. 24A(3) amended by No. 68/2009 s. 97(Sch. item 39.23(b)).

S. 24A(3)(b) amended by No. 68/2009 s. 97(Sch. item 39.23(b)).

(4) If the Court of Appeal remits a matter to a court under subsection (3)(a), 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.

S. 24A(4) amended by No. 68/2009 s. 97(Sch. item 39.23(b)).

(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 person.

S. 24A(5) amended by No. 68/2009 s. 97(Sch. item 39.23(b)).

25 Abrogation of defence of insanity

(1) The common law defence of insanity is abrogated.

(2) A jury is not entitled in any criminal trial to return a verdict of not guilty on account of insanity.

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

26 Supervision orders

- (1) If a court declares that a person is liable to supervision under this Part, the court must make a supervision order in respect of the person⁴.
- (2) A supervision order may—
 - (a) commit the person to custody (*custodial supervision order*)—
 - (i) subject to subsection (3), in an appropriate place; or
 - (ii) subject to subsection (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 disability service provider, the Secretary to the Department of Human Services or the Secretary to the Department of Health—

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.

S. 26(3)(b)
substituted by
No. 29/2010
s. 19(1).

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

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

s. 27

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

* * * * *

S. 26(8)
substituted by
No. 29/2010
s. 19(2).

(8) A person who is detained in custody in an approved mental health service under a supervision order is deemed to be in the custody of the Secretary to the Department of Health.

S. 26(9)
inserted by
No. 29/2010
s. 19(2).

(9) A person who is detained in custody in a residential treatment facility or a residential institution under a supervision order is deemed to be in the custody of the Secretary to the Department of Human Services.

Note

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.

27 How long does a supervision order last?

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

- (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.

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— (i) murder; or (ii) an offence against section 20 of the Crimes Act 1958 (threats to kill)	a period equivalent to the maximum term of imprisonment available for the offence
(c) any other offence for which there is a statutory maximum term of imprisonment	a period equivalent to half the maximum term of imprisonment available for the offence
(d) any other offence punishable by imprisonment but for which there is no statutory maximum term	a period specified by the court

- (2) If a person—

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

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

s. 28A

- (3) For the purpose of subsection (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.
- (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(4)
inserted by
No. 7/2002
s. 7(3).

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

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

S. 28A(2)
amended by
No. 29/2010
s. 20(1).

28A Appeal against supervision order

- (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 the Secretary to the Department of Human Services or the Secretary to the Department of Health 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.

-
- (2A) An appeal under this section is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is made or any extension of that period granted under section 76C.
- (2B) If the appeal is commenced by a person in respect of whom a supervision order is made, the Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of appeal within 7 days after the day on which the notice of appeal is filed.
- (2C) If the appeal is commenced by the Secretary to the Department of Human Services, the Secretary to the Department of Health, the Director of Public Prosecutions or the Attorney-General—
- (a) the notice of appeal must be signed by that person personally; and
 - (b) a copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed; and
 - (c) that person must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the proceeding when the supervision order was made, if that legal practitioner can reasonably be identified.
- (3) On an appeal under this section, the Court of Appeal may—
- (a) confirm the supervision order; or
 - (b) set aside the supervision order and make another supervision order in substitution for it; or
- S. 28A(2A) inserted by No. 68/2009 s. 97(Sch. item 39.25).
- S. 28A(2B) inserted by No. 68/2009 s. 97(Sch. item 39.25).
- S. 28A(2C) inserted by No. 68/2009 s. 97(Sch. item 39.25), amended by No. 29/2010 s. 20(2).
- S. 28A(3)(b) amended by No. 68/2009 s. 97(Sch. item 39.26(a)).

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
No. 65 of 1997
Part 5—Disposition of People Declared to be Liable to Supervision

s. 28A

S. 28A(3)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.26(a)).

(c) set aside the supervision order and remit the matter, with or without directions, to the court that made it; or

S. 28A(3)(d)
amended by
No. 68/2009
s. 97(Sch.
item 39.26).

(d) set aside the supervision order and order the person who was subject to the supervision order to be released unconditionally.

(4) If the Court of Appeal remits a matter to a court under subsection (3)(c), that court must make another supervision order in accordance with this Act and any directions given by the Court of Appeal.

S. 28A(5)
amended by
No. 68/2009
s. 97(Sch.
item 39.27(a)).

(5) The Court of Appeal may make any one or more of the following orders pending the making of a supervision order in respect of a person under this section—

S. 28A(5)(a)
amended by
No. 68/2009
s. 97(Sch.
item 39.27(b)).

(a) an order granting the person bail;

S. 28A(5)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.27(b)).

(b) subject to subsection (6), an order remanding the person in custody in an appropriate place;

S. 28A(5)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.27(b)).

(c) subject to subsection (7), 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—

S. 28A(5)(d)(i)
amended by
No. 68/2009
s. 97(Sch.
item 39.27(b)).

(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.
- (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.

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*), the Secretary to the Department of Human Services or the Secretary to the Department of Health may apply to the court that made the order for a variation of the order if it appears to the supervisor, the Secretary to the Department of Human Services or the Secretary to the Department of Health that the person subject to the order has failed to comply with it.

S. 29(1)
substituted by
Nos 7/2002
s. 9(1),
29/2010 s. 21.

* * * * *

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.

s. 30

- (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 subsection (4), a person who is apprehended under subsection (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 subsection (4) as soon as possible.
- (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

- (1) If at any time it appears to a person having supervision of a person under a non-custodial supervision order, the Secretary to the Department of Human Services or the Secretary to the Department of Health that the person subject to the order—

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

S. 30A(1)
substituted by
No. 29/2010
s. 22.

s. 30B

- (a) has failed to comply with the order; and
- (b) is no longer in Victoria—

the person having supervision, the Secretary to the Department of Human Services or the Secretary to the Department of Health 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 subsection (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 subsection (4) is made must hear it as soon as possible.

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

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

S. 30B(1)
substituted by
No. 29/2010
s. 23(1).

- (1) If at any time it appears to a person having the supervision of a forensic patient under a custodial supervision order or to the Secretary to the Department of Health that the forensic patient subject to the custodial supervision order—

(a) is absent without leave from an approved mental health service; and

(b) is no longer in Victoria—

the person having supervision or the Secretary to the Department of Health may apply to the Supreme Court, County Court or Magistrates' Court for a warrant to arrest the patient.

(1A) If at any time it appears to the Secretary to the Department of Health that a federal forensic patient—

S. 30B(1A)
inserted by
No. 44/2004
s. 7(1),
substituted by
No. 29/2010
s. 23(2).

(a) is absent without leave from an approved mental health service; and

(b) is no longer in Victoria—

the Secretary to the Department of Health may apply to the Supreme Court, County Court or Magistrates' Court for a warrant to arrest that patient.

(1B) If at any time it appears to the Secretary to the Department of Human Services that a forensic resident subject to a custodial supervision order—

S. 30B(1B)
inserted by
No. 29/2010
s. 23(2).

(a) is absent without leave from a residential treatment facility or a residential institution;
and

(b) is no longer in Victoria—

the Secretary to the Department of Human Services may apply to the Supreme Court, County Court or Magistrates' Court for a warrant to arrest that resident.

(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 subsection (1) or (1A), the court may order that a warrant to arrest be issued against the person subject to the order.

S. 30B(2)
amended by
No. 44/2004
s. 7(2).

s. 31

S. 30B(3)
amended by
No. 29/2010
s. 23(3).

- (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, residential treatment facility or residential institution from which he or she was absent without leave.

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

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

- (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 subsection (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.
- (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.

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

s. 33

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

- (6) A direction may be given under subsection (5) more than once.

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

33 Variation or revocation of non-custodial supervision orders

- (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 subsection (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.

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

- (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.

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

- (3) A direction may be given under subsection (2) more than once.

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

34 Appeal against confirmation or variation of supervision orders

- (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 or the Secretary to the Department of Health may appeal to the Court of Appeal against an order confirming or varying a supervision order if he or she considers that—

S. 34(2)
amended by
No. 29/2010
s. 24(1).

-
- (a) the supervision order should not have been confirmed or varied; 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 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.
- (3A) An appeal under this section is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order confirming or varying the supervision order is made or any extension of that period granted under section 76C.
- (3B) If the appeal is commenced by a person who is subject to a supervision order, the Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of appeal within 7 days after the day on which the notice of appeal is filed.
- (3C) If the appeal is commenced by the Secretary to the Department of Human Services, the Secretary to the Department of Health, the Director of Public Prosecutions or the Attorney-General—
- (a) the notice of appeal must be signed by that person personally; and

S. 34(3A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.28).

S. 34(3B)
inserted by
No. 68/2009
s. 97(Sch.
item 39.28).

S. 34(3C)
inserted by
No. 68/2009
s. 97(Sch.
item 39.28),
amended by
No. 29/2010
s. 24(2).

s. 34

- (b) a copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed; and
- (c) that person must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the proceeding when the supervision order was made, if that legal practitioner can reasonably be identified.

(4) On an appeal against a confirmation of a supervision order, the Court of Appeal may—

- (a) confirm the supervision order; or
- (b) set aside 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) set aside the supervision order and remit the matter, with or without directions, to the court that made it.

S. 34(4)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.29).

S. 34(4)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.29).

(5) On an appeal against a variation of a supervision order, the Court of Appeal may—

- (a) confirm the order for variation; or
- (b) set aside 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) set aside the order for variation and remit the matter, with or without directions, to the court that made it.

S. 34(5)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.29).

S. 34(5)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.29).

- (6) If the Court of Appeal remits a matter to a court under subsection (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 sets aside a supervision order in respect of a person 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 person.

S. 34(7)
amended by
No. 68/2009
s. 97(Sch.
item 39.30).

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 or the Secretary to the Department of Health 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.

S. 34A(1)
amended by
No. 29/2010
s. 25(1).

s. 34A

S. 34A(2A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.31).

(2A) An appeal under this section is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is revoked or any extension of that period granted under section 76C.

S. 34A(2B)
inserted by
No. 68/2009
s. 97(Sch.
item 39.31),
amended by
No. 29/2010
s. 25(2).

(2B) A notice of appeal under subsection (2A) must be signed personally by the Secretary to the Department of Human Services, the Secretary to the Department of Health, the Director of Public Prosecutions or the Attorney-General, as the case requires.

S. 34A(2C)
inserted by
No. 68/2009
s. 97(Sch.
item 39.31).

(2C) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed.

S. 34A(2D)
inserted by
No. 68/2009
s. 97(Sch.
item 39.31).

(2D) The person commencing the appeal must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the proceeding when the supervision order was revoked, if that legal practitioner can reasonably be identified.

S. 34A(3)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.32).

- (3) On an appeal under this section, the Court of Appeal may—
- (a) confirm the order revoking the supervision order; or
 - (b) set aside 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) set aside the order revoking the supervision order and remit the matter, with or without directions, to the court that made it.

S. 34A(3)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.33).

(4) If the Court of Appeal remits a matter to a court under subsection (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—

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

(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 the person on a non-custodial supervision order; or

(ii) if so satisfied, must confirm the order or vary the place of custody;

s. 36

- (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.

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

- (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. 36
(Heading)
inserted by
No. 68/2009
s. 97(Sch.
item 39.34).

36 Person subject to supervision order has right to appear

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

- (1) Unless subsection (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 subsection (1).

S. 36(4)
amended by
No. 68/2009
s. 97(Sch.
item 39.35).

- (4) If the court is satisfied that the attendance of the person before the court would be detrimental to the person's health, the court may order that the person not attend the hearing.

- (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 197 of the **Criminal Procedure Act 2009** (Order for legal representation for accused) applies to a hearing referred to in subsection (1) as if the hearing were a criminal trial.
- (7) Nothing in Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958** applies to a hearing referred to in subsection (1).

S. 36(6)
amended by
No. 68/2009
s. 97(Sch.
item 39.36).

S. 36(7)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 17).

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.

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

- (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—

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

- (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. 38

S. 38
substituted by
No. 7/2002
s. 16,
amended by
No. 69/2009
s. 54(Sch. Pt 1
item 13.2) (ILA
s. 39B(1)).

38 Rules of evidence not to apply in certain hearings

- (1) 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).
- (2) Nothing in subsection (1) prevents the application of Part 3.10 of the **Evidence Act 2008** to a hearing, and for the purposes of the application of Part 3.10 the investigation is taken to be a criminal proceeding.

S. 38(2)
inserted by
No. 69/2009
s. 54(Sch. Pt 1
item 13.2).

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.

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

- (3) Subsection (1) does not require notice to be given of the hearing of an application for a warrant under section 30A or 30B.

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

S. 38B
(Heading)
amended by
No. 29/2010
s. 26(1).

- (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—

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

- (a) the Director of Public Prosecutions; and
(b) the Attorney-General; and
(c) the Secretary to the Department of Human Services or the Secretary to the Department of Health (as the case requires); and
(d) the person having the custody, care, control or supervision of the person subject to the supervision order.

S. 38B(1)(c)
substituted by
No. 29/2010
s. 26(2).

- (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

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

- (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—

s. 38C

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- (a) each family member of the person; and
 - (b) each victim of the offence with which the person was charged.
- (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 subsection (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.
- (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 subsection (8) or (10).
- (8) On application by the Director of Public Prosecutions, the Attorney-General, the Secretary to the Department of Health 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 subsection (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.

S. 38C(8)
amended by
No. 29/2010
s. 27.

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

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

- (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—

s. 38E

- (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
 - (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 subsection (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.

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

38E Provision of information to family members and victims

- (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.

- (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

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

- (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.

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

39 Principle to be applied

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

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.

40 Matters to which the court is to have regard

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

- (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.

(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

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

(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

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

(e) has obtained and considered any other reports the court considers necessary.

s. 41

S. 40(3)
substituted by
No. 7/2002
s. 19(3).

(3) Subsection (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(4)
inserted 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—

- (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.

S. 41
(Heading)
inserted by
No. 68/2009
s. 97(Sch.
item 39.37).

41 Reports on mental condition of persons declared liable to supervision

- (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.
- (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 subsection (3) is to assist the court in determining any application or undertaking any review in respect of the person to whom the report relates.

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

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 subsection (3).

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

- (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(4) def. of
*appropriate
person*
amended by
No. 29/2010
s. 28.

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

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—

a family member of the person or a victim of the offence may make a report to the court.

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

(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
- (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

S. 43(1)(c)
amended by
No. 7/2002
s. 21(2).

- (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.

S. 43(1)(d)
inserted by
No. 7/2002
s. 21(2).

(2) A report may be made—

- (a) in writing by statutory declaration; or
- (b) in writing by statutory declaration and orally by sworn evidence.

S. 44
substituted by
No. 7/2002
s. 22.

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.

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 subsection (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 subsection (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—
 - (i) committing a person to custody in a residential treatment facility or a residential institution; or
 - (ii) providing for a person to receive services in a residential treatment facility or a residential institution or from a disability services provider or the Secretary to the Department of Human Services; or
 - (b) making another order under this Act—
 - (i) that a person be placed in custody in a residential treatment facility or a residential institution; or
 - (ii) that a person otherwise receive treatment or services in a residential treatment facility or a residential institution or from a disability services provider or the Secretary to the Department of Human Services.

S. 47(1)
amended by
No. 23/2006
s. 237(2),
substituted by
No. 29/2010
s. 29(1).

s. 47

S. 47(1A)
inserted by
No. 29/2010
s. 29(1).

(1A) A court must request the Secretary to the Department of Health to provide the court with a certificate of available services if the court is considering—

(a) imposing a supervision order on a person—

(i) committing a person to custody in an approved mental health service; or

(ii) providing for a person to receive services in an approved mental health service or from the Secretary to the Department of Health; or

(b) making another order under this Act—

(i) that a person be placed in custody in an approved mental health service; or

(ii) that a person otherwise receive treatment or services in an approved mental health service or from the Secretary to the Department of Health.

(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.

S. 47(3)
substituted by
No. 29/2010
s. 29(2).

(3) If there are no facilities or services available, the certificate may contain any other options that either the Secretary to the Department of Human Services or the Secretary to the Department of Health considers appropriate for the court to consider in making the proposed order.

(4) The Secretary to the Department of Human Services or the Secretary to the Department of Health must provide a certificate to the court within 7 days after receiving a request under subsection (1) or within such longer period as the court allows.

S. 47(4)
amended by
No. 29/2010
s. 29(3).

(5) The court may require the Secretary to the Department of Human Services or the Secretary to the Department of Health 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.

S. 47(5)
amended by
No. 29/2010
s. 29(4).

PART 7—LEAVE OF ABSENCE

Division 1—Leave of absence

48 Application of Division

S. 48
amended by
No. 44/2004
s. 8 (ILA
s. 39B(1)).

S. 48(1)
amended by
No. 69/2005
s. 27(1)(a)(i)(ii).

S. 48(2)
inserted by
No. 44/2004
s. 8.

(1) This Division applies in relation to forensic patients and forensic residents.

(2) The Division also applies in relation to federal forensic patients.

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.

S. 49(d)
amended by
No. 44/2004
s. 9(1),
substituted by
No. 69/2005
s. 27(1)(b).

Note to s. 49
inserted by
No. 69/2005
s. 27(1)(c).

Note

Some forensic patients and forensic residents cannot be granted extended leave—see section 57(4).

50 Special leave

- (1) A forensic patient or forensic resident, or a person on their behalf, may apply for special leave of absence, specifying the special circumstances for which the leave is required.
- (2) An application is to be made—
 - (a) in the case of a forensic patient, to the authorised psychiatrist for the approved mental health service;
 - (b) in the case of a forensic resident, to the Secretary to the Department of Human Services.
- (3) The authorised psychiatrist or Secretary to the Department of Human Services must grant an application for special leave of absence if satisfied that—
 - (a) there are special circumstances; and
 - (b) the safety of members of the public will not be seriously endangered.
- (4) If the authorised psychiatrist or Secretary to the Department of Human Services refuses to grant special leave of absence to a forensic patient or forensic resident, the forensic patient or forensic resident may appeal to the Panel.
- (5) On an appeal, the Panel may—
 - (a) confirm the decision of the authorised psychiatrist or Secretary to the Department of Human Services; or
 - (b) direct that the forensic patient or forensic resident be allowed special leave of absence.

s. 51

(6) Special leave of absence—

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

- (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.

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?

S. 52(1)
amended by
No. 29/2010
s. 30(1).

- (1) The *surrounds*, in relation to an approved mental health service, a residential treatment facility or a residential institution, is the area declared under subsection (2) to be the surrounds in relation to that service.

S. 52(2)
amended by
No. 29/2010
s. 30.

- (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, a residential treatment facility or a residential institution to be the surrounds in relation to that approved mental health service, residential treatment facility or residential institution.

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—

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

- (a) between the hours of 6.00 am and 9.00 pm;
and

- (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
 - (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.

s. 54A

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- (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).
 - (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.

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

54A Applicant profile

- (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—

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

-
- (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
- (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.
- (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.

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. 56

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

- (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.

S. 56
amended by
No. 44/2004
s. 9(2) (ILA
s. 39B(1)).

56 What is extended leave?

- (1) 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.

S. 56(2)
inserted by
No. 44/2004
s. 9(2),
repealed by
No. 69/2005
s. 27(1)(d).

* * * * *

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

57 Granting of extended leave

S. 57(1)
amended by
No. 10/2005
s. 3(Sch. 1
item 7).

- (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—
- (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 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) a forensic patient who is—
 - (i) remanded in custody in an approved mental health service under this Act; or
 - (ii) detained in an approved mental health service under section 30(2) or 30A(3); or
 - (iii) deemed to be a forensic patient by section 73E(4) or 73K(8); or
 - (iv) detained in an approved mental health service under section 20BJ(1) or 20BM of the Crimes Act 1914 of the Commonwealth; or
 - (b) a forensic resident who is—
 - (i) remanded in custody in a residential service under this Act; or
 - (ii) detained in a residential service under section 30(2) or 30A(3); or
 - (iii) deemed to be a forensic resident by section 73E(4) or 73K(8).

S. 57(4)
substituted by
No. 69/2005
s. 27(2).

s. 57A

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

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. 57B
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 to a forensic resident 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(2)
amended by
No. 29/2010
s. 31(1).

(2A) The Secretary to the Department of Health may appeal to the Court of Appeal against a grant of extended leave to a forensic patient 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(2A)
inserted by
No. 29/2010
s. 31(2).

(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.
- (3A) An appeal under this section is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which extended leave is granted or refused (as the case requires) or any extension of that period granted under section 76C.
- (3B) If the appeal is commenced under subsection (1), the Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of appeal within 7 days after the day on which the notice of appeal is filed.
- (3C) If the appeal is commenced by the Secretary to the Department of Human Services, the Secretary to the Department of Health, the Director of Public Prosecutions or the Attorney-General—
- (a) the notice of appeal must be signed by that person personally; and
- (b) a copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed; and
- (c) that person must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the application for extended leave, if that legal practitioner can reasonably be identified.
- S. 57B(3A) inserted by No. 68/2009 s. 97(Sch. item 39.38).
- S. 57B(3B) inserted by No. 68/2009 s. 97(Sch. item 39.38).
- S. 57B(3C) inserted by No. 68/2009 s. 97(Sch. item 39.38), amended by No. 29/2010 s. 31(3).

- (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) set aside the grant and order that extended leave be refused; or
 - (c) set aside 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 subsection (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.

S. 57B(5)(b) amended by No. 68/2009 s. 97(Sch. item 39.39).

S. 57B(5)(c) amended by No. 68/2009 s. 97(Sch. item 39.39).

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

58 Suspension and revocation of extended leave

- (1) Extended leave may be suspended at any time by the chief psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident) if the chief psychiatrist or Secretary is satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if leave is not suspended.

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

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.

Note to s. 58(6) inserted by No. 7/2002 s. 28(2).

s. 58A

58A Appeals regarding revocation of extended leave

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

(1) A person may appeal to the Court of Appeal against a revocation of that person's extended leave.

S. 58A(2)
amended by
No. 29/2010
s. 32(1).

(2) The Secretary to the Department of Human Services may appeal to the Court of Appeal against a refusal to revoke extended leave granted to a forensic resident 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.

S. 58A(2A)
inserted by
No. 29/2010
s. 32(2).

(2A) The Secretary to the Department of Health may appeal to the Court of Appeal against a refusal to revoke extended leave granted to a forensic patient if he or she considers that—

(a) 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(3A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.40).

(3A) An appeal under this section is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which extended leave is revoked or revocation of

the extended leave is refused (as the case requires) or any extension of that period granted under section 76C.

- (3B) If the appeal is commenced under subsection (1), the Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of appeal within 7 days after the day on which the notice of appeal is filed. **S. 58A(3B) inserted by No. 68/2009 s. 97(Sch. item 39.40).**
- (3C) If the appeal is commenced by the Secretary to the Department of Human Services, the Secretary to the Department of Health, the Director of Public Prosecutions or the Attorney-General— **S. 58A(3C) inserted by No. 68/2009 s. 97(Sch. item 39.40), amended by No. 29/2010 s. 32(3).**
- (a) the notice of appeal must be signed by that person personally; and
 - (b) a copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed; and
 - (c) that person must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the application for revocation of extended leave, if that legal practitioner can reasonably be identified.
- (4) On an appeal against a revocation of extended leave, the Court of Appeal may—
- (a) confirm the revocation of extended leave; or
 - (b) set aside the revocation and restore the extended leave; or **S. 58A(4)(b) amended by No. 68/2009 s. 97(Sch. item 39.41).**
 - (c) remit the matter, with or without directions, to the court that revoked the leave.

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- (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 subsection (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;
 - (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;
- (b) any other functions conferred on the Panel by or under this or any other Act.

S. 60(a)
amended by
Nos 44/2004
s. 10, 69/2005
s. 27(3).

61 Staff

Any employees that are necessary for the purposes of the Panel may be employed under Part 3 of the **Public Administration Act 2004**.

S. 61
substituted by
No. 46/1998
s. 7(Sch. 1),
amended by
No. 108/2004
s. 117(1)
(Sch. 3
item 50.1).

62 Secrecy

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

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

Penalty: 10 penalty units.

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- (2) A person referred to in subsection (1) may make a record of, or divulge or communicate information referred to in subsection (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) Subsection (1) does not prevent a person producing a document or divulging information to a court in the course of criminal proceedings or proceedings under this Act.

63 Annual Report

- (1) As soon as practicable after the end of each calendar year, the Panel must submit a report to the Minister that includes the following information—
- (a) the number and type of leave applications—
 - (i) made to the Panel during that year; and
 - (ii) granted by the Panel during that year; and
 - (iii) refused by the Panel during that year; and
 - (b) the number of suspensions during that year of leave granted by the Panel and the type of leave suspended.
- (2) The Minister must cause each report under subsection (1) to be laid before each House of the Parliament within 14 sitting days of that House after it is received by the Minister.

Division 3—Procedure of Panel

64 Procedure of the Panel

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

65 Evidence

- (1) The Panel is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit.
- (2) Evidence before the Panel—
 - (a) may be given orally or in writing or partly orally and partly in writing; and
 - (b) may be given on oath or by declaration.
- (3) A member of the Panel may administer an oath or take an affirmation or declaration for the purposes of this Act.
- (4) The Panel, on its own initiative or on the application of an applicant for leave, may cause to be served on any person a summons to attend 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 subsection (4).

S. 65(4)
amended by
No. 68/2009
s. 97(Sch.
item 39.42).

- (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 subsection (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.

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- (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 subsection (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.
- (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.

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- (4) Unless the Panel makes an order under subsection (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 subsection (5) applies.

71 Proceedings to be closed to public

- (1) Unless subsection (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 subsection (2) may be given subject to any conditions the Panel considers appropriate.

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

72 Protection of members etc.

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

S. 72(3)
amended by
No. 68/2009
s. 97(Sch.
item 39.43).

73 Offences

A person must not—

- (a) insult a member of the Panel in or in relation to the exercise of the powers or functions as a member; or
- (b) repeatedly interrupt the proceedings of the Panel; or
- (c) create a disturbance or take part in creating a disturbance in or near a place where the Panel is sitting; or
- (d) do any other act or thing that would, if the Panel were a court of record, constitute a contempt of that court.

Penalty: 10 penalty units.

s. 73A

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

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

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

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.

73B Corresponding laws and orders

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

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.

73C Informed consent

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

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.

73D Transfer of persons from Victoria to a participating State

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

- (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. 73E

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- (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.

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

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.
- (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;

s. 73E

- (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 to
s. 73E(3)
amended by
No. 23/2006
s. 237(3).

Note

An *appropriate place* is an approved mental health service, a residential treatment facility or a residential institution—see section 3.

- (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 treatment facility or a residential institution—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 treatment facility or a residential institution—the person is deemed to be a forensic resident absent from the residential treatment facility or the residential institution 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.

S. 73E(4)(b)
amended by
No. 23/2006
s. 237(4)(a).

S. 73E(4)(d)
amended by
No. 23/2006
s. 237(4).

73F Review of persons transferred to Victoria

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

- (1) Within 6 months after a person has been transferred to Victoria under section 73E, the relevant Secretary 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.
- (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.

S. 73F(1)
substituted by
No. 29/2010
s. 33(1).

s. 73G

S. 73F(8)
inserted by
No. 29/2010
s. 33(2).

- (8) In this section *relevant Secretary* means—
- (a) in the case of a person deemed to be a forensic patient or a forensic patient, the Secretary to the Department of Health; or
 - (b) in the case of a person deemed to be a forensic resident or a forensic resident, the Secretary to the Department of Human Services.

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

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.
- (2) If the offence referred to in subsection (1) no longer exists at the date referred to in subsection (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 subsection (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

S. 73H
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 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.
- (1A) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is made or any extension of that period granted under section 76C.
- (1B) A notice of appeal under subsection (1A) must be signed by the Attorney-General personally.
- (1C) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed.

S. 73H(1A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.44).

S. 73H(1B)
inserted by
No. 68/2009
s. 97(Sch.
item 39.44).

S. 73H(1C)
inserted by
No. 68/2009
s. 97(Sch.
item 39.44).

s. 73H

S. 73H(1D)
inserted by
No. 68/2009
s. 97(Sch.
item 39.44).

(1D) The Attorney-General must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the review under section 73F, if that legal practitioner can reasonably be identified.

(2) On an appeal under subsection (1), the Court of Appeal may—

(a) confirm the order; or

S. 73H(2)(b)
amended by
No. 68/2009
s. 97(Sch.
item 39.45).

(b) set aside 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

S. 73H(2)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.45).

(c) set aside 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 subsection (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 subsection (5), an order remanding the person in custody in an appropriate place;

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

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

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

73I Definitions

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.

73J Warrant to arrest person who absconds to Victoria

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

(1) The Secretary to the Department of Human Services or the Secretary to the Department of Health may apply to the Magistrates' Court for a warrant to arrest a person if the Secretary reasonably believes that—

S. 73J(1)
amended by
No. 29/2010
s. 34.

- (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

- (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 subsection (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 subsection (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.

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

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.

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- (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 subsection (2)(b), or an order under subsection (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 subsection (2)(c), or an order under subsection (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
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s. 73L

authorised to escort the person to the relevant State.

- (8) On the making of an interim disposition order under subsection (2)(b) in respect of a person or an order under subsection (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 treatment facility or a residential institution—the person is deemed to be a forensic resident.

S. 73K(8)(b) amended by No. 23/2006 s. 237(5).

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

73L Review of interim disposition order

S. 73L(1) substituted by No. 29/2010 s. 35(1).

- (1) Within 7 days after an interim disposition order has been made in respect of a person, the relevant Secretary 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.
- (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.
- (8) In this section *relevant Secretary* means—
 - (a) in the case of a person detained in an approved mental health facility, the Secretary to the Department of Health; or
 - (b) in the case of a person detained in a residential treatment facility or residential institution, the Secretary to the Department of Human Services.

S. 73L(8)
inserted by
No. 29/2010
s. 35(2).

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) subsection (2) of this section applied instead of section 28(5).

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

s. 73N

- (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
 - (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.

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

73N Appeal against unconditional release

- (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.

S. 73N(1A)
inserted by
No. 68/2009
s. 97(Sch.
item 39.46).

- (1A) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the order is made or any extension of that period granted under section 76C.

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- (1B) A notice of appeal under subsection (1A) must be signed by the Attorney-General personally. **S. 73N(1B) inserted by No. 68/2009 s. 97(Sch. item 39.46).**
- (1C) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 of the **Criminal Procedure Act 2009** within 7 days after the day on which the notice of appeal is filed. **S. 73N(1C) inserted by No. 68/2009 s. 97(Sch. item 39.46).**
- (1D) The Attorney-General must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the review under section 73L, if that legal practitioner can reasonably be identified. **S. 73N(1D) inserted by No. 68/2009 s. 97(Sch. item 39.46).**
- (2) On an appeal under subsection (1), the Court of Appeal may—
- (a) confirm the order; or
 - (b) set aside 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 **S. 73N(2)(b) amended by No. 68/2009 s. 97(Sch. item 39.47).**
 - (c) set aside the order and remit the matter, with or without directions, to the court that made the order for unconditional release; or **S. 73N(2)(c) amended by No. 68/2009 s. 97(Sch. item 39.47).**
 - (d) set aside 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. **S. 73N(2)(d) amended by No. 68/2009 s. 97(Sch. item 39.47).**

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- (3) If the Court of Appeal remits a matter to a court under subsection (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 subsection (5), an order remanding the person in custody in an appropriate place;
 - (c) subject to subsection (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
No. 65 of 1997
Part 7B—Persons Absconding to Victoria from Interstate

s. 73N

(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.

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**S. 73N(7)(8)
repealed by
No. 68/2009
s. 97(Sch.
item 39.48).**

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 an accused or any 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.

S. 75(1)(c)
amended by
No. 68/2009
s. 97(Sch.
item 39.49).

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 subsection (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

- (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.

S. 76B
inserted by
No. 7/2002
s. 31,
amended by
No. 7/2009
s. 425(d) (as
amended by
No. 68/2009
s. 54(k)),
substituted by
No. 68/2009
s. 97(Sch.
item 39.50).

76B Rules of court

- (1) Rules of court made by the authority having for the time being power to make rules regulating the practice and procedure of a court may include rules for or with respect to any matter for which provision is to be made under this Act by rules of court.
- (2) Rules of court made under this Act may regulate generally the practice and procedure under this Act.

S. 76C
inserted by
No. 68/2009
s. 97(Sch.
item 39.51).

76C Extension of time for filing notice of appeal

- (1) The Court of Appeal, or, in accordance with the rules of court, the Registrar of Criminal Appeals of the Supreme Court at any time may extend the time within which a notice of appeal may be filed under this Act.
- (2) If the Registrar of Criminal Appeals of the Supreme Court refuses an application to extend time under subsection (1), the applicant is entitled to have the Court of Appeal determine the application.

S. 76C(1)
amended by
Nos 34/2010
s. 48, 81/2011
s. 22(4).

S. 76D
inserted by
No. 68/2009
s. 97(Sch.
item 39.51).

76D Powers which may be exercised by a single Judge of Appeal

- (1) The power of the Court of Appeal under section 76C to extend the time within which notice of appeal may be given may be exercised by a single Judge of Appeal in the same manner as it may be exercised by the Court of Appeal.

- (2) If a Judge of Appeal refuses an application to exercise a power referred to in subsection (1), the applicant is entitled to have the application determined by the Court of Appeal.

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

78 Abolition of Governor's pleasure orders

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

79 Supreme Court—limitation of jurisdiction

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

80 Regulations

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

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

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

No. 65 of 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 Administration Act 2004**.

- (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

Sch. 1
cl. 1(1)(d)
amended by
Nos 46/1998
s. 7(Sch. 1),
108/2004
s. 117(1)
(Sch. 3
item 50.2).

Sch. 1

is not to be taken to be a judicial office or an office or place of profit under the Crown.

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
 - (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 in respect of the office of member subject to the **Public Administration Act 2004** (other than Part 3 of that Act).
- (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

Sch. 1
cl. 2(1)(e)
amended by
No. 46/1998
s. 7(Sch. 1),
substituted by
Nos 108/2004
s. 117(1)
(Sch. 3
item 50.3),
80/2006
s. 26(Sch.
item 22).

-
- (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
 - (b) 12 months after the member ceases to hold office—

whichever occurs first.

Sch. 1

- (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.

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- (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
 - (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.

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- (2) The member of the Panel referred to in subclause (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.

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- (3) A question of law may be referred under subclause (2) only if the chairperson of the Panel agrees to the referral.
- (4) If a question of law is referred under subclause (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 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 subclause (1) may be made on the application of any person or on the Panel's own initiative.
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SCHEDULE 3

Section 89

SAVINGS AND TRANSITIONAL PROVISIONS

1 Definitions

In this Schedule—

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

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

2 Existing detainees

- (1) Each existing detainee is, on and after the commencement day, deemed to be subject to a custodial supervision order under this Act.
- (2) The nominal term of the custodial supervision order is to be determined in accordance with section 28 as if the maximum penalty for the offence which led to the person becoming an existing detainee were the maximum penalty attaching to that offence on the commencement day.
- (3) If the offence referred to in subsection (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

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(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**.

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

(5) If the nominal term has expired, a major review must be held within 6 months after the commencement day.

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.

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

(2) Subclause (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.

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

(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 subclause (1) the court may revoke the supervision order if satisfied on the evidence available that the safety of the existing detainee or members of the public will not be seriously endangered as a result of the revocation of the order.
- (3) In considering an application for revocation of a supervision order in respect of an existing detainee the court may take into account any reports on the existing detainee made by, or submitted to, the Adult Parole Board before the commencement day.

5 Persons released under section 498 of Crimes Act 1958

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

6 Unfitness to stand trial

- (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.

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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.

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

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. 9
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—

- (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.

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- (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 subclause (1)(a), (2)(a) or (3)(a) that has not been determined before the commencement referred to in that subclause is to be determined in accordance with this Act as in force immediately before that commencement.
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Sch. 3 cl. 11
inserted by
No. 68/2009
s. 97(Sch.
item 39.52).

11 Transitional provisions—Criminal Procedure Act 2009

- (1) Section 14A as inserted by section 423 of the **Criminal Procedure Act 2009** applies to a finding on an investigation under Part 2 that an accused is unfit to stand trial made on or after the commencement of section 423 of that Act.
- (2) Section 24AA as inserted by section 424 of the **Criminal Procedure Act 2009** applies to a verdict of not guilty because of mental impairment recorded on or after the commencement of section 424 of that Act.

Sch. 3 cl. 12
inserted by
No. 68/2009
s. 97(Sch.
item 39.52).

12 Transitional provisions—Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009

- (1) Section 19A as amended by item 39.17 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.
- (2) Section 24A as amended by item 39.24 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.
- (3) Section 28A as amended by item 39.25 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.

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- (4) Section 34 as amended by item 39.28 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.
- (5) Section 34A as amended by item 39.31 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal against the revocation of a non-custodial supervision order where the order revoking the supervision order is made on or after the commencement of that item.
- (6) Section 57B as amended by item 39.38 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the application for extended leave is refused or granted, as the case may be, on or after the commencement of that item.
- (7) Section 58A as amended by item 39.40 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the extended leave is revoked or the application for revocation of extended leave is refused, as the case may be, on or after the commencement of that item.
- (8) Section 73H as amended by item 39.44 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.
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- (9) Section 73N as amended by item 39.46 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to an appeal under that section where the order to which the appeal relates is made on or after the commencement of that item.

Sch. 3 cl. 13
(Heading)
amended by
No. 29/2011
s. 3(Sch. 1
item 23).

Sch. 3 cl. 13
inserted by
No. 29/2010
s. 36.

13 Transitional provision—Health and Human Services Legislation Amendment Act 2010

Any act matter or thing of a continuing nature that was done by or in relation to, or any proceeding brought by or against, the Secretary to the Department of Human Services before the commencement of Division 1 of Part 5 of the **Health and Human Services Legislation Amendment Act 2010** is to be taken to be done by or in relation to, and may be brought by or against, the Secretary to the Department of Health after that commencement if the act matter or thing or proceeding relates to—

- (a) a forensic patient; or
- (b) an approved mental health service.

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ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 18 September 1997

Legislative Council: 15 October 1997

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

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 18 September 1997

Legislative Council: 15 October 1997

Absolute majorities:

Legislative Assembly: 8 October 1997 and 11 November 1997

Legislative Council: 28 October 1997

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

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

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

Endnotes

Mental Health Legislation (Commonwealth Detainees) Act 2004, No. 44/2004

Assent Date: 16.6.04
Commencement Date: Ss 6–10 on 17.6.04: s. 2
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Public Administration Act 2004, No. 108/2004

Assent Date: 21.12.04
Commencement Date: S. 117(1)(Sch. 3 item 50) on 5.4.05: Government Gazette 31.3.05 p. 602
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Statute Law Revision Act 2005, No. 10/2005

Assent Date: 27.4.05
Commencement Date: S. 3(Sch. 1 item 7) on 28.4.05: s. 2
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Legal Profession (Consequential Amendments) Act 2005, No. 18/2005

Assent Date: 24.5.05
Commencement Date: S. 18(Sch. 1 item 30) on 12.12.05: Government Gazette 1.12.05 p. 2781
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Sentencing and Mental Health Acts (Amendment) Act 2005, No. 69/2005

Assent Date: 11.10.05
Commencement Date: S. 27 on 1.10.06: 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**

Crimes (Homicide) Act 2005, No. 77/2005

Assent Date: 22.11.05
Commencement Date: S. 10 on 23.11.05: s. 2
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Health Professions Registration Act 2005, No. 97/2005

Assent Date: 7.12.05
Commencement Date: S. 182(Sch. 4 item 15) on 1.7.07: 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**

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
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Disability Act 2006, No. 23/2006

Assent Date: 16.5.06
Commencement Date: S. 237 on 1.7.07: 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 Acts (Further Workplace Protection and Other Matters) Act 2006, No. 80/2006

Assent Date: 10.10.06
Commencement Date: S. 26(Sch. item 22) on 11.10.06: s. 2(1)
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Relationships Act 2008, No. 12/2008

Assent Date: 15.4.08
Commencement Date: S. 73(1)(Sch. 1 item 15) on 1.12.08: 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**

Criminal Procedure Act 2009, No. 7/2009 (as amended by No. 68/2009)

Assent Date: 10.3.09
Commencement Date: Ss 423–425 on 1.1.10: Government Gazette 10.12.09 p. 3215
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009, No. 68/2009

Assent Date: 24.11.09
Commencement Date: S. 97(Sch. item 39) on 1.1.10: Government Gazette 10.12.09 p. 3215
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Statute Law Amendment (Evidence Consequential Provisions) Act 2009, No. 69/2009

Assent Date: 24.11.09
Commencement Date: S. 54(Sch. Pt 1 item 13), (Sch. Pt 2 item 17) on 1.1.10: 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**

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

Endnotes

Statute Law Amendment (National Health Practitioner Regulation) Act 2010, No. 13/2010

Assent Date: 30.3.10
Commencement Date: S. 51(Sch. item 18) on 1.7.10: 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**

Health and Human Services Legislation Amendment Act 2010, No. 29/2010

Assent Date: 8.6.10
Commencement Date: Ss 18–36 on 1.7.10: Special Gazette (No. 235) 23.6.10 p. 1
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Courts Legislation Miscellaneous Amendments Act 2010, No. 34/2010

Assent Date: 15.6.10
Commencement Date: S. 48 on 1.1.11: s. 2(5)
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Statute Law Revision Act 2011, No. 29/2011

Assent Date: 21.6.11
Commencement Date: S. 3(Sch. 1 item 23) on 22.6.11: s. 2(1)
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011, No. 81/2011

Assent Date: 21.12.11
Commencement Date: S. 22(4) on 21.12.11: s. 2(1)
Current State: This information relates only to the provision/s amending the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

Endnotes

3. Explanatory Details

¹ S. 18(4): Section 23 provides similarly to this subsection 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.

Guide to Court Processes

