

Crimes (Mental Impairment and Unfitness to be Tried) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 sets out the three main purposes of the Bill.
- Clause 2 provides for the commencement of the various provisions of the Bill.
- Clause 3 contains definitions of terms used in the Bill.

The term "forensic patient" is a new statutory term used to denote people who are remanded in custody in an approved mental health service under this Bill or who are committed to custody in an approved mental health service pursuant to a supervision order made under this Bill or a person who was originally committed to custody in a prison pursuant to a supervision order made under this Bill and who is subsequently transferred to an approved mental health service pursuant to s. 17 of the **Mental Health Act 1986**. Section 17 of the **Mental Health Act 1986** is inserted into that Act by clause 87 of this Bill.

The term "forensic resident" is also a new statutory term used to denote people who are remanded in custody in a residential service under this Bill or who are committed to custody in a residential service pursuant to a supervision order made under this Bill or a person who was originally committed to custody in a prison pursuant to a supervision order made under this Bill and who is subsequently transferred to a prison under this Bill by way of section 21A of the **Intellectually Disabled Persons' Services Act 1986**. Section 21A of the **Intellectually Disabled Persons' Services Act** is inserted into that Act by clause 84 of this Bill.

- Clause 4 provides that, except as provided in clause 5 and in clause 25(1) which abrogates the defence of insanity, the provisions of this Bill only apply in relation to trials in the County Court or Supreme Court.
- Clause 5 provides the exception to the rule in clause 4. It provides that the defence of mental impairment as defined in clause 20(1) applies to proceedings in the Magistrates' Court. The special verdict of not guilty because of mental impairment as stated in clause 20(2) does not apply to proceedings in the

Magistrates' Court. Clause 21(1), which provides that a person is presumed not to be suffering from a mental impairment as defined in clause 20(1), also applies in the Magistrates' Court jurisdiction. These provisions apply to proceedings in the summary jurisdiction in order to ensure jurisprudential consistency in the concept of the defence of mental impairment.

PART 2—UNFITNESS TO STAND TRIAL

- Clause 6 defines the criteria for unfitness to be tried. The criteria in paragraphs (1)(a)–(f) inclusive are a codification of the common law criteria espoused by the Supreme Court of Victoria in *R v Presser* [1958] VR 45 and the rule in *R v Kesavarajah* [1994] 181 CLR 230.
- (2) is a codification of the common law rule in *R v Padola* [1959] 3 All ER 418.
- Clause 7 (1) provides that a person is presumed to be fit to be tried.
- (2) provides that the presumption can only be rebutted as a consequence of the investigation procedures established under this Bill.
- (3) provides that the issue of a person's fitness to stand trial is a question of fact and is to be determined on the balance of probabilities by a specially empanelled jury.
- (4) provides that the party raising the issue of a person's fitness to stand trial is the party which bears the onus of rebutting the presumption provided in (1).
- (5) provides that if the trial judge raises the issue the prosecution has carriage of the matter but no onus of proof in relation to it. This sub-clause is necessary to clarify the procedure to be followed where the issue of a person's fitness has been raised by the court.
- Clause 8 (1) provides that where the issue of fitness is raised in a committal proceeding the issue cannot be determined by the committal magistrate but must be reserved for consideration by the court of trial. The committal must proceed in accordance with the procedures provided in Schedule 5 of the **Magistrates' Court Act 1989**. The fact that the question of the defendant's fitness to stand trial has been raised is not a basis for discharging a defendant at the committal. The question of the defendant's fitness must not be determined by the committal magistrate but must be reserved for consideration by the trial judge.

- (2) provides that the issue of a person's fitness to stand trial must be determined within 3 months of the conclusion of the committal. These time frames are provided to ensure that persons who are unfit to stand trial have the issues in relation to them determined as soon as possible to ensure that if appropriate treatment or services are required to assist the person they can be provided as soon as possible.
- (3) provides that the court of trial may extend the period within which the issue is to be determined for a period not exceeding 3 months.
- (4) provides that an extension may be granted more than once.

Clause 9 deals with the procedure to be followed where the issue of fitness is raised at any time after a presentment or indictment has been filed.

- (1) provides that if the issue of the defendant's fitness to stand trial has been raised at any time after the presentment or indictment has been filed the issue must be reserved for investigation under Part 2 of the Bill.
- (2) provides that if the issue is raised after the trial has commenced the trial judge must determine whether there is a real and substantial question and if so must adjourn or discontinue the trial as appropriate and proceed to hold an investigation into the defendant's fitness.
- (3) provides that the question of fitness to stand trial may be raised more than once in the same proceedings.
- (4) provides that the time limits provided under sections 353(3) and 359A of the **Crimes Act 1958** are suspended once it has been determined that a real and substantial question as to a defendant's fitness to stand trial has been raised and the matter has been reserved for investigation under this Bill until that investigation has been completed.

Clause 10 provides that the court of trial which has found that there is a real and substantial question as to the defendant's fitness to stand trial may make any of the interim orders provided in (1) if appropriate pending the commencement of an investigation under this Bill before a specially empanelled jury.

- (2) provides that the court must not remand a defendant in custody in an appropriate place unless it has received a certificate from the Secretary to the Department of Human Services stating that the facilities or services necessary for that order are available.

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

Clause 11 provides for the procedure to be followed on an investigation into a defendant's fitness to stand trial. An investigation into a person's fitness to stand trial is a new procedure introduced by this Bill.

- (1) provides that the court must hear any relevant evidence and submissions put to it by either the prosecution or the defence and, if it considers that it is in the interests of justice to do so, may call evidence of its own initiative or require the defendant to undergo psychiatric or psychological examination and for such examination results to be put before the court.
- (2) provides that the **Juries Act 1967**, except s. 34 which provides for peremptory challenges, applies to an investigation as if the investigation were a criminal inquest with the meaning of the **Juries Act 1967**.
- (3) provides that the trial judge must explain certain issues to the jury prior to evidence being heard. The judge must explain the reasons for the investigation which is to determine the question of the defendant's fitness to stand trial, the findings which may be made (being either the defendant is or is not fit to stand trial) and that the question of the defendant's fitness to stand trial is to be determined on the balance of probabilities.
- (4) provides that if the jury determines the defendant is unfit to stand trial it is for the judge to determine whether or not the defendant is likely to become fit to stand trial within the next 12 months. If the judge determines that the defendant is likely to become fit the judge must specify the period by the end of which it is considered the defendant is likely to become fit to stand trial. This is a change from the position under s. 393 of the **Crimes Act 1958** where upon a finding of unfitness a court must order that a defendant be detained at the Governor's pleasure rather than making any other order which may facilitate the defendant becoming fit.
- (5) provides that the judge may call further evidence on his or her own initiative for the purposes of determining whether or not the defendant is likely to become fit within the next 12 months and if so by what time frame.

- (6) makes it clear that the jury which is empanelled to determine the issue of the defendant's fitness to stand trial must not consider any other matter in relation to the proceedings for the offence with which the defendant is charged. This reinforces clause 7(3)(b) which provides that the issue of a person's fitness to stand trial is to be determined by a specially empanelled jury.

- Clause 12
- (1) provides that if the jury determines that the defendant is fit to stand trial the trial must be commenced or resumed in accordance with usual criminal procedures.
 - (2) provides that if a jury has found that the defendant is not fit to stand trial and the judge has determined that the defendant is likely to become fit pursuant to clause 11(4)(b) the judge must adjourn the matter for that period. The court may make interim orders pending a resumption of the matter.

- Clause 13
- provides that if the court has set a period of adjournment under clause 12(2) either the defendant or the Director of Public Prosecutions may apply to the court for the matter to be brought before the court before the expiration of the period of adjournment. Either party may apply for the trial to commence or resume if either party considers that the defendant has become fit to stand trial or alternatively can apply for an order that the court directly proceed to the special hearing if either party considers that the defendant will not become fit to stand trial within 12 months from the finding of unfitness.
- (2) provides that in either case an application under (1) must be accompanied by a report on the mental condition of the defendant by either a registered medical practitioner or a registered psychologist.
 - (3) provides for the orders the court may make on an application under this clause.

- Clause 14
- (1) provides that at the expiration of the adjournment under clause 12(2) the defendant is presumed to be fit to stand trial unless the issue is raised again and the trial judge considers that there is a real and substantial question as to the defendant's fitness.
 - (2) provides that if at the expiration of the adjournment the judge considers that there is a real and substantial question of the defendant's fitness to stand trial the judge must either grant another adjournment (but not so that the total period of adjournment from the

initial finding of unfitness exceeds 12 months) or proceed directly to a special hearing under Part 3 of this Bill within a period of 3 months.

- (3) provides that if the court orders that a special hearing be held it may make interim orders pending the commencement of the special hearing.
- (4) provides that at the end of the period of adjournment where the issue has not been raised again and the trial has been ordered to commence or resume it must be commenced or resumed as soon as practicable in accordance with usual criminal procedures. If the trial had not commenced it must commence within 3 months unless the court grants an extension under (5). This time frame is provided to ensure that the commencement of a person's trial is not delayed as a result of the issue of unfitness having been considered and determined.

PART 3—SPECIAL HEARINGS

Clause 15 sets out the purposes of the new procedure of a special hearing. The purpose of a special hearing is to consider the evidence in relation to the alleged offence or offences and make a finding in relation to that evidence.

- Clause 16
- (1) provides that a special hearing is to be conducted as nearly as possible as if it were a trial. The **Juries Act 1967** (without exception) applies to a special hearing as if it were a criminal inquest within the meaning of the **Juries Act 1967**.
 - (2) provides that the defendant must be taken to have pleaded not guilty to the offence and that if the defendant is legally represented the legal representative may exercise the defendant's rights to challenge jurors or the jury. It also provides that any defence available at a trial, including the defence of mental impairment, is available to the defendant at the special hearing and that the rules of evidence apply. Paragraph (f) makes it clear that any alternative verdict that would be available to a jury at a criminal trial is available to the jury at a special hearing.
 - (3) provides for the directions which the judge must give to the jury at the commencement of the special hearing. The judge must explain to the jury that the defendant has been found unfit to be tried in accordance with the usual procedures of a criminal trial, what unfitness means, why a special hearing is being held and what

findings are available to a jury and on what standard of proof the jury must make its finding.

- Clause 17 (1) sets out the specific findings available to the jury at the special hearing. The findings under (a) and (b) are findings which are available at a trial. Paragraph (c) is a new finding, the effects of which are set out in clause 18(3).
- (2) provides that the finding in clause (1)(c) is a finding which must be made beyond reasonable doubt. If the jury has a reasonable doubt that the defendant committed the offence charged and this is not due to the defendant's mental impairment at the time of the commission of the offence then it must find the defendant not guilty of the offence charged.

- Clause 18 (1) makes it clear that a finding under clause 17(1)(a) is taken for all purposes to be a finding of not guilty at a criminal trial.
- (2) provides that a finding that the defendant is not guilty because of mental impairment is taken for all purposes to be a finding of not guilty because of mental impairment at a criminal trial.
- (3) provides that a finding that the defendant committed the offence charged or an offence available as an alternative is a qualified finding of guilt and does not constitute a basis for a conviction for the offence to which the finding relates. The finding does however constitute a bar to further prosecution in respect of that same offence and does not expose the defendant to double jeopardy in relation to that offence. A finding made under clause 17(1)(c) may be appealed in the same manner as if the defendant had been convicted of the offence at a trial.
- (4) provides that where a finding under clause 17(1)(c) is made the judge must either declare that the defendant is liable to supervision under Part 5 of the Bill or order that the defendant be released unconditionally.

Note 1 in (4) is a reference to clause 23 which provides for the order that the judge must make where a finding is made under clause 17(1)(b). Note 2 refers to clause 40(2) which sets out the matter to which a court is to have regard prior to making an order for unconditional release.

- Clause 19 provides that the court may make interim orders where it has declared a defendant liable to supervision but not yet made the supervision order.

PART 4—DEFENCE OF MENTAL IMPAIRMENT

- Clause 20 (1) sets out the criteria which must be satisfied in order for a person to satisfy the defence of not guilty because of mental impairment. The criteria is a codification of the common law test provided in the M'Naughten Rules of 1843 and endorsed by the High Court in *The King v Porter* [1936] 55 CLR 182.
- (2) provides that where a person is found to be not guilty because of mental impairment at a trial or a special hearing under this Bill in either the County Court or the Supreme Court a special verdict of not guilty because of mental impairment must be returned.
- Clause 21 (1) provides that a person is presumed not to have been suffering from a mental impairment.
- (2) provides that the question of whether a person was suffering from a mental impairment at the time of the commission of the offence is a question of fact and is to be determined by a jury on the balance of probabilities.
- (3) provides that the party raising the defence of mental impairment is the party which bears the onus of rebutting the presumption.
- Clause 22 (1) provides that the question of mental impairment may be raised at any time during a trial or a special hearing by the defence or by the prosecution with leave of the court.
- (2) provides that if there is admissible evidence that raises the question of mental impairment the judge must direct the jury to consider that question and explain to the jury the findings which may be made and if the jury finds that the defendant is not guilty the jury must specify whether it is a verdict (either at a trial or under clause 17(1)(a)), or whether it is a finding of not guilty because of mental impairment (either at a trial or at a special hearing under clause 17(1)(b)).
- (3) provides that where the defence of mental impairment is raised at a committal stage the case must not be dismissed only because the defence has been raised. The issue of determining whether the defence is satisfied is left to the jury at trial.
- Clause 23 provides for the options which are available to the court where the jury has returned a verdict of not guilty because of mental impairment. In such a case the court must either declare the defendant to be liable to supervision under Part 5 of this Bill or order that the defendant is to be unconditionally released.

Note 3 refers to clause 40(2) which provides that the court cannot make an order that a person be unconditionally released unless it has considered the matters set out in the sub-clause.

Clause 24 provides that the court may make interim orders after it has declared a defendant liable to supervision but before it has made the supervision order.

Clause 25 abrogates the common law defence of insanity and provides that a jury cannot bring back a verdict of not guilty on account of insanity once this clause of this Bill has commenced.

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

- Clause 26 (1) provides that where a court has made a declaration under this Bill that a person is liable to supervision under this part the court must proceed to make a supervision order in respect of that person. Note 4 refers to Part 6 which sets out the principles on which the court is to act, the matter to which the court is to have regard and the reports which the court must obtain prior to making a supervision order.
- (2) provides that a supervision order may be either a custodial or a non-custodial supervision order.
- (5) provides that a supervision order may be appealed by either party to the proceedings as if the supervision order were a sentence.
- (6) provides that the Secretary to the Department of Human Services may appeal to the Court of Appeal against a supervision order if the Secretary considers that a different supervision order should have been made and that an appeal should be brought in the public interest.
- (7) provides that on an appeal by the Secretary to the Department of Human Services the Court of Appeal may quash the original order and make its own order.
- (8) provides that where a supervision order commits a person into custody in an appropriate place that person is deemed to be in the custody of the Secretary to the Department of Human Services. Note 5 refers to section 4 of the **Corrections Act 1986** pursuant to which a person who is in custody in a prison is deemed to be in the custody of the Secretary to the Department of Justice.

- Clause 27 (1) provides that a supervision order (whether custodial or non-custodial) is for an indefinite term.
- (2) provides that where the supervision order allows for the person to be released on conditions, the court may direct when making that order that the matter be brought back before the court for review at the end of the period to be specified by the court.
- Clause 28 (1) provides that when the court has made a supervision order it must set the nominal term which applies to that supervision order in accordance with the table contained in the clause.
- (2) provides that where the defendant was charged with multiple offences, the nominal term is to be set according to the offence that carries the longest maximum term of imprisonment for which the supervision order was imposed.
- (3) provides that for the purposes of (2) the maximum term is to be 25 years where the offence is murder or treason and in relation to any other offence for which there is no statutory maximum it is to be a period specified by the court.
- Clause 29 sets out the consequences where a person who is subject to a supervision order which is non-custodial in nature fails to comply with conditions of the supervision order.
- (1) provides that where a person has failed to comply with the supervision order the person who has the supervision of that person may apply to the court which made the supervision order for that order to be varied.
- (2) provides that the person subject to the order must be given at least 14 days notice of the hearing.
- (3) provides that where a person has failed to appear at the hearing a warrant may be issued for their arrest.
- (4) provides that on an application under this section the court must either confirm the condition of the supervision order or vary the conditions of the supervision order.
- (5) provides that if the court has varied the supervision order to a custodial supervision order the nominal term continues to run.
- Clause 30 (1) provides for an emergency power of apprehension by an appropriate person (as defined in sub-clause (6)) in respect of a person who is subject to a non-custodial supervision order where that person has

failed to comply with the conditions of the order and it is considered that the safety of the person subject to the order or of the public will be seriously endangered if the person is not apprehended.

- (2) provides that where a person is apprehended under (1) that person is to be detained in an appropriate place and treated or provided with services if necessary.
- (3) provides that where an appropriate person is seeking to exercise the power of apprehension under (1) such person may with such assistance as is required or such force as may reasonably be necessary enter the premises and use such restraint as may be reasonably necessary.
- (4) provides that a person who is apprehended under (1) may only be detained for a maximum of 48 hours unless the person is to be brought before the court for an application under clause 29(1).
- (5) provides that an application under clause 29(1) must be heard by the court as soon as possible.
- (6) defines appropriate persons.

Clause 31 (1) provides for other circumstances (apart from clause 29(1)), where an application may be made to the court for a variation or revocation of a supervision order. This makes it clear that a variation may be made in respect of any supervision order but that a supervision order cannot be revoked unless it is of a non-custodial nature at the time at which the application has been made. The persons who may apply for a variation or a revocation are:

- (a) the person subject to the order;
 - (b) the person having the custody, care, control or supervision or that persons;
 - (c) the Director of Public Prosecutions.
- (2) provides that where the application has been made by the person subject to the supervision order and the application is not granted, that person cannot bring another application before the court before the expiration of 3 years, or such lesser period as the court specifies.
 - (3) provides that the applicant must give notice of the application at least 14 days prior to the hearing to the following persons if appropriate: the person subject to the order, a family member of the person subject to the order and the Director of Public Prosecutions.

- (4) provides that when a court receives an application under this section, the court must give notice of the application at least 14 days prior to the hearing to the victims. This sub-clause does not apply to an application made under clause 29(1).
- (5) provides that notice need not be given to a family member or victim whose whereabouts have not been ascertained after reasonable inquiries have been made.

- Clause 32
- (1) provides that when an application is made under clause 31 for variation of a custodial supervision order the court must either confirm that the order is a custodial supervision order or vary the order to a non-custodial supervision order or vary the place of custody.
 - (2) provides that a supervision order which is custodial must not be varied to a non-custodial order unless the court is satisfied that the person subject to the order or members of the public will not be seriously endangered as a result of that variation.
 - (3) provides that in the case of a forensic patient or a forensic resident (that, is persons who are subject to a supervision order in an appropriate place) the court must not convert a custodial supervision order to a non-custodial supervision order unless the forensic patient or forensic resident has completed a period of at least 12 months extended leave, granted by the court under clause 57. Paragraph (b) provides that the court may take into account whether or not the forensic patient or forensic resident has complied with any conditions of their extended leave.
 - (4) provides that a variation of the supervision order from custodial to non-custodial does not affect the continuation of the nominal terms.
 - (5) provides that clause 27(2) applies when a supervision order has been varied from custodial to non-custodial.

Clause 33 deals with the situation where an application is made for variation or revocation of a non-custodial supervision order or on a review directed to be held by the court pursuant to clause 27(2). On the hearing of such applications the court must either confirm the existing order, vary the existing order, or revoke the order.

Clause 34 provides that an order made on an application for variation or revocation is subject to appeal in the same manner as the original supervision order. Note 7

refers back to clause 26(5) which provides that a supervision order is subject to appeal in the same manner as the sentence.

- Clause 35 (1) provides that where a supervision order is still in existence at least 3 months before the end of the nominal term set under clause 28 the court that made the order must undertake a major review of that order.
- (2) provides that the purpose of this review is to determine whether the person who is subject to the supervision order is able to be released from it.
- (3) provides that if the supervision order is a custodial supervision order at the time of the major review the court must convert it to a non-custodial supervision order unless it is satisfied that the person or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order. Paragraph (b) provides that if at the time of the major review the supervision order is a non-custodial supervision order the court may either confirm the order, vary the order, or revoke the order.

- Clause 36 (1) provides that, at any hearing in which a court is considering making, varying or revoking a supervision order the person who is, or is to be, subject to the order has the right to appear before the court in person.
- (2) provides that where the person does not appear the court must satisfy itself that the person has been informed of their right to appear.
- (3) provides that the person may be legally represented.
- (4) provides that if the court is satisfied that the person's appearance before the court would be detrimental to their health, the court may order that the person not appear.
- (5) provides that where the person is in custody the court may order that the person in charge of the place of custody brings the person before the court for the purposes of the hearing.
- (6) provides that section 360A of the **Crimes Act 1958** applies to a hearing referred to in (1) as if that hearing were a criminal trial.
- (7) provides that nothing in Part IIA of the **Evidence Act 1958** (inserted by the **Evidence (Audio Visual and Audio Linking) Act 1997**) applies to a hearing referred to in (1).

- Clause 37 (1) provides that at a hearing referred to in clause 36 the State or the Director of Public Prosecutions or both are entitled to appear if either

considers that they have a legitimate interest in the matter and the court may allow any other person who has a substantial interest in the matter to appear and be legally represented with leave of the court.

- (2) provides that where a person is entitled or allowed to appear under (1), that person is to be a party to the matter.

Clause 38 provides that at a hearing for an application for variation or revocation or at a major review the court is not bound by the rules of evidence.

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

Clause 39 sets out the overriding principle which the court must apply when considering whether to make, vary or revoke a supervision order or whether to remand a person in custody under this Bill.

Clause 40 (1) sets out the matters to which the court must have regard in deciding whether or not to make, vary or revoke an order under Parts 3, 4 or 5 of this Bill.

- (2) provides that a court cannot order that a person be unconditionally released or have their degree of supervision significantly reduced unless it has followed the procedure in paragraphs (a)–(e) inclusive.

- (3) provides that notice need not be given under (2)(c) where that person's whereabouts have not been ascertained after reasonable enquiries have been made.

Clause 41 (1) provides that where a court has declared a person to be liable to a supervision order under Part 5, the appropriate person as defined in sub-clause (4) must arrange for a report on the person's mental condition to be prepared and filed with the court. This provision puts an obligation on the appropriate person to prepare this report in circumstances where the court cannot make a supervision order without first having obtained the report.

- (2) provides that the report must be filed within 30 days after the court makes the declaration or within such longer period as the court has allowed.

- (3) provides that the appropriate person must also arrange for reports to be prepared and filed with the court at intervals of not more than 12 months, outlining any treatment, therapy, counselling, or services that the person has received since the making of the order in the first

instance or since the last report, and any changes to the person's condition or behavioural problems and plans for managing such conditions or problems.

(4) defines appropriate persons.

Clause 42 (1) provides that a family member of the person subject to the supervision order or any victim of the offence may make a report to the court for specified purposes.

(2) provides that where the report is made by a family member the report must deal with the views of that family member on the conduct of the person who is or will be subject to the supervision order and the impact of that conduct on the family member.

(3) provides that the report by the victim is to contain particulars of any injuries, loss or damage suffered by the victim as a direct result of the alleged offence.

(4) provides that where a family member or victim is under the age of 18 or is incapable of making a report because of mental impairment or other reason a report may be made by another person on behalf of that family member or victim.

Clause 43 (1) provides that where a report is made by a family member of a victim the report may be made to the court before it makes an order under Part 3, 4 or 5 or wherever an application is made for variation or revocation, or on a major review.

(2) provides that such report may be made in writing as a statutory declaration or in writing and orally by sworn evidence at the hearing.

Clause 44 provides that where a person makes a report under clause 42, the person must file a copy with the court and provide a copy to the person who is or is to be subject to the order or to his or her legal practitioner.

Clause 45 (1) provides that the court may rule as admissible the whole or any part of a report made under clause 42.

(2) provides that reports made under clause 42 are not admissible in any other civil or criminal proceedings except in relation to prosecution for perjury or interference with the due administration of justice or unless the person who made the report consents to it being admissible.

- (3) provides the exception to (2) where the court, tribunal or person acting judicially is satisfied on an application of a party to the proceedings that it is in the interests of justice that the report be admissible.
- Clause 46
- (1) provides that the court may, at the request of any party to the proceedings, call upon any person who has made a report under clause 42 to give evidence in a proceeding under this Act.
 - (2) provides that in such circumstances the person who gives evidence in (1) may be cross-examined and re-examined.
- Clause 47
- (1) provides that in certain circumstances the court must request the Secretary to the Department of Human Services to provide the court with the certificate of available services. The certificate must be obtained if the court is considering imposing either a supervision order or another order under this Bill, for example, a remand order, placing a person in custody in an appropriate place or ordering that the person otherwise receive treatment in, or services from, an appropriate place, a contracted service provider or the Secretary to the Department of Human Services.
 - (2) provides that the certificate under (1) must state whether or not there are facilities or services available for the custody, care or treatment of the person and if so, what those facilities or services are.
 - (3) provides that if there are no facilities or services available the certificate may contain details of any other options the Secretary considers appropriate for the court to consider.
 - (4) provides that the Secretary must provide the certificate within 7 days of being so requested by the court or such longer period as the court provides.
 - (5) provides that if the court is not satisfied with the contents of the certificate, it may require further evidence to be called from, or submissions made on behalf of, the Secretary to the Department of Human Services.

PART 7—LEAVE OF ABSENCE

Division 1—Leave of Absence

- Clause 48 provides that this Division dealing with leave of absence only applies in relation to forensic patients and forensic residents who are subject to a

supervision order. The Division does not apply to forensic patients or forensic residents who are remanded in custody in an approved mental health service or in a residential service.

Clause 49 provides for the 4 types of leave which may be granted to a forensic patient or a forensic resident. These types of leave are: special leave of absence, on-ground leave, limited off-ground leave, and extended leave.

- Clause 50 (1) provides that a forensic patient or forensic resident may apply for special leave of absence. In applying for such leave of absence the applicant must specify the special circumstances which justify the application.
- (2) provides that in the case of forensic patients the application is to be to the authorised psychiatrist and in the case of forensic residents is to be made to the Secretary to the Department of Human Services.
- (3) provides the circumstances in which special leave of absence must be granted. The criteria are that there are special circumstances and that the safety of members of the public will not be seriously endangered.
- (4) provides a right of appeal to the Forensic Leave Panel if an application for special leave is refused.
- (5) provides that the Panel may either confirm the decision to refuse leave or allow special leave.
- (6) provides that special leave of absence cannot exceed 24 hours and may be subject to such conditions as the authority granting leave considers appropriate.

Clause 51 defines on-ground leave.

Clause 52 provides that the surrounds is an area to be declared by the Governor in Council by notice published in the Government Gazette.

Clause 53 defines limited off-ground leave.

- Clause 54 (1) provides that a forensic patient or a forensic resident may apply to the Forensic Leave Panel for on-ground leave or limited off-ground leave.
- (2) provides that the Panel must be satisfied that the safety of the applicant or members of the public will not be seriously endangered as a result of the applicant allowed on-ground leave or limited off-ground leave.
- (3) provides that the Panel may impose any conditions on such leave.

- (4) provides that on-ground leave or limited off-ground leave may be granted for a period of up to 6 months.
 - (5) provides that a person may apply for and be granted on-ground leave and limited off-ground leave more than once. This allows for a high degree of flexibility in that if previous applications have been refused by the panel, the person is not prevented from applying again.
- Clause 55
- (1) provides that special leave of absence, on-ground leave or limited off-ground leave may be suspended at any time by the chief psychiatrist or the Secretary to the Department of Human Services if the safety of the person on leave or members of the public will be seriously endangered if leave is not suspended. This power is an emergency power of suspension.
 - (2) provides that if leave is suspended this must be confirmed in writing to the person in respect of whom the leave was suspended.
 - (3) provides that the suspension must be lifted as soon as the reason for the suspension no longer exists.
 - (4) provides that where the suspension is imposed or lifted notice must be given of this in writing to the person or body that granted the leave.
 - (5) provides that a person whose leave is suspended under this section is deemed not to have leave of absence during the period of suspension.
- Clause 56 defines extended leave. Extended leave can only be granted by the court which made the original supervision order. Extended leave cannot be granted by the Forensic Leave Panel.
- Clause 57
- (1) provides that a forensic patient or a forensic resident may apply to the court which made the supervision order for extended leave.
 - (2) provides that the court must not grant an application under (1) unless it is satisfied that the safety of the applicant or members of the public will not be seriously endangered as a result of such leave being granted.
 - (3) provides that in considering an application for extended leave the court must have regard to any proposed plan of leave submitted to the court by the authorised psychiatrist or the Secretary to the Department of Human Services as appropriate. This allows for long term thinking to be taken into account in determining the length and conditions applicable to any extended leave granted.

- (4) provides that an application may be made for extended leave more than once.

Clause 58 provides for a power for the chief psychiatrist or the Secretary to the Department of Human Services as appropriate to suspend extended leave. This provision is the corollary of that provided in clause 55 in relation to special leave, on-ground leave or limited off-ground leave. Again such suspension must be confirmed in writing to the person formerly on leave. (2)(b) provides that this suspension can only operate for a maximum of 48 hours unless an application is made to the court for revocation of the leave.

- (3) provides that an application referred to in 2(b)(i) must be heard by the court as soon as possible.
- (4) provides that the court may either revoke the leave or lift the suspension.
- (5) provides that if the chief psychiatrist or Secretary is satisfied that the reason for suspension no longer lifts, the suspension must be lifted immediately. This is the mechanism for the suspension to be lifted prior to the expiration of the 48 hours.

Division 2—Forensic Leave Panel

Clause 59 establishes the Forensic Leave Panel.

- (2) provides that the persons listed in paragraphs (a)–(d) inclusive are to be the permanent members of the Panel. The issue of which members of the Panel are to sit on any particular hearing is dealt with in Schedule 2.
- (3) provides that Schedule 1 has effect with respect to members of the Panel. Schedule 1 deals with appointment of members.

(4) and (5) provide who is to be President of the Panel.

Clause 60 sets out the functions of the Panel.

Clause 61 provides that any officers and employees that are necessary for the purposes of the Panel may be appointed or employed.

Clause 62 is a secrecy provision.

Clause 63 requires the Panel to submit an annual report to the Minister, which is to be tabled in Parliament.

Division 3—Procedure of Panel

Clause 64 provides the procedure of the Panel.

- (1) provides that the Panel must act according to equity and good conscience without regard to technicalities or legal forms, is bound by the rules of natural justice, but is not required to conduct any proceedings in a formal manner.
- (2) provides that Schedule 2, which provides for the provisions with respect to the procedure of the Panel, has effect.

Clause 65 provides for the manner in which evidence may be put before the Panel.

Clause 66 provides that the Panel must give reasons for any decisions it makes and if requested by the applicant must put such reasons in writing. The Panel must provide reasons where it rejects an application for leave.

Clause 67 allows for the Panel to appoint specified persons to assist it in any proceeding before it.

Clause 68 specifies the procedures which must be followed in terms of notice of a hearing before the Panel.

Clause 69 provides that if the procedures specified in clause 68 are not followed, a hearing or determination of the Panel is not invalidated or affected by reason only of that failure (except where the applicant for leave is not notified of a hearing).

- Clause 70
- (1) provides that the applicant for leave is entitled to appear in person before the Panel and that person may be legally represented by a legal practitioner or any other person authorised by the applicant.
 - (2) provides that if the applicant does not appear at the hearing the Panel must satisfy itself that the applicant has chosen not to appear.
 - (3) provides for other persons who may be entitled or permitted to appear before the Panel.

Clause 71 (1) provides that, as a general rule, proceedings before the Panel are to be closed to members of the public.

- (2) provides the exception to the general rule in that a particular proceeding or part of a proceeding of the Panel is to be open to the public if the Panel is satisfied that it would be in the best interest of the applicant for leave or in the public interest.

Clause 72 (1) provides an immunity for members or acting members of the Panel in the exercise of their quasi judicial functions.

- (2) provides that a legal practitioner or person appearing before the Panel on behalf of a party has the same protection as a legal practitioner would have who is appearing for a party in a proceedings in the Supreme Court.

- (3) provides that a person summoned to attend or who appears before the Panel as a witness has the same protection and is subject to the same liabilities as a witness in proceedings in the Supreme Court.

Clause 73 sets out the matters which would constitute a contempt of the Panel. An offence under this Part is a summary offence to be prosecuted in the Magistrates' Court.

PART 8—GENERAL

Clause 74 provides that where notice is required to be given to either a family member or a victim under this Bill, such notice must be given by registered post.

Clause 75 provides the power for a court to make a suppression order in relation to proceedings before a court under this Bill.

- (3) provides that it is an offence to breach an order made under this section.

Clause 76 (2) provides that evidence given during a hearing as defined in (1) or documents prepared solely for the purpose of an application to the court or the Panel are not admissible in any civil or criminal proceedings except in certain specified circumstances.

- (3) provides that a court, tribunal or person acting judicially may rule as admissible in any proceeding before them not being a proceeding under this Bill, any document prepared for the purpose of an application to the court or Panel where application is made by a party to the proceeding before them and the court, tribunal or person acting judicially is satisfied that it is in the interest of justice to do so.

Clause 77 provides that the Secretary to the Department of Human Services may delegate to a person employed or engaged in the administration of the **Intellectually Disabled Persons' Services Act 1986**, any power, duty or function of the Secretary under this Bill other than this power of delegation.

Clause 78 (1) provides that a court does not have jurisdictional power to order that a person be kept in strict custody until the Governor's pleasure is known.

(2) provides that the Governor does not have the authority to make an order directing that a person be kept in strict custody during the Governor's pleasure. This clause is the corollary to the repeal of sections 393 and 420 of the **Crimes Act 1958** as provided in clause 82.

Clause 79 is inserted in accordance with section 85 of the **Constitution Act 1975** and provides that it is the intention of clause 78(1) to alter or vary the jurisdiction of the Supreme Court by removing the power to order that a person be kept in strict custody until the Governor's Pleasure is known.

Clause 80 is a regulation-making power.

PART 9—AMENDMENT OF OTHER ACTS

Clause 81 makes consequential amendments to the **Corrections Act 1986**. It repeals section 72(3) and (6) and 79 of the Corrections Act which deal with the powers of the Adult Parole Board in respect of Governor's Pleasure orders.

Clause 82 makes consequential amendments to the **Crimes Act 1958**.

Clause 83 makes consequential amendments to the **Intellectually Disabled Persons' Services Act 1986**.

Clause 84 inserts a new section 21A into the **Intellectually Disabled Persons' Services Act 1986** to provide for persons who are the subject of a supervision order under this Bill and have been ordered to be placed in custody in a prison. The new section 21A allows for such persons to be subsequently transferred to a residential service as a forensic resident.

Clause 85 inserts a new Division 2A of Part 5 of the **Intellectually Disabled Persons' Services Act 1986**. These sections give forensic residents a status under the **Intellectually Disabled Persons' Services Act 1986**.

Clause 86 makes consequential amendments to the **Mental Health Act 1986**. It inserts a definition of "forensic patient", includes a forensic patient within the definition of "patient" and removes references in the definition of security patient to persons detained at the Governor's Pleasure. It also makes minor consequential amendments to sections 5, 16 and 30.

Clause 87 inserts a new Division 4 of Part 3 of the **Mental Health Act 1986**. The new section 17 of the **Mental Health Act** provides that a person who was originally detained in a prison pursuant to a supervision order made under this Bill may be subsequently transferred to an approved mental health service as a forensic patient.

Clause 88 Inserts a new Division 5 of Part 4 of the **Mental Health Act 1986**.

PART 10—SAVINGS AND TRANSITIONAL PROVISIONS

Clause 89 provides that the transitional provisions are contained in Schedule 3 of the Bill.

SCHEDULES

Schedule 1—Provisions with respect to members of the Panel

Clause 1 provides that judicial members of the Panel are to be appointed by the Governor in Council for 5 year terms at the expiration of which they are eligible for reappointment. Judicial members are not subject to the provisions of the **Public Sector Management Act 1992**.

Clause 2 provides for the appointment of other members of the Panel excluding the chief psychiatrist who is appointed under the **Mental Health Act 1986**.

Clause 3 provides for acting members to be appointed to the Panel.

Clause 4 provides that a judicial member ceases to hold office as a member of the Panel only upon ceasing to hold the office of judge.

Clause 5 provides for the general provisions applying to the members in terms of the terms and conditions of appointment, the removal or suspension of members other than judicial members or the chief psychiatrist, that resignation may be made in writing by the member and delivered to the Governor in Council.

Schedule 2—Provisions with respect to the Procedure of the Panel

- Clause 1 provides for the constitution of the Panel for each particular hearing. The chief psychiatrist is only to sit on the Panel in respect of applications for leave by a forensic patient. (2) provides that a member of the Panel who has primary responsibility for the treatment or supervision of the applicant for leave must not be a member of the Panel for the purposes of the hearing for that application for leave.
- Clause 2 provides for the procedures of the Panel.
- (1) provides that any matter arriving for determination by the Panel is to be determined on a majority basis and if the Panel is evenly divided the chairperson's opinion prevails.
 - (2) provides that an act or decision of the Panel is not invalidated only because of a defect or irregularity or because an acting member was inappropriately sitting on the Panel.
 - (3) provides that the procedure of the Panel in respect of its day to day functioning are to be in its discretion.
- Clause 3 deals with determinations of questions of law.
- Clause 4 provides that the President in consultation with other members may give directions as to the arrangements of the business of the Panel and the procedures of the Panel.
- Clause 5 provides for the Panel to sit at such times as the President determines and at the place where the applicant for leave is detained unless the President determines otherwise.
- (2) provides that the President may determine that there be a special sitting of the Panel in the case of an emergency situation.
- Clause 6 provides for procedural powers of the Panel.
- Clause 7 deals with written reasons of the Panel.
- Clause 8 provides for the Panel to amend any determination made by it for the purpose of correcting a mistake.

Schedule 3—Savings and Transitional Provisions

- Clause 1 contains definitions used in Schedule 3.

- Clause 2 (1) provides that an existing detainee as defined in clause 1 is, at the commencement of this Bill, deemed to be subject to a custodial supervision order under this Bill.
- (2) provides that a nominal term in accordance with clause 28 of this Bill is deemed to apply to the custodial supervision order applicable to each existing detainee under (1).
- (3) provides that if an offence referred to in (2) no longer exists, the nominal term is to be set by reference to an offence with which the existing detainee could have been charged had it existed at the time of the original charge.
- (4) provides that the nominal term is deemed to run from the day on which the existing detainee was made subject to a Governor's pleasure order pursuant to sections 393 or 420 of the **Crimes Act 1958**.
- (5) provides that if the nominal term has expired at the commencement of this Act a major review must be held within 3 months after the commencement day.
- Clause 3 provides that existing detainees who are on leave are deemed to be on the type of leave which correlates to that which could be granted under this Bill. Such leave exists for the period specified in the original grant of leave but not so that the leave exceeds a period of 6 months after the commencement day.
- Clause 4 (1) provides that an existing detainee who has been on leave which corresponds to extended leave under this Bill for a period of at least 12 months may apply to the court for a revocation of their supervision order.
- Clause 5 provides that any conditions imposed by section 498 of the **Crimes Act 1958** continue in force.
- Clause 6 provides that the procedures provided in Part 2 of this Bill in relation to an investigation into a person's fitness apply in respect of an offence that is alleged to have been committed whether before, on, or after the commencement day. If a finding of unfitness had been made in a trial prior to the commencement of this Bill but no order as to the person's detention had been made, this Bill applies in respect of the requirement to hold a special hearing and in relation to the dispositional options which are available under this Bill.

Clause 7 is a transitional provision in relation to the defence of insanity which existed prior to the commencement of this Bill.

- (1) provides that despite clause 25 the defence of insanity continues to apply with respect to any offence alleged to have been committed before the commencement day.
- (2) provides that if a jury has returned a verdict of not guilty on the grounds of insanity in relation to an offence allegedly committed before the commencement day, that verdict is taken for all purposes to be a finding of not guilty because of mental impairment under Part 4 of this Bill.