TASMANIA

CRIMINAL JUSTICE (MENTAL IMPAIRMENT) ACT 1999

No. 21 of 1999

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CRIMINAL JUSTICE (MENTAL IMPAIRMENT) ACT 1999

No. 21 of 1999

An Act to provide for procedures for dealing with persons who are unfit to stand trial or who are not guilty of offences owing to insanity and to amend the *Criminal Code* and the *Sentencing Act 1997*

[Royal Assent 14 May 1999]

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Criminal Justice (Mental Impairment) Act 1999*.

2. Commencement

The provisions of this Act commence on a day or days to be proclaimed.

3. Interpretation

In this Act, unless the contrary intention appears –

approved hospital has the same meaning as in the *Mental Health Act 2013*;

authorised person means a person authorised by the Chief Psychiatrist to exercise the powers of an authorised person under this Act;

Chief Psychiatrist has the same meaning as in the *Mental Health Act 2013*;

controlling authority has the same meaning as in the *Mental Health Act 2013*;

Director means the Director of Corrective Services;

forensic order means a restriction order or supervision order;

immediate family, in relation to a deceased victim, includes –

(a) the spouse of the deceased victim; and

(b) a parent, guardian or step-parent of the deceased victim; and

(c) a child or stepchild of the deceased victim; and

(d) a brother, sister, stepbrother or stepsister of the deceased victim;

next of kin of a person means a person's spouse, parents, children, any other person who is the primary carer of the person, a person who is in a caring relationship, within the meaning of the *Relationships Act 2003*, with the person or any other class of person prescribed by the regulations as the next of kin of a person;

psychiatrist means a medical practitioner who –

(a) is a Fellow of the Royal Australian and New Zealand College of Psychiatrists; or

(b) holds specialist registration in the speciality of psychiatry; or

(c) holds limited registration which enables the person to practise the speciality of psychiatry;

regulations means regulations made and in force under this Act;

restriction order has the meaning given by section 24;

secure mental health unit has the same meaning as in the *Mental Health Act 2013*;

spouse, in relation to a person, includes the person who is in a significant relationship, within the meaning of the *Relationships Act 2003*, with that person;

supervision order has the meaning given by section 29A;

treatment order has the same meaning as in the *Mental Health Act 2013*;

Tribunal means the Tasmanian Civil and Administrative Tribunal;

victim, in relation to an offence or conduct that would, but for the fact that the perpetrator has been found not guilty of the offence by reason of insanity or the fact that a finding to that effect has been made, have constituted an offence, means a person who has suffered significant mental or physical injury as a direct consequence of the offence or conduct and includes the immediate family of a deceased victim.

4. Application of Act

(1) This Act applies to all courts.

(2) The application of this Act extends to a restriction order and a supervision order made under the *Sentencing Act 1997*.

5. Questions of fact

For the purposes of this Act, the question whether a person is unfit to stand trial on a charge of an offence is a question of fact.

6 - 7. . . . . .

PART 2 – UNFITNESS TO STAND TRIAL

8. Unfitness 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 or for any other reason, the person is –

(a) unable to understand the nature of the charge; or

(b) unable to plead to the charge or to exercise the right of challenge; or

(c) unable to understand the nature of the proceedings; or

(d) unable to follow the course of the proceedings; or

(e) unable to make a defence or answer the charge.

(2) Notwithstanding subsection (1)(e), a person is not unfit to be tried if the only reason that the person is unable to make a defence or answer a charge is that he or she is suffering from memory loss.

9. Presumption of fitness to stand trial and standard of proof

(1) A person's fitness to stand trial is to be presumed unless it is established, on an

investigation under this Part, that the person is unfit to stand trial.

(2) The question of a person's unfitness to stand trial is to be determined on the balance of probabilities.

10. Reservation of question of fitness to stand trial

(1) A court before which a person is charged with an offence may, on the application of the prosecutor, the defendant or on its own initiative, reserve the question of the defendant's fitness to stand trial for investigation under this Part.

(2) If, at preliminary proceedings for an indictable offence, the question of a defendant's fitness to stand trial arises –

(a) the question is to be reserved for determination by the Supreme Court; and

(b) after the question is so determined –

(i) the preliminary proceedings are to be completed in accordance with the relevant criminal procedures; and

(ii) if appropriate, the Supreme Court may return the preliminary proceedings to the relevant court for completion.

(3) If, after a trial begins, the court of trial decides that the question of the defendant's fitness to stand trial should be investigated, the court may

adjourn or discontinue the trial and proceed, subject to this Part, with the investigation.

(4) Nothing in this section prevents the question of a defendant's fitness to stand trial from being raised more than once in the same proceedings.

(5) A court must not conduct an investigation into a defendant's fitness to stand trial unless it appears to the court that there is a real and substantial question as to his or her fitness to stand trial.

11. Procedure on investigation

(1) On an investigation into a defendant's fitness to stand trial, a court –

(a) must hear any relevant admissible and probative evidence and representations put to the court by the prosecutor or the defendant; and

(b) may call evidence on its own initiative; and

(c) may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court.

(2) At an investigation, the defendant is entitled to be legally represented.

12. Investigation by Supreme Court into fitness to stand trial

(1) In the case of proceedings in the Supreme Court, the question whether a defendant is fit to stand trial must be determined by a jury.

(2) The application of the *Juries Act 2003* extends to the constitution and proceedings of a jury for the purposes of this section.

(3) Each juror chosen under this section must –

(a) take an oath in the form specified in Part 1 of Schedule 1; or

(b) make an affirmation in the form specified in Part 2 of Schedule 1.

(4) If a jury determines that the defendant is unfit to stand trial, it must also determine whether or not the defendant is likely to become fit to stand trial during the next 12 months.

13. Finding that defendant is not unfit to stand trial

(1) If an investigation is completed before a jury is empanelled for the purposes of a trial and the court does not find that the defendant is unfit to stand trial, the court must call on the defendant to plead to the charge and, if he or she does not do so, must enter a plea of not guilty.

(2) If an investigation is completed after a jury is empanelled for the purposes of a trial and the court does not find that the defendant is unfit to stand trial, the court must resume the

proceedings in accordance with appropriate criminal procedures.

14. Finding that defendant is not fit to stand trial

(1) If, on an investigation, a court finds that the defendant is unfit to stand trial or records a finding to that effect under section 19, the court must determine whether or not the defendant is likely to become fit to stand trial during the next 12 months.

(2) If the court determines that the defendant is likely to become fit to stand trial during the next 12 months, the court must adjourn the proceedings for a period not exceeding 12 months and discharge any jury empanelled for the purposes of the trial.

(3) If, after the adjournment, the court is of the opinion that the grounds on which the investigation was thought to be necessary no longer exist, the court may decide not to proceed with the investigation.

(4) Where the court decides not to proceed with the investigation, the court must call on the defendant to plead to the charge and, if he or she does not do so, must enter a plea of not guilty.

(5) In the case of a trial in the Supreme Court, a decision under subsection (3) is to be made without further proceedings before a jury.

15. Special hearings

(1) A court must proceed to hold a special hearing if –

(a) the court determines that the defendant is not likely to become fit to stand trial within 12 months; or

(b) the defendant does not become fit to stand trial within 12 months after the determination referred to in section 14(2).

(2) The purpose of the special hearing is to determine whether, despite the unfitness of the defendant to stand trial, on the limited evidence available the defendant is not guilty of the offence.

(3) In the case of proceedings in the Supreme Court, the question whether a defendant is not guilty of the offence must be determined by a jury.

(4) The application of the *Juries Act 2003* extends to the constitution and proceedings of a jury for the purposes of this section.

16. Procedures at special hearings

(1) A special hearing is to be conducted so that the onus of proof and standard of proof are the same as in a trial of criminal proceedings and in other respects as nearly as possible as if it were a trial of criminal proceedings.

(2) The fact that the person has been found to be unfit to stand trial is taken not to be an impediment to his or her representation.

(3) Without limiting the generality of subsection (1), at a special hearing –

(a) the defendant is taken to have pleaded not guilty to the offence; and

(b) the defendant's legal representative may exercise the defendant's rights to challenge jurors or the jury; and

(c) the defendant may raise any defence that could be properly raised as if the special hearing were an ordinary trial of criminal proceedings; and

(d) the defendant is entitled to give evidence.

17. Findings at special hearings

The following findings are available to a court at a special hearing:

(a) not guilty of the offence charged or of any offence available as an alternative;

(b) . . . . . .

(c) not guilty of the offence charged on the ground of insanity or a finding to the same effect;

(d) a finding cannot be made that the defendant is not guilty of the offence

charged or any offence available as an alternative.

18. Effect of findings

(1) A defendant who is found not guilty of an offence at a special hearing is taken to have been found not guilty at an ordinary trial of criminal proceedings.

(2) If a defendant is found not guilty of the offence charged on the ground of insanity or on a finding being made to that effect, or a finding cannot be made that the defendant is not guilty of an offence, the court is to –

(a) make a restriction order; or

(b) release the defendant and make a supervision order; or

(c) make a treatment order; or

(d) . . . . . .

(e) release the defendant on such conditions as the court considers appropriate; or

(f) release the defendant unconditionally.

(3) Despite subsection (2), only the Supreme Court may make a restriction order or supervision order under that subsection.

(4) A treatment order made under subsection (2)(c), whether before or after the commencement of the *Crimes (Miscellaneous Amendments) Act*

2016, is taken to have been made under Division 2 of Part 3 of Chapter 2 of the *Mental Health Act 2013*.

19. When investigation into fitness during trial may be dispensed with

A court may, if the prosecutor and defendant agree, dispense with or terminate an investigation into the defendant's fitness to stand trial and –

(a) record a finding that the defendant is unfit to stand trial; or

(b) proceed under section 13 as if, after the investigation, the court had made a finding that the defendant is not unfit to stand trial.

20. Same jury to determine all issues

Unless a judge otherwise orders, the same jury may be empanelled for the purposes of –

(a) an investigation under section 12 as to whether or not a defendant is fit to stand trial; and

(b) a special hearing under section 15 as to whether the defendant is not guilty of an offence with which he or she is charged; and

(c) the trial for the offence with which the defendant is charged.

PART 3 – DEFENCE OF INSANITY

21. Procedure for dealing with persons found not guilty by reason of insanity

(1) On a verdict that a person is not guilty of an offence on the ground of insanity or on a finding being made to that effect, the court is to –

(a) make a restriction order; or

(b) release the defendant and make a supervision order; or

(c) make a treatment order; or

(d) . . . . . .

(e) release the defendant on such conditions as the court considers appropriate; or

(f) release the defendant unconditionally.

(2) Despite subsection (1), only the Supreme Court may make a restriction order or supervision order under that subsection.

(3) A treatment order made under subsection (1)(c), whether before or after the commencement of the *Crimes (Miscellaneous Amendments) Act 2016*, is taken to have been made under Division 2 of Part 3 of Chapter 2 of the *Mental Health Act 2013*.

PART 3A – BREACH OF CONDITIONS ON RELEASE

21A. Breach of conditions on release

(1) If it appears that a person (***the defendant***) has breached the conditions on his or her release imposed under section 18(2)(e) or section 21(1)(e), an application may be made to the court, which imposed the conditions, for an order under this section.

(2) An application under subsection (1) may be made by any of the following:

(a) an authorised person;

(b) a police officer;

(c) a prosecutor;

(d) a probation officer, within the meaning of the *Corrections Act 1997*;

(e) the Chief Psychiatrist.

(3) A person making an application under subsection (1) must give notice of the application to the defendant.

(4) The court may issue a warrant for the arrest of the defendant if –

(a) the defendant fails to appear at the hearing of the application; or

(b) the court is satisfied that reasonable efforts to give the defendant notice of the

application have been made but those efforts have been unsuccessful.

(5) If a court finds a defendant guilty of an offence punishable by imprisonment committed while the defendant was on release subject to conditions imposed under section 18(2)(e) or section 21(1)(e) (in this section called the ***new offence***), a person referred to in subsection (2) –

(a) may make an oral application to the court, while the defendant is before the court in relation to the new offence, for an order under this section; and

(b) is to provide the defendant in writing with the grounds for the oral application, if directed to do so by the court.

(6) If an application is made under subsection (5) to a court that is not the court that imposed the conditions on the defendant, the court hearing the application may do either of the following:

(a) deal with the application under this section;

(b) adjourn the application to the court that imposed the conditions and either grant the defendant bail or remand the defendant in custody.

(7) If, on the hearing of an application under this section, the court is satisfied that the defendant has breached the conditions on his or her release, it may –

(a) confirm the conditions as originally imposed; or

(b) impose new conditions on the defendant; or

(c) revoke the order imposing the conditions and deal with the defendant for the offence or offences in respect of which the order was made in any manner in which the court could deal with the defendant under section 18(2) or section 21(1), as the case may be.

(8) In determining how to deal with a defendant who is found to have breached the conditions of his or her release under this section, the court must take into account the extent to which the defendant had complied with the conditions before committing the breach.

PART 4 – PERSONS LIABLE TO FORENSIC ORDERS AND TREATMENT ORDERS

Division 1 – Interpretation

22. Interpretation: Part 4

In this Part,

defendant includes a person who is subject to a forensic order or treatment order.

Division 2 – . . . . . .

23**.** . . . . . .

Division 3 – Restriction orders

24. Restriction orders

A restriction order is an order requiring the person to whom it applies to be admitted to and detained in a secure mental health unit until the order is discharged by the Supreme Court.

25**.** . . . . . .

26. Discharge of restriction orders

(1) A defendant subject to a restriction order, the Secretary of the responsible Department in relation to the *Mental Health Act 2013* or the

Chief Psychiatrist may apply to the Supreme Court for discharge of the restriction order if –

(a) the first such application is not less than 2 years after the order was made; and

(b) each subsequent application is made not less than 2 years after the preceding application.

(2) The Supreme Court may, on an application under this section or section 37(3)(b), discharge a restriction order.

(3) For the purposes of a hearing by the Supreme Court for discharge of a restriction order –

(a) an application is to be in writing with a copy served on the Director of Public Prosecutions and, if the defendant is not the applicant, on the defendant; and

(b) the Director of Public Prosecutions or counsel representing the Director of Public Prosecutions must appear for the Crown at the hearing of the application; and

(c) the defendant may be present at the hearing of the application unless the Court makes an order to the contrary; and

(d) the applicant and the Director of Public Prosecutions may call evidence in support of, or in opposition to, the application; and

(e) if either party causes a report to be prepared relating to the application and intends to tender the report as evidence, that party must provide the other party with a copy of the report; and

(f) if either party puts any such report in evidence –

(i) the other party is entitled to cross-examine the person who made the report; and

(ii) the party that put the report in evidence may, after any such cross-examination, examine the person making the report by way of reply; and

(g) the Court may order the Chief Psychiatrist or any other person or body to prepare and submit to the Court a report in respect of such matters relating to the defendant as the Court may specify.

(4) A copy of a report prepared under subsection (3)(g) is to be provided to the applicant, the defendant and the Director of Public Prosecutions.

27. Powers of Supreme Court on discharge of restriction order

If the Supreme Court discharges a restriction order, it may make any other order in respect of

the defendant that it could have made under section 18(2) or 21.

28. . . . . .

Division 4 – Subsequent trial of person found unfit to stand trial

29. Subsequent fitness for trial of person subject to treatment order or forensic order

(1) If –

(a) a defendant has been found unfit to stand trial and a court has made an order under section 18(2) in respect of the defendant; and

(b) the Chief Psychiatrist is satisfied that the defendant has become fit to stand trial –

the Chief Psychiatrist must inform the Attorney-General, in writing, of that fact.

(2) . . . . . .

(3) On receiving a notification under subsection (1), the Attorney-General must, after consulting with the Director of Public Prosecutions –

(a) request the court before which the defendant was found to be unfit to stand trial to resume the proceedings against the defendant; or

(b) determine that no further proceedings are to be taken against the defendant for the offence in respect of which he or she was found unfit to stand trial and advise the defendant in writing of that fact.

(3A) If the Attorney-General determines under subsection (3)(b) that no further proceedings are to be taken against the defendant, he or she is to –

(a) request the court before which the defendant was found to be unfit to stand trial to dismiss the proceedings against the defendant and discharge the treatment order, restriction order or supervision order; and

(b) notify the following persons of that determination:

(i) the defendant;

(ii) the controlling authority, within the meaning of the *Mental Health Act 2013*, of the approved hospital in which the defendant is detained if the defendant is subject to a treatment order that requires the defendant to be detained in that hospital;

(iii) the Chief Psychiatrist.

(iv) . . . . . .

(4) On receipt of a request from the Attorney-General under subsection (3)(a), the appropriate court must –

(a) resume the proceedings against the defendant; and

(b) call on the defendant to plead to the charge –

and, if the defendant does not do so, must enter a plea of not guilty.

(5) If proceedings are resumed against the defendant as mentioned in subsection (4), the court may, without regard to any finding as to the guilt of the defendant, revoke or discharge the treatment order, restriction order or supervision order made under this Act.

(6) On receipt of a request from the Attorney-General under subsection (3A)(a), the appropriate court must –

(a) dismiss the proceedings against the defendant; and

(b) revoke or discharge the treatment order, restriction order or supervision order.

Division 5 – Supervision orders

29A. Supervision orders

(1) A supervision order is an order releasing the person to whom it applies under the supervision of the Chief Psychiatrist and on such conditions

as to the supervision of that person and such other conditions as the court considers appropriate.

(2) Without limiting the conditions that may be specified in a supervision order, such conditions may include any one or more of the following conditions:

(a) a condition requiring the defendant to take medication or submit to the administration of medical treatment as specified in the order or as determined by the Chief Psychiatrist;

(b) a condition requiring the defendant to comply with any directions as to supervision given by the Chief Psychiatrist.

(3) If a defendant who is subject to a supervision order notifies the person responsible for his or her medical treatment that he or she objects to taking medication or the administration of medical treatment as required by or under the order, that person or the Chief Psychiatrist is to notify the Tribunal, in writing, of that objection within 7 days.

(4) Section 38 of the *Guardianship and Administration Act 1995* and section 213 of the *Mental Health Act 2013* do not apply in respect of the taking of medication by, or the administration of medical treatment to, a defendant if the defendant takes the medication or submits to the administration of the medical

treatment in compliance with a supervision order even though the defendant objects to doing so.

30. Variation or revocation of supervision order

(1) At any time while a supervision order is in force, the Supreme Court may, on the application of the Secretary of the responsible Department in relation to the *Mental Health Act 2013*, the Chief Psychiatrist, the defendant or any other person with a proper interest in the matter, vary or revoke the supervision order and, if the order is revoked, make, in substitution for the order, any other order that the Supreme Court might have made under section 18(2) or 21 in the first instance.

(2) Without limiting the persons who may apply to vary or revoke a supervision order, a person has a proper interest in the matter if the person has the care and control of the person subject to the supervision order.

(3) If the Supreme Court refuses an application by or on behalf of a defendant for variation or revocation of a supervision order, a later application for variation or revocation of the order may not be made by or on behalf of the defendant for 6 months or such other period as the Supreme Court may direct on refusing the application.

(4) Before determining an application, the Supreme Court may order the Chief Psychiatrist, the controlling authority of a secure mental health unit or any other person or body to provide a

report in respect of the matters specified in the order.

(5) For the purposes of a report, the defendant is to make himself or herself available for examination as required by the Chief Psychiatrist, the controlling authority of a secure mental health unit or the person or body providing the report.

(6) The Chief Psychiatrist, the controlling authority of a secure mental health unit or the person or body who provides a report is to provide a copy of it to the applicant, defendant and Director of Public Prosecutions as soon as practicable.

(7) For the purposes of a hearing by the Supreme Court for the variation or revocation of a supervision order –

(a) an application is to be in writing with a copy served on the Director of Public Prosecutions and, if the defendant is not the applicant, on the defendant; and

(b) the Director of Public Prosecutions or counsel representing the Director of Public Prosecutions must appear for the Crown at the hearing of the application; and

(c) the defendant may be present at the hearing of the application unless the Court makes an order to the contrary; and

(d) the applicant, the defendant and the Director of Public Prosecutions may call

evidence in support of, or in opposition to, the application; and

(e) if a party causes a report to be prepared relating to the application and intends to tender the report as evidence, that party must provide each other party with a copy of the report; and

(f) if a party puts any such report in evidence –

(i) each other party is entitled to cross-examine the person who made the report; and

(ii) the party who put the report in evidence may, after any such cross-examination, examine the person making the report by way of reply; and

(g) the Court may order the Chief Psychiatrist or any other person or body to prepare and submit to the Court a report in respect of such matters relating to the defendant as the Court may specify.

31. Apprehension of defendant under supervision order

(1) In this section –

prescribed person means –

(a) the Chief Psychiatrist; or

(b) a person who administers, or assists in the administration of, medical treatment to the defendant under a supervision order; or

(c) a person who is authorised by the Chief Psychiatrist to supervise, wholly or partly, the administration of a supervision order in respect of the defendant; or

(d) an authorised person; or

(e) a mental health officer within the meaning of the *Mental Health Act 2013*; or

(f) a police officer.

(2) A prescribed person may apprehend a defendant who is subject to a supervision order if the prescribed person believes on reasonable grounds –

(a) that –

(i) the defendant has contravened, or is likely to contravene, the supervision order; or

(ii) there has been, or is likely to be, a serious deterioration in the defendant's mental health; and

(b) that, because of the breach or likely breach of the supervision order or the deterioration or likely deterioration in the defendant's mental health, there is a risk that the defendant will harm himself, herself or another person.

(3) As soon as practicable after apprehending a defendant under subsection (2), the prescribed person is to –

(a) notify the Chief Psychiatrist of the apprehension; and

(b) take the defendant to –

(i) an approved hospital; or

(ii) a secure mental health unit if the prescribed person is of the opinion that the defendant should be taken to a secure mental health unit for treatment or for the protection of the defendant or any other person.

(4) If after apprehending a defendant under subsection (2) the prescribed person is of the opinion that the defendant should be taken to a secure mental health unit but it is not possible or practicable to do so immediately, the prescribed person may take the defendant to an approved hospital where he or she is to be admitted and treated as an involuntary patient, within the meaning of the *Mental Health Act 2013*, until such time as he or she can be transferred to a secure mental health unit.

(5) When apprehending a defendant, taking him or her to a secure mental health unit or an approved hospital or transferring him or her to a secure mental health unit under this section, a prescribed person may –

(a) be assisted by such persons as he or she considers appropriate; and

(b) use such restraint and force as the prescribed person believes appropriate in the circumstances; and

(c) enter, without warrant, any premises or part of premises in which the prescribed person reasonably believes the defendant is present.

(5A) The custody and escort provisions, within the meaning of the *Mental Health Act 2013*, apply in respect of the taking of a defendant to an approved hospital or a secure mental health unit under this section.

(6) A secure mental health unit to which a defendant is taken under subsection (3) is to admit the defendant and may detain the defendant in the unit –

(a) for a period not exceeding 24 hours; and

(b) if the Chief Psychiatrist authorises it, for one further period not exceeding 72 hours; and

(c) if the Tribunal authorises it, for one or more further periods each of a length to be determined by that Tribunal.

(7) Despite subsection (6), if –

(a) within a period referred to in paragraph (a) or (b) of that subsection an application is made to the Tribunal for an extension of the period for which a defendant may be detained under that subsection; and

(b) a member of the Tribunal authorises it –

the defendant may be detained in the secure mental health unit until the application is determined by that Tribunal.

(8) Despite subsection (6), if within any period for which a defendant may be detained under that subsection an application is made to the Supreme Court under section 30 to vary or revoke the supervision order in respect of the defendant, the defendant may be detained in a secure mental health unit until the Court has determined the application.

(9) While a defendant is being detained in an approved hospital or secure mental health unit under this section, the supervision order is suspended.

31A. Suspension of supervision order while defendant imprisoned

If a defendant is sentenced to a term of imprisonment for an offence while subject to a supervision order, the supervision order is suspended while the defendant is in prison serving the term of imprisonment.

Division 5A – . . . . . .

31B - 31C**.** . . . . . .

Division 6 – Court procedure

32. Expert evidence

For the purposes of proceedings under this Part, a court may –

(a) call such expert evidence as it thinks fit; and

(b) order the production of medical reports in respect of a defendant and for that purpose may require the defendant to undergo a medical, psychiatric or psychological examination.

33. Reports on attitudes of victims and next of kin

(1) For the purpose of assisting a court to determine proceedings under this Part, the Attorney-General must provide the court with a report stating, so far as reasonably ascertainable, the

views of the next of kin of the defendant and the victims, if any, of the defendant's conduct.

(2) In the case of a defendant released under a supervision order, a report is not required if the purpose of the proceeding is –

(a) to determine whether the defendant should be detained or subjected to a more rigorous form of supervision; or

(b) to vary, in minor respects, the conditions on which the defendant was released.

34. Principle on which courts are to act

A court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community when determining –

(a) which order to make under section 18(2) or 21(1) or this Part; or

(b) whether to discharge or vary such an order; or

(c) the conditions of such an order.

35. Matters to which courts are to have regard

(1) In determining proceedings under this Part, a court must, in addition to applying the principle in section 34, have regard to –

(a) the nature of the defendant's mental impairment or other condition or disability; and

(b) whether the defendant is, or would if released be, likely to endanger another person or other persons generally; and

(c) whether there are adequate resources available for the treatment and support of the defendant in the community; and

(d) whether the defendant is likely to comply with the conditions of a supervision order; and

(e) other matters that the court thinks relevant.

(2) A court may not discharge a restriction order, release a defendant under section 18(2) or 21(1) or this Part or significantly reduce the degree of supervision to which a defendant is subject unless the court –

(a) has considered the reports of the Chief Psychiatrist, or a medical practitioner nominated by the Chief Psychiatrist, and one other expert, who may or may not be a medical practitioner, each of whom has personally examined the defendant, on –

(i) the condition of the defendant; and

(ii) the possible effects of the proposed action on the behaviour of the defendant; and

(b) has considered the report on the attitudes of victims, if any, and next of kin prepared under this Part; and

(c) is satisfied that the defendant's next of kin and the victims, if any, of the offence with which the defendant was charged have been given reasonable notice of the proceedings.

(3) Notice need not be given under subsection (2)(c) to a person whose whereabouts have not, after reasonable inquiry, been ascertained.

(4) In this section –

medical practitioner means a person who –

(a) is a psychiatrist; or

(b) is a medical practitioner approved by the Chief Psychiatrist as holding the requisite training and experience to provide medico-legal reports to the court.

35A. Interim orders

A court may make any interim order it considers appropriate in the circumstances.

Division 7 – Appeals to Court of Criminal Appeal

36. Appeals

(1) In this section,

decision includes a determination, a declaration and a finding.

(2) An appeal lies to the Court of Criminal Appeal at the suit of the Attorney-General, the Secretary of the responsible Department in relation to the *Mental Health Act 2013* or the defendant from a decision or order made by the Supreme Court under this Part.

(3) On an appeal, the Court of Criminal Appeal may affirm or quash the decision or order against which the appeal is brought or substitute any other decision or order as it thinks proper.

Division 7A – Referral of forensic orders

36A. Referral of forensic order to Supreme Court

(1) If a magistrate is of the opinion, after taking into account the matters required to be considered in determining the order to be made, that a forensic order should be made in respect of a defendant, the magistrate may refer the matter to the Supreme Court for determination.

(2) On the referral of a matter to the Supreme Court under subsection (1), the Supreme Court –

(a) must enquire into the circumstances of the case; and

(b) has the same powers to deal with the defendant as if the defendant had been dealt with in the Supreme Court.

Division 8 – Review of forensic orders

37. Review of persons detained under forensic orders

(1) A forensic order is to be reviewed under the *Mental Health Act 2013* by the Tribunal within 12 months after the order was made and at least once in each period of 12 months afterwards.

(2) In reviewing a forensic order, the Tribunal is to apply the principle in section 34 and to have regard to the matters set out in section 35(1).

(3) If the Tribunal, on review, determines that a forensic order is no longer warranted or that the conditions of the order are now inappropriate –

(a) the Tribunal must issue the defendant with a certificate to that effect; and

(b) the defendant may apply immediately, despite any other provision of this Act, to the Supreme Court for discharge, revocation or variation of the forensic order.

(4) If the Tribunal issues a certificate in respect of the discharge of a restriction order, the certificate may include the recommendation of the Tribunal that, should the order be discharged –

(a) a supervision order or treatment order be made in respect of the defendant; or

(b) the defendant be released either unconditionally or on the conditions specified in the recommendation.

(5) If the Tribunal issues a certificate in respect of the revocation of a supervision order, the certificate may include the recommendation of the Tribunal that, should the order be revoked –

(a) a treatment order be made in respect of the defendant; or

(b) the defendant be released either unconditionally or on the conditions specified in the recommendation.

(6) If the Tribunal, on review, issues a certificate in respect of the variation of the conditions of a supervision order, the certificate may include the recommendations of the Tribunal as to what conditions should be included in the order.

(7) If the Tribunal, on review, determines that a supervision order should be revoked and that, instead, a restriction order should be made in respect of the defendant, the Tribunal is to –

(a) recommend to the Secretary of the responsible Department in relation to the *Mental Health Act 2013* that he or she make an application under section 30(1) for the revocation of the supervision order and the making of the restriction order; and

(b) provide a copy of that recommendation to the defendant.

PART 5 – MISCELLANEOUS

38. Counsel to have independent discretion

If a defendant is unable to instruct his or her legal representative on any question relating to an investigation or special hearing under this Act, the legal representative may act, in the exercise of an independent discretion, in what he or she genuinely believes to be the defendant's best interests.

39. Power of court to deal with defendant before proceedings completed

(1) If the question of a defendant's fitness to stand trial is reserved for investigation under this Act, the court by which the question was reserved or by which the investigation is to be conducted may –

(a) admit the defendant to bail –

(i) on condition that he or she will appear subsequently for the purposes of the investigation; and

(ii) on any other condition that the court considers appropriate; or

(b) if the court considers that it would not be appropriate to admit the defendant to bail –

(i) remand the defendant in custody; or

(ii) order that the defendant be detained in a secure mental health unit; or

(iii) make any other order that the court thinks appropriate for the custody or detention of the defendant.

(c - d) . . . . . .

(1A) A court may only make an order that the defendant be detained in a secure mental health unit if –

(a) the defendant appears to be suffering from a mental illness within the meaning of the *Mental Health Act 2013*; and

(b) the court considers that the defendant should be admitted to a secure mental health unit for his or her own health or safety or for the protection of others; and

(c) the Chief Psychiatrist has provided a report to the effect that –

(i) the admission of the defendant to the secure mental health unit is necessary for his or her care or treatment; and

(ii) adequate facilities and staff exist at the secure mental health unit for the appropriate care and treatment of the defendant; and

(iii) in the case of a defendant who has not attained the age of 18 years, the secure mental health unit is the most appropriate place available to accommodate him or her in the circumstances having regard to the objectives and general principles set out in sections 4 and 5 of the *Youth Justice Act 1997*.

(1B) When making an order under subsection (1), the court may make any other order it considers appropriate including, but not limited to –

(a) an order requiring the production of a report in relation to the defendant's fitness to stand trial and his or her medical, psychological or psychiatric condition; and

(b) an order requiring the defendant to submit to an assessment for the purposes of a report referred to in paragraph (a); and

(c) an order giving directions in relation to the nature and means of obtaining the assessment referred to in paragraph (b); and

(d) an order allowing the person who is required to produce a report access to the defendant's medical records with or without the defendant's consent.

(1C) If the court under this section orders the production of a report of any kind in relation to the defendant, the person producing the report is to provide a copy of it to both the defendant and prosecutor unless the court orders otherwise.

(2) If –

(a) proceedings are adjourned under Part 2 after a court determines that a defendant is likely to become fit to stand trial; or

(b) a court orders that a defendant is liable to supervision under this Act but wishes to reserve the question as to how the court is to deal with the defendant –

the court may exercise any of the powers conferred under subsection (1).

39A. Limitation on making certain orders in respect of youth

A court may not make a restriction order or any other order under this Act that commits a person who has not attained the age of 18 years to a secure mental health unit unless the court has received a report from the Chief Psychiatrist to the effect that –

(a) adequate facilities and staff exist at the secure mental health unit for the appropriate care and treatment of the person; and

(b) the secure mental health unit is the most appropriate place available to accommodate the youth in the circumstances.

39B. Report of Chief Psychiatrist

(1) In this section –

defendant includes a person who is subject to a restriction order or any other order under this Act that commits a person to, or otherwise requires the detention of a person in, a secure mental health unit.

(2) If a court requires a report from the Chief Psychiatrist or is provided with a report by the Chief Psychiatrist in relation to a defendant, the court may make such orders as to the distribution and security of the report provided as it considers necessary or appropriate.

(3) Unless the court orders otherwise, the Chief Psychiatrist must give, as soon as practicable, a copy of any report referred to in subsection (2) to –

(a) the prosecutor; and

(b) the Australian legal practitioner representing the defendant or, if the defendant is unrepresented, the defendant.

(4) The prosecution or the defence may dispute the whole or any part of the report of the Chief Psychiatrist.

(5) If the whole or any part of the report of the Chief Psychiatrist is disputed, the court must not take into consideration the report or part in dispute unless the party disputing the report or part has had the opportunity –

(a) to lead evidence on the disputed matters; and

(b) to cross-examine on the disputed matters the Chief Psychiatrist or, if the Chief Psychiatrist has delegated his or her function of writing the report, the author of the report.

39C. Custody on making of order committing defendant to secure mental health unit

(1) In this section –

defendant means a person who is subject to a restriction order or any other order under this Act that commits a person to, or otherwise requires the detention of a person in, a secure mental health unit;

specified means specified in a restriction order or any other order under this Act that commits a person to, or otherwise requires the detention of a person in, a secure mental health unit.

(2) If a court makes a restriction order or any other order under this Act that commits a defendant to, or otherwise requires the detention of a person in, a secure mental health unit –

(a) the court is to specify in the order that the specified person, or a person of the specified class of person, is to be responsible for taking the defendant to the specified secure mental health unit; and

(b) the court may specify in the order that the specified person or another specified person, or a person of the specified class or another specified class of person, is to be responsible for bringing the defendant from the specified secure mental health unit before the court in connection with the exercise by the court of its powers under this Act.

(3) A copy of the restriction order or other order that commits a defendant to, or otherwise requires the detention of the defendant in, a secure mental health unit and any report of the Chief Psychiatrist or other medical practitioner relevant to the decision of the Court to make the order are to accompany the defendant to the specified secure mental health unit.

(4) While a defendant is the responsibility of a person as specified in a restriction order or other order that commits the defendant to, or otherwise requires the detention of the defendant in, a secure mental health unit –

(a) that person has the custody of the defendant; and

(b) the defendant is taken to be in detention for the purposes of section 41.

40. Exclusion of evidence

A finding made on an investigation into a defendant's fitness to stand trial or on a special hearing does not constitute an issue estoppel against the defendant in any later civil or criminal proceedings and evidence of any such finding is not admissible against the defendant in criminal proceedings against the defendant.

41. Arrest of person escaping from detention or absent without leave

(1) If a person who is committed to detention pursuant to a restriction order made under this Act or the *Sentencing Act 1997* –

(a) escapes from the detention; or

(b) is absent, without proper authority, from the place of detention –

the person may be arrested without warrant, and returned to the place of detention, by a police officer or an authorised person.

(1A) If a judge of a court by which a person is committed to detention under this Act is satisfied that there are proper grounds to suspect that the person –

(a) has escaped from the detention or is absent, without proper authority, from the place of detention; and

(b) has left the State –

the judge may issue a warrant for the arrest of the person and for his or her return to the place of detention.

(1B) If a judge or magistrate of a court by which a person is made the subject of a treatment order is satisfied that there are proper grounds to suspect that the person –

(a) has escaped or is absent without leave of absence from an approved hospital; and

(b) has left the State –

the judge or magistrate may issue a warrant for the arrest of the person and for his or her return to the approved hospital.

(2) If a judge of a court by which a person is released under a supervision order is satisfied that there are proper grounds to suspect that the person has contravened or failed to comply with a condition of the order and has left the State, the judge may issue a warrant for the arrest of the person and for his or her return to the court.

41A. Authorisation of persons

The Chief Psychiatrist may authorise a person, or a member of a class of persons, for the

purposes of any or all of the provisions of this Act as may be specified in the authorisation.

42. Persons currently held in custody

(1) If, immediately before the commencement of this section, a person was detained in custody under a restriction order in force under section 382 of the *Criminal Code* or under Division 2 of Part IV of the *Mental Health Act 1963*, that person is taken to be subject to a restriction order made under this Act on the commencement of this section.

(2) Notwithstanding section 37, immediately after the commencement of this section the Mental Health Tribunal must review the detention of a person who is taken by virtue of subsection (1) to be subject to a restriction order made under this Act on that commencement.

(3) Subsections (2) and (3) of section 37 have the same application to a review held under subsection (2) as they have to a review held under that section.

42A. Provision of reports to certain persons

(1) In this section –

defendant includes a person who is subject to a forensic order or a treatment order.

(2) On the application of any of the following persons, that person may be provided with a

copy of any report in respect of a defendant which is provided to a court under this Act:

(a) the controlling authority of a secure mental health unit if the defendant is admitted to the secure mental health unit;

(b) the Chief Psychiatrist;

(ba) . . . . . .

(c) the Director if the defendant is remanded to a prison;

(d) the controlling authority of an approved hospital if the defendant is admitted to the approved hospital;

(e) the Secretary of the responsible Department in relation to the *Mental Health Act 2013* if a treatment order has been made in respect of the defendant.

43. Regulations

(1) The Governor may make regulations for the purposes of this Act.

(2) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends this Act.

(3) Regulations made under subsection (2) may take effect on the day on which the Act amending this Act commences or a later day as specified in the regulations, whether the day so specified is

before, on or after the day on which the regulations are made.

44. Savings and transitional provisions consequent on the enactment of the *Mental Health Amendment (Secure Mental Health Unit) Act 2005*

(1) In this section –

commencement day means the day on which the *Mental Health Amendment (Secure Mental Health Unit) Act 2005* commences;

former Act means this Act as in force immediately before the commencement day.

(2) Where appropriate, an order made under the former Act that is in force immediately before the commencement day continues in effect in accordance with its terms and is taken to have been made under this Act.

(3) A supervision order made under the former Act by a court other than the Supreme Court and in force immediately before the commencement day is taken to have been made by the Supreme Court under this Act.

(4) The Forensic Tribunal is to review a restriction order or supervision order made under the former Act under section 37 but the first review is to be undertaken at a time to be determined by the Forensic Tribunal.

(5) For the purposes of subsection (4), the Forensic Tribunal is not limited to determining, for the undertaking of the first review of the restriction order or supervision order, a time that is within the period of 12 months commencing on the commencement day.

44A. Transitional provision on commencement of *Mental Health Act 2013*

A continuing care order or a community treatment order made under this Act, and in force immediately before the day on which all of the provisions of the *Mental Health Act 2013* commence, continues in effect after that day as if the order were a treatment order made under the *Mental Health Act 2013*.

45**.** *The amendments effected by this section have been incorporated into the authorised version of the Criminal Code.*

46**.** *The amendment effected by this section has been incorporated into the authorised version of the Mental Health Act 1996.*

47**.** *The amendments effected by this section have been incorporated into the authorised version of the Sentencing Act 1997.*

SCHEDULE 1 – OATH AND AFFIRMATION OF JURORS

Section 12

PART 1 – OATH

"Do you swear that you will conscientiously try whether the accused is unfit to stand trial for the offence with which he (or she) is charged and decide it according to the evidence and also not disclose anything about the jury's deliberations. So help you God."

PART 2 – AFFIRMATION

"Do you solemnly, sincerely and truly declare and affirm that you will conscientiously try whether the accused is unfit to stand trial for the offence with which he (or she) is charged and decide it according to the evidence and also not disclose anything about the jury's deliberations."

NOTES

The foregoing text of the *Criminal Justice (Mental Impairment) Act 1999* comprises those instruments as indicated in the following table. Any reprint changes made under any Act, in force before the commencement of the *Legislation Publication Act 1996*, authorising the reprint of Acts and statutory rules or permitted under the *Legislation Publication Act 1996* and made before 25 September 2023 are not specifically referred to in the following table of amendments.

Act	Number and year	Date of commencement
Criminal Justice (Mental Impairment) Act 1999	No. 21 of 1999	1.11.1999
Justice Legislation (Miscellaneous Amendments) Act 1999	No. 61 of 1999	24.11.1999
Justice (Amendment of Custody Legislation) Act 2002	No. 35 of 2002	14.11.2002
Relationships (Consequential Amendments) Act 2003	No. 45 of 2003	1.1.2004
Juries Act 2003	No. 48 of 2003	1.1.2006
Mental Health Amendment (Secure Mental Health Unit) Act 2005	No. 72 of 2005	20.2.2006
Legal Profession (Miscellaneous and Consequential Amendments) Act 2007	No. 66 of 2007	31.12.2008
Health Practitioner Regulation National Law (Tasmania) (Consequential Amendments) Act 2010	No. 3 of 2010	1.7.2010
Justice and Related Legislation (Miscellaneous Amendments) Act 2012	No. 13 of 2012	30.5.2012
Mental Health (Transitional and Consequential Provisions) Act 2013	No. 69 of 2013	17.2.2014
Crimes (Miscellaneous Amendments) Act 2016	No. 21 of 2016	11.7.2016
Justice Miscellaneous (Court Backlog and Related Matters) Act 2020	No. 27 of 2020	1.7.2021
Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021	No. 18 of 2021	5.11.2021
Mental Health Amendment Act 2023	No. 4 of 2023	25.9.2023

TABLE OF AMENDMENTS

Provision affected	How affected
Section 3	Amended by No. 45 of 2003, Sched. 1, No. 72 of 2005, s. 90, No. 3 of 2010, Sched. 1, No. 69 of 2013, Sched. 1, No. 21 of 2016, s. 6, No. 18 of 2021, s. 62 and No. 4 of 2023, s. 12
Section 4	Amended by No. 72 of 2005, s. 91
Section 6	Repealed by No. 72 of 2005, s. 92
Section 7	Repealed by No. 72 of 2005, s. 92
Section 10	Amended by No. 13 of 2012, s. 25 and No. 27 of 2020, s. 11
Section 12	Amended by No. 48 of 2003, Sched. 9
Section 15	Amended by No. 48 of 2003, Sched. 9
Section 17	Amended by No. 21 of 2016, s. 7
Section 18	Amended by No. 72 of 2005, s. 93, No. 69 of 2013, Sched. 1 and No. 21 of 2016, s. 8
Section 21	Substituted by No. 72 of 2005, s. 94 Amended by No. 69 of 2013, Sched. 1 and No. 21 of 2016, s. 9
Part 3A	Inserted by No. 21 of 2016, s. 10
Section 21A	Inserted by No. 72 of 2005, s. 94 Substituted by No. 21 of 2016, s. 10 Amended by No. 4 of 2023, s. 13
Section 22	Amended by No. 72 of 2005, s. 96 and No. 69 of 2013, Sched. 1
Division 2 of Part 4	Repealed by No. 72 of 2005, s. 97
Section 23	Repealed by No. 72 of 2005, s. 97
Section 24	Substituted by No. 72 of 2005, s. 98
Section 25	Repealed by No. 72 of 2005, s. 98
Section 26	Amended by No. 72 of 2005, s. 99, No. 69 of 2013, Sched. 1 and No. 4 of 2023, s. 14
Section 27	Substituted by No. 72 of 2005, s. 100
Section 28	Repealed by No. 72 of 2005, s. 100
Section 29	Amended by No. 72 of 2005, s. 101, No. 69 of 2013, Sched. 1 and No. 4 of 2023, s. 15
Section 29A	Inserted by No. 72 of 2005, s. 102 Amended by No. 69 of 2013, Sched. 1, No. 18 of 2021, s. 63 and No. 4 of 2023, s. 16
Section 30	Amended by No. 72 of 2005, s. 103, No. 69 of 2013, Sched. 1 and No. 4 of 2023, s. 17
Section 31	Substituted by No. 72 of 2005, s. 104 Amended by No. 69 of 2013, Sched. 1, No. 21 of 2016, s. 11, No. 18 of 2021, s. 64 and No. 4 of 2023, s. 18
Section 31A	Inserted by No. 72 of 2005, s. 104
Division 5A of	Repealed by No. 69 of 2013, Sched. 1

Provision affected	How affected
Part 4	
Section 31B of Part 4	Inserted by No. 72 of 2005, s. 105
Section 31B	Repealed by No. 69 of 2013, Sched. 1
Section 31C of Part 4	Inserted by No. 72 of 2005, s. 105
Section 31C	Repealed by No. 69 of 2013, Sched. 1
Section 34	Substituted by No. 72 of 2005, s. 106
Section 35	Amended by No. 72 of 2005, s. 107, No. 3 of 2010, Sched. 1, No. 21 of 2016, s. 12 and No. 4 of 2023, s. 19
Section 35A	Inserted by No. 21 of 2016, s. 13
Section 36	Amended by No. 72 of 2005, s. 108 and No. 69 of 2013, Sched. 1
Section 36A of Part 4	Inserted by No. 21 of 2016, s. 14
Section 37	Substituted by No. 72 of 2005, s. 110 Amended by No. 69 of 2013, Sched. 1 and No. 18 of 2021, s. 65
Section 39	Amended by No. 72 of 2005, s. 111, No. 69 of 2013, Sched. 1 and No. 4 of 2023, s. 20
Section 39A	Inserted by No. 72 of 2005, s. 112 Amended by No. 4 of 2023, s. 21
Section 39B	Inserted by No. 72 of 2005, s. 112 Amended by No. 66 of 2007, Sched. 1 and No. 4 of 2023, s. 22
Section 39C	Inserted by No. 72 of 2005, s. 112 Amended by No. 4 of 2023, s. 23
Section 41	Amended by No. 35 of 2002, s. 6, No. 72 of 2005, s. 113 and No. 69 of 2013, Sched. 1
Section 41A	Inserted by No. 72 of 2005, s. 114 Substituted by No. 69 of 2013, Sched. 1 Amended by No. 4 of 2023, s. 24
Section 42A	Inserted by No. 72 of 2005, s. 115 Amended by No. 69 of 2013, Sched. 1 and No. 4 of 2023, s. 25
Section 43	Substituted by No. 72 of 2005, s. 116
Section 44	Substituted by No. 72 of 2005, s. 116
Section 44A	Inserted by No. 69 of 2013, Sched. 1
Part 1 of Schedule 1	Amended by No. 61 of 1999, Sched. 1
Part 2 of Schedule 1	Amended by No. 61 of 1999, Sched. 1