

2006

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**CRIMINAL CODE (MENTAL IMPAIRMENT) AMENDMENT BILL 2006
EXPLANATORY STATEMENT**

**Circulated by the authority of
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Outline

On 19 February 2004 the Chief Minister directed the Chief Executive of the Chief Minister's Department to set up a high level Interdepartmental Committee (IDC) to: "examine all aspects in relation to the care and custody of people with mental health issues who come into contact with the criminal justice system. The committee should also examine any requirement for the provision of facilities, including step down or forensic mental health facilities, in the ACT".

As a result of the IDC recommendations six key initiatives were announced to create a model of forensic mental health management in the ACT.

The first initiative was expressed as "the application of different definitions to criminal justice matters and mental health treatment matters. The foreshadowed definition of mental impairment in the *Criminal Code 2002* ("the Code") will apply to criminal law matters, while definitions for therapeutic matters remain in the *Mental Health (Treatment & Care) Act 1994* ("the Mental Health Act").

The rationale behind differentiating the definitions is that the current Mental Health Act definitions were drafted for medical purposes and are principally about therapeutic treatment. The definition of mental impairment in the Code is designed for criminal proceedings. The Code definition ensures that in a criminal prosecution a person would not be found guilty of a crime if they suffered from a mental impairment that had the effect that they did not know the nature and quality of the conduct or they suffered from a mental impairment that had the effect that they did not know that the conduct was wrong or they suffered from a mental impairment that had the effect that they could not control their conduct.

The definition used in the Code has to contemplate a broader range of medical conditions than the definitions in the Mental Health Act. The Code defines mental impairment as including mental illness, which is an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition resulting from the reaction of a healthy mind to extraordinary stimuli. The definition of mental impairment under the Code also covers such conditions as senility, intellectual disability, mental disease, brain damage and severe personality disorder.

The Bill commences the provisions of Division 2.3.2 of the Code and adopts the Code definition of mental impairment in Part 13 of the *Crimes Act 1900*. Consequential amendments are also made to the *Mental Health (Treatment and Care) Act 1994* and the *Children and Young People Act 1999* to ensure the application of the Code definition to criminal proceedings.

Criminal Code (Mental Impairment) Amendment Bill 2006

Clauses

Part 1 Preliminary

Clause 1: Name of Act

This is a technical clause which names the short title of the Act.

Clause 2: Commencement

This clause enables the Act to commence on a day nominated by the Minister in a commencement notice. The provisions for a commencement notice are set out in section 77 of the *Legislation Act 2001*.

If the Minister does not commence the Act six months after the Act is notified on the Legislation Register, then the Act automatically commences the following day. The provisions for automatic commencement are set out in section 79 of the *Legislation Act 2001*.

Clause 3: Legislation amended

This clause lists the parent Act, the *Criminal Code 2002*, which will be amended by the Act.

The amending Act will also amend the *Crimes Act 1900*, the *Mental Health (Treatment and Care) Act 1994* and the *Children and Young People Act 1999*. Explanations of the amendments to these latter Acts are discussed at Schedule 1 on pages four to seven below.

Clause 4: Delayed application of div 2.3.2 etc Section 9

This clause omits section 9 of the parent Act as the division is being commenced.

Clause 5: Definitions – applies provisions and default application date

This clause includes Division 2.3.2 as an immediately applied provision.

Clause 6: Section 10(1), definition of applied provisions

This clause omits section 66(2)(d) relating to geographical application from the Act.

Clause 7: Section 10(1), definition of applied provisions, note

This clause substitutes a new note at section 10 to reflect that Division 2.3.2 and section 66(2)(d) become applied provisions on commencement.

Clause 8: Mental impairment and criminal responsibility

This clause substitutes wording in subsection (7) to make a distinction between proceedings conducted in the Magistrates Court and the Supreme Court. If the tribunal of fact is satisfied that a person is not criminally responsible for an offence only because of mental impairment a special verdict of not guilty by reason of mental impairment is available in the Supreme Court while the appropriate disposition in the Magistrates Court is that the charge for the offence should be dismissed by reason of mental impairment. A mental impairment, of itself, does not entitle an accused to either of these outcomes. The requirements of section 28 of the Code must be met.

Clause 9: Geographical application – procedure Section 66(2), note

This clause omits the note no longer required as a result of the commencement of the provisions.

Schedule 1: Consequential amendments

Part 1.1 *Children and Young People Act 1999*

Clauses 1.1-1.9

Part 1.1 of Schedule 1 to the Bill substitutes terminology used in the *Children and Young People Act 1999* by replacing the terms “mental dysfunction or mental illness” with the term “mental impairment”.

It also includes the Code definition of mental impairment in the Dictionary to the Act and removes the defunct definitions of mental dysfunction and mental illness.

Part 1.2 *Crimes Act 1900*

Part 1.2 of Schedule 1 to the Bill substitutes terminology used in the *Crimes Act 1900* by replacing the terms “mental dysfunction or mental illness” with the term “mental impairment”. It also includes the Code definition of mental impairment in the Dictionary and removes the defunct definitions of mental dysfunction and mental illness.

Clause 1.10: Part 13 heading

This clause replaces the heading to Part 13 to reflect the change in terminology.

Clause 1.11: Section 300, definitions of mental dysfunction and mental illness

This clause removes the definitions of mental dysfunction and mental illness from the definitions in section 300. Clause 1.34 inserts the Code definition of mental impairment into the *Crimes Act 1900* Dictionary.

Clause 1.12: Section 308(a)

This clause replaces the wording in s308(a) to reflect the change in terminology.

Clause 1.13: Section 309(1)

This clause replaces the wording in section 309(1) to reflect the change in terminology. It also removes the requirement that the examination be done by a doctor and now specifies that a clinical examination is required for the purpose of determining whether the accused needs immediate treatment or care because of mental impairment. This amendment is necessary because a doctor may not be the appropriate health professional to conduct the examination in all cases, for example, particularly in the case of someone suffering from an acquired brain injury where a psychologist ought properly carry out the clinical examination. The new wording provides flexibility to ensure that the most appropriate health professional will be responsible for the clinical examination.

Terminology has also been updated to reflect the adoption of the commonly used term “custodial escort” as prescribed in the Dictionary to the *Legislation Act 2001*. This is a technical amendment to the Act so that the Act complies with contemporary forms of legislative drafting.

Clause 1.14: Section 309(1)(b)(ii)

This clause replaces the wording in section 309(1)(b)(ii) to reflect the change in terminology.

Clause 1.15: Section 315(4)

This clause replaces the word “disability” with the new terminology of “mental impairment”.

Clause 1.16: Division 13.3 heading

This clause substitutes the heading in Division 13.3 to replace the term “acquittal” with “verdict of not guilty”.

Clause 1.17: Section 320

This clause omits section 320 of the Act. This is because the provisions of section 28 of the *Criminal Code 2004* will now apply. Section 28 sets out the grounds upon which an accused person is entitled to a verdict of not guilty because of mental impairment.

Clause 1.18: Section 321

This clause is a technical amendment to the wording of section 321 so that it complies with contemporary forms of legislative drafting.

Clause 1.19 – 1.23: Section 322; Section 323 Heading, Section 323(1), Section 324 Heading and Section 324(1)

These clauses substitute terminology to replace the wording “be acquitted on the grounds” with “a special verdict of not guilty because”.

Clause 1.24: Division 13.4 heading

This clause substitutes the heading in Division 13.4 to replace the term “on grounds of mental impairment” with “because of mental impairment”.

Clause 1.25: Section 326

This clause omits section 326 of the Act. This is because the provisions of section 28 of the *Criminal Code 2004* will now apply. Section 28 sets out the grounds upon which an accused person is entitled to a verdict of not guilty because of mental impairment.

Clause 1.26: Section 327

This clause is a technical amendment to the wording of section 327 so that it complies with contemporary forms of legislative drafting.

Clause 1.27: Section 328 Heading

This clause substitutes the wording in the heading of section 328 to replace the word “dismissal” with “finding of not guilty because of mental impairment.”

Clause 1.28: Section 328(1)

This clause substitutes the wording in section 328(1) to replace “the charges are dismissed on the ground of mental impairment” with “is found not guilty because of mental impairment.”

Clause 1.29: Section 329 Heading

This clause substitutes the wording in the heading of section 329 to replace the word “dismissal” with “finding of not guilty because of mental impairment.”

Clause 1.30: Section 329(1)

This clause substitutes the wording in section 329(1) to replace “the charges against him or her are dismissed on the ground of mental impairment” with “is found not guilty because of mental impairment.”

Clause 1.31: Division 13.5 heading

This clause replaces the heading to Division 13.5 to reflect the change in terminology.

Clauses 1.32 – 1.40: Division 13.5 and Division 13.6

Clauses 1.32 – 1.40 of the Bill substitutes terminology used in Divisions 13.5 and 13.6 of the *Crimes Act 1900* by replacing the terms “mental dysfunction or mental illness” with the term “mental impairment”. It also includes the Code definition of mental impairment in the Dictionary.

Clauses 1.41- 1.53: *Mental Health (Treatment and Care) Act 1994*

Part 1.3 of Schedule 1 to the Bill substitutes terminology used in the *Mental Health (Treatment and Care) Act 1994* relating to persons charged, accused or otherwise coming into contact with the criminal justice system by replacing the terms “mental dysfunction or mental illness” with the term “mental impairment”.

This includes people who have been arrested in connection with an offence, in respect of whom a police officer is satisfied that there are sufficient grounds on which to charge the person in connection with an offence and people who are actually charged in connection with an offence. It also applies to adults and children to whom Part 13 of the *Crimes Act 1900* and/or Chapter 6 of the *Children and Young People Act 1999* apply.

The amendments will require the Mental Health Tribunal to apply the mental impairment definition to these people rather than having to distinguish between the mentally ill and the mentally dysfunctional definitions currently in the *Mental Health (Treatment and Care) Act 1999*. Those definitions will continue to apply with respect to the therapeutic management of persons to whom that Act applies.

It also includes the Code definition of mental impairment in the Dictionary to the Act.

Clauses 1.41 – 1.48

Clauses 1.41 – 1.48 of the Bill substitutes terminology used in Divisions 13.5 and 13.6 of the *Crimes Act 1900* by replacing the terms “mental dysfunction or mental illness” with the term “mental impairment”.

Clause 1.49: Section 68(1)(a)

This clause corrects a typographical error in the Act and substitutes 315A(3) for 315A(2).

Clause 1.50: Section 68(1)(c)

This clause inserts subsection (3) after section 319 (2) to clarify that either order made under 319 (2) or (3) of the *Crimes Act 1900* is an order to which section 68 of the Act applies.

Clause 1.51: Section 70 Heading

This clause substitutes the heading in section 70 to reflect the change in terminology from “recommendations about mentally dysfunctional or mentally ill persons” to “Recommendations about people with mental impairment”.

Clause 1.52: Section 70

This clause substitutes the terminology in section 70 of the Act from “mentally dysfunctional or mentally ill” to “has a mental impairment”.

Clause 1.53: Section 83A(2)(f)

This clause substitutes the terminology in section 83A(2)(f) from “mentally dysfunctional or mentally ill person” to “a person who has a mental impairment”.

Clause 1.54: Transitional

This clause restates the transitional provisions that apply with respect to fitness to plead as a result of the *Crimes Legislation Amendment Act 2005*.

The intent of these provisions is to ensure that if the Supreme Court or Magistrates Court had made an order under Part 13 of the *Crimes Act 1900* requiring a person to submit to the jurisdiction of the tribunal to enable the tribunal to determine whether or not the person was fit to plead to charge then Part 13 of the *Crimes Act 1900* and section 68 of the *Mental Health (Treatment and Care) Act 1994* apply as if the question of the person’s fitness to plead had been decided by the court once a final determination on the issue has been made.

If a final determination had not yet been made before the relevant commencement date then the former part 8 of the *Mental Health (Treatment and Care) Act 1994* applies until the tribunal makes a final determination and thereafter Part 13 of the *Crimes Act 1900* and the *Mental Health (Treatment and Care) Act 1994*, especially section 68 apply.

The part expires 5 years after the day it commences.

Clause 1.55 Dictionary, new definition of *mental impairment*

This clause includes the Code definition of mental impairment in the Dictionary to the Act.

Clause 1.56 Dictionary, definition of *mentally dysfunctional or mentally ill offender*

This clause removes the defunct definition of mentally dysfunctional or mentally ill offender. The new definition to be applied is inserted by Clause 1.57.

Clause 1.57 Dictionary, definition of *offender with a mental impairment*

Clause 1.57 inserts the new definition of offender with a mental impairment.