

Serial 56
Criminal Code Amendment (Mental Impairment and Unfitness to be Tried)
Bill 2002
Dr Toyne

**A BILL
for
AN ACT**

to amend the Criminal Code

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NORTHERN TERRITORY OF AUSTRALIA
CRIMINAL CODE AMENDMENT (MENTAL IMPAIRMENT AND
UNFITNESS TO BE TRIED) ACT 2002

No. of 2002

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NORTHERN TERRITORY OF AUSTRALIA

No. of 2002

AN ACT

to amend the Criminal Code

[Assented to 2002]
[Second reading 2002]

The Legislative Assembly of the Northern Territory enacts as follows:

1. Short title

This Act may be cited as the *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act 2002*.

2. Commencement

This Act comes into operation on 15 June 2002.

3. Repeal

Sections 6, 35 and 36 of the Criminal Code are repealed.

4. New Part

The Criminal Code is amended by inserting after Part II the following:

"PART IIA – MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED

"Division 1 – Preliminary

"43A. Definitions

"In this Part –

'appropriate person' means –

- (a) in relation to an accused person or supervised person who is detained or in custody in, or receives treatment, services or assistance in, at or from, an approved treatment facility or an approved temporary treatment facility within the meaning of the *Mental Health and Related Services Act* – the chief executive officer of the Department of Health and Community Services;
- (b) in relation to an accused person or supervised person who is detained or in custody in, or receives treatment, services or assistance in, at or from, a prescribed person, organisation or facility or a person, organisation or facility who or which is a member of a class of prescribed persons, organisations or facilities – the chief executive officer of the Department of Health and Community Services;
- (c) in relation to a person who is a represented person within the meaning of the *Adult Guardianship Act* – the chief executive officer of the Department of Health and Community Services; or
- (d) in relation to a person who is held in custody in a prison or is under the supervision of a parole officer within the meaning of the *Parole of Prisoners Act* – the chief executive officer of the Department of Justice;

'chief executive officer' has the same meaning as in the *Public Sector Employment and Management Act*;

'committal proceeding' means proceedings to determine whether or not to commit a person to trial under Part V of the *Justices Act*;

'court' means the Supreme Court;

'custodial supervision order' means a supervision order referred to in section 43ZA(1)(a);

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'expert' means a person who holds a qualification or has experience or expertise that is relevant to the mental impairment, condition or disability of an accused person or a supervised person;

'investigation' means an investigation into the fitness of an accused person to stand trial conducted under Division 3;

'mental illness' means an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur);

'mental impairment' includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication;

'next of kin', in relation to a person, means the person's parent, spouse or de facto partner, sibling or child or any other person who is the person's primary carer;

'non-custodial supervision order' means a supervision order referred to in section 43ZA(1)(b);

'prison' means a prison or a police prison within the meaning of the *Prisons (Correctional Services) Act*;

'special hearing' means a hearing conducted under Division 4;

'supervised person' means a person who is the subject of a supervision order;

'supervision order' means a custodial supervision order or a non-custodial supervision order made by a court under Division 5;

'victim' means a person who suffered injury, loss or damage as a direct result of an offence or conduct that would, but for the mental impairment or unfitness to be tried of the person who carried out the conduct, have constituted an offence.

"43B. Meaning of 'supervised person' in Divisions 6 and 7

"In Divisions 6 and 7 –

'supervised person' means the person the supervision of whom is the subject of a hearing referred to in those Divisions.

"Division 2 –Mental impairment

"43C. Defence of mental impairment

"(1) The defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment –

- (a) he or she did not know the nature and quality of the conduct;
- (b) he or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
- (c) he or she was not able to control his or her actions.

"(2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

"43D. Presumption of competence and burden of proof

"(1) A person is presumed not to have been suffering a mental impairment unless the contrary is proved.

"(2) The party raising the defence of mental impairment bears the onus of rebutting the presumption specified in subsection (1).

"43E. Standard of proof

"The question of whether a person was suffering from a mental impairment having the effect specified in section 43C(1)(a), (b) or (c) is a question of fact to be determined by a jury on the balance of probabilities.

"43F. Who may raise defence and when may defence be raised and considered?

- "(1) The defence of mental impairment may be raised –
- (a) by the defence at any time during the trial;
 - (b) by the court on application by the prosecution; or
 - (c) by the court on its own initiative.

"(2) If the defence of mental impairment is raised during the trial, the issues relating to establishing the defence are to be separately tried.

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"(3) If the defence of mental impairment arises during a committal proceeding, the question is to be reserved for consideration by the court during the trial of the accused.

"(4) A committal proceeding is not to be discontinued and the accused person discharged only because the defence of mental impairment has been raised during the committal proceeding.

"43G. Hearing of question of mental impairment by court etc.

"(1) If the defence of mental impairment is raised during the trial, the court –

- (a) must hear the evidence and representations as to the accused's mental competence produced by the parties; and
- (b) on application by the defence or the prosecution or on its own initiative – may require the accused to be examined by a psychiatrist or other appropriate expert and the results of the examination to be reported to the court.

"(2) After the evidence has concluded and the parties have addressed the jury, the Judge must direct the jury to consider –

- (a) the question of mental impairment and determine whether on the balance of probabilities the defence of mental impairment is established; and
- (b) whether the evidence establishes the elements of the offence the accused person is charged with, or an offence that the accused person may be found guilty alternatively of, beyond reasonable doubt,

and to determine whether the accused person –

- (c) is not guilty of the offence charged;
- (d) is not guilty of the offence charged because of his or her mental impairment; or
- (e) committed the offence charged or an offence that he or she may be found alternatively guilty of.

"(3) In directing the jury, the Judge must explain to the jury the findings that it may make and the consequences of the findings in law and otherwise.

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"43H. Plea of not guilty by reason of mental impairment may be accepted

"If the parties to a prosecution of an offence agree, the court may, at any time during the trial of the offence, accept a plea and record a finding of not guilty of the offence because of mental impairment.

"43I. Effect of findings under this Division

"(1) If an accused person is found not guilty of the offence charged, the court must discharge the accused person.

"(2) If an accused person is found not guilty because of mental impairment, the court must –

- (a) declare that the accused person is liable to supervision under Division 5; or
- (b) order that the accused person be released unconditionally.

"(3) If the court makes a declaration under subsection (2)(a), the court may also make the interim orders it considers just, including orders providing for –

- (a) the custody of the accused person (which may include an order remanding the accused person in custody in a prison or other appropriate place);
- (b) for the bail of the accused person;
- (c) for the examination of the accused person by a psychiatrist or other appropriate expert; or
- (d) if the court makes an order referred to in paragraph (c) – an order that a report of the results of the examination be produced before the court.

"(4) If an accused person is found guilty of the offence charged or an offence that he or she may be found guilty alternatively of, the court must record the jury's verdict and proceed to deal with the conviction and sentencing of the accused person in the normal way.

"Division 3 – Unfitness to stand trial

"43J. When is a person unfit to stand trial?

"(1) A person charged with an offence is unfit to stand trial if the person is –

- (a) unable to understand the nature of the charge against him or her;

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- (b) unable to plead to the charge and to exercise the right of challenge;
- (c) unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);
- (d) unable to follow the course of the proceedings;
- (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- (f) unable to give instructions to his or her legal counsel.

"(2) A person is not unfit to stand trial only because he or she suffers from memory loss.

"43K. Presumption of fitness to stand trial and burden of proof

"(1) A person is presumed to be fit to stand trial.

"(2) The presumption of fitness to stand trial is rebutted only if it is established by an investigation under this Division that the person is unfit to stand trial.

"(3) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising the question bears the onus of rebutting the presumption of fitness.

"(4) If the question of a person's fitness to stand trial is raised by the court, the prosecution has carriage of the matter and no party bears the onus of rebutting the presumption of fitness.

"43L. Standard of proof

"The question of whether a person is fit to stand trial is a question of fact to be determined by a jury on the balance of probabilities.

"43M. Committal proceedings

"(1) If the question of an accused person's fitness to stand trial arises at a committal proceeding –

- (a) the accused person is not to be discharged only because the question has been raised during the committal proceeding;
- (b) the committal proceeding is to be completed in accordance with the *Justices Act* (whether or not sections 106 and 110 of that Act are complied with); and

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- (c) if the accused person is committed for trial – the question is to be reserved for consideration by the court during the trial of the accused person.

"(2) In the event of an inconsistency between Part V of the *Justices Act* and this section, this section prevails to the extent of the inconsistency.

"43N. Institution of investigation of fitness of accused person

"(1) The question of whether an accused person is fit to stand trial may be raised in the court by the prosecution or the defence, or by the court, at any time after the presentation of the indictment.

"(2) The court must order an investigation into the fitness of the accused person to stand trial if –

- (a) the question of fitness was reserved during the committal proceedings; or
- (b) the Judge is satisfied that there are reasonable grounds on which to question the accused person's fitness to stand trial.

"(3) If the court makes an order for an investigation into the fitness of the accused person after the trial has commenced, the court may adjourn or discontinue the trial and conduct an investigation.

"(4) The question of the fitness of an accused person to stand trial may be raised more than once in the same proceeding.

"43O. Court may make interim orders

"Before or at the time the court makes an order under section 43N(2) for an investigation, the court may also make the interim orders it considers just, including one or more of the following orders:

- (a) an order for the bail of the accused person;
- (b) an order that the accused person be remanded in custody (whether in a prison or other appropriate place);
- (c) an order that any reports relating to the fitness of the accused person to stand trial held by the prosecution or defence be produced before the court;
- (d) an order that the accused person undergo an examination by a psychiatrist or other appropriate expert and that a report of the results of the examination be given to the court.

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"43P. Procedure for conduct of investigation

"(1) At the commencement of the investigation, the Judge must explain to the jury –

- (a) the reason for the investigation;
- (b) the findings that may be made and the consequences of those findings in law and otherwise; and
- (c) the standard of proof required to establish whether the accused person is fit for trial.

"(2) The court must hear the relevant evidence and submissions relating to the question of fitness of the accused person put to the court by the prosecution and the defence.

"(3) If the Judge considers that it is in the interests of justice to do so, the court may –

- (a) call evidence on its own initiative;
- (b) require the accused person to undergo an examination by a psychiatrist or other appropriate expert; and
- (c) require the results of an examination referred to in paragraph (b) to be produced before the court.

"43Q. Finding that accused person fit to stand trial

"If the jury finds that the accused is fit to stand trial, the trial of the accused person for committing the offence he or she is charged with is to proceed in the normal way.

"43R. Procedure if accused person found unfit to stand trial after conduct of investigation

"(1) If the jury finds that the accused person is unfit to stand trial, the Judge must determine whether there is a reasonable prospect that the accused person might, within 12 months, regain the necessary capacity to stand trial.

"(2) In making his or her determination under subsection (1), the Judge –

- (a) may call evidence on his or her own initiative; and
- (b) must refer to all relevant evidence and make the determination on the balance of probabilities.

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"(3) If the Judge determines that it is not likely that the accused will become fit to stand trial within 12 months, the court must hold a special hearing within 3 months after the date of the Judge's determination.

"(4) If the Judge determines that there is a reasonable prospect that the accused person might become fit for trial within 12 months, the Judge must adjourn the matter of the fitness of the accused person to be tried for the period, not exceeding 12 months, within which the Judge considers that the accused person might become fit.

"(5) If the matter is adjourned under subsection (4), the Judge may make the interim orders he or she considers just, including one or more of the following orders:

- (a) an order for the bail of the accused person;
- (b) an order that the accused person is remanded in custody (whether in a prison or another appropriate place) during the adjournment.

"(6) The Judge must not make an order under subsection (5) remanding the accused person in custody in a prison unless the Judge is satisfied that there is no practicable alternative given the circumstances of the accused person.

"(7) On the expiry of the adjournment, the accused person is presumed to be fit to stand trial unless a party or the court raises a real and substantive question as to the accused person's fitness to stand trial.

"(8) Where the accused person is presumed to be fit, the trial of the accused person for committing the offence he or she is charged with is to proceed in the normal way.

"(9) Where a real and substantial question as to the accused person's fitness has been raised in accordance with subsection (7), the court must –

- (a) if the adjournment was for less than 12 months – adjourn the matter for a further period that, when added together with the first period of adjournment, does not exceed 12 months; or
- (b) hold a special hearing within 3 months after the date the adjournment expires.

"(10) If the Judge further adjourns the matter under subsection (9)(a), he or she may vary an order made under subsection (5) in respect of the accused person or make any other orders referred to in subsection (5) as he considers just (and, in doing so, must comply with subsection (6)).

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"(11) On the expiry of an adjournment under subsection (9)(a), subsections (7), (8), (9) and (10) apply with the necessary changes as if a reference to an adjournment in those subsections were a reference to a further adjournment under subsection (9)(a).

"(12) A matter may be adjourned more than once under subsection (9)(a) but the total period of adjournment of a matter under this section is not to exceed 12 months.

"43S. Abridgement of adjournment under section 43R

"Where the court has made an order under section 43R(4) or (9)(a) adjourning the matter of the fitness of an accused person to be tried, the accused person or the Director of Public Prosecutions may at any time during the adjournment apply to the court for either of the following orders:

- (a) if the accused person or the Director of Public Prosecutions considers that the accused person has become fit to stand trial – an order that the trial of the accused person for committing the offence he or she is charged with is to proceed in the normal way;
- (b) if the accused person or the Director of Public Prosecutions considers that the accused person will not become fit to stand trial by the end of the 12 month period referred to in section 43R – an order to hold a special hearing within 3 months after the date the order is made.

"43T. Finding that accused unfit to stand trial by agreement

"(1) If, at any time before or during the trial of an offence, the parties to the prosecution of the offence agree that the accused person is unfit to stand trial, the court may dispense with an investigation into the fitness of the accused person to stand trial and record a finding that the accused person is unfit to stand trial.

"(2) If the court records a finding under subsection (1), the court must hold a special hearing within 3 months of recording the finding.

"43U. Extension of period for holding special hearing

"(1) The Court may, on application or on its own initiative, extend, by not more than 3 months, the period within which a special hearing is to be held under section 43R, 43S or 43T.

"(2) There is no limit to the number of extensions that the court may make under subsection (1).

"Division 4 – Special hearings

"43V. Purpose of special hearings

"(1) A special hearing is to determine, on the evidence available, whether an accused person who is found not fit to stand trial –

- (a) is not guilty of the offence he or she is charged with;
- (b) is not guilty of the offence he or she is charged with because of his or her mental impairment; or
- (c) committed the offence he or she is charged with or an offence available as an alternative to that offence.

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

"43W. Procedure for conduct of special hearing

"(1) A special hearing is to be conducted as nearly as possible as if it were a criminal trial.

"(2) At a special hearing –

- (a) the accused person is taken to plead not guilty;
- (b) the accused person's legal representative (if any) may exercise the accused person's right of challenge;
- (c) the accused person may raise any defence (including the defence of mental impairment) that he or she could raise at a criminal trial;
- (d) the rules of evidence apply;
- (e) the accused person may give evidence; and
- (f) any alternative finding of guilt that would be available for a jury at a criminal trial is available to the jury at the special hearing.

"(3) The Judge must explain to the jury –

- (a) that a real and substantial question has been raised as to the accused person's fitness to be tried;
- (b) the meaning of being unfit to stand trial;

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- (c) the purpose of the special hearing, the findings that are available to the jury and the consequences of the findings at law and otherwise; and
- (d) the standard of proof required for the findings.

"43X. Findings at special hearing

"(1) If the jury at a special hearing finds the accused person is not guilty of the offence, the finding is taken to be a finding of not guilty at a criminal trial and the court must discharge the accused person.

"(2) If the jury at a special hearing finds the accused person is not guilty because of mental impairment, the finding is taken to be a finding of not guilty because of mental impairment at a criminal trial and the court must –

- (a) declare that the accused person is liable to supervision under Division 5; or
- (b) order that the accused person be released unconditionally.

"(3) If the jury at a special hearing finds, on the evidence available, that the accused person committed the offence charged or an offence available as an alternative to the offence, the finding –

- (a) is taken to be a qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates;
- (b) constitutes a bar to further prosecution in respect to the same conduct and circumstances; and
- (c) is subject to appeal in the same manner as if it were a finding of guilt at a criminal trial,

and the court must declare that the accused person is liable to supervision under Division 5 or discharge the accused person unconditionally.

"43Y. Interim orders pending supervision

"If the court makes a declaration under section 43X(2)(a), the court may make the interim orders pending the supervision order it considers just, including one or more of the following orders:

- (a) an order for the bail of the accused person;
- (b) an order that the accused person is to be remanded in custody (whether in a prison or another appropriate place) until the supervision order is made;

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- (c) an order that the accused person undergo an examination by a psychiatrist or other appropriate expert;
- (d) if the court makes an order referred to in paragraph (c) – an order that a report of the results of the examination be produced before the court.

"Division 5 – Supervision orders

"43Z. When supervision orders are made

"If the court declares under section 43I(2)(a) or 43X(2)(a) or (3) that an accused person is liable to supervision, the court must make a supervision order under this Division in respect of the person.

"43ZA. Nature of supervision orders

"(1) A supervision order may, subject to the conditions the court considers appropriate and specifies in the order –

- (a) if it is a custodial supervision order – commit the accused person to custody –
 - (i) subject to subsection (2) – in a prison; or
 - (ii) subject to subsection (3) – in any other appropriate place; or
- (b) if it is a non-custodial supervision order – release the accused person.

"(2) The court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative for the circumstances of the person.

"(3) The court must not make a supervision order –

- (a) committing the accused person to custody in an appropriate place; or
- (b) providing for the accused person to receive treatment or other services in, at or from an appropriate place,

unless the court has received a certificate from the chief executive officer of the Department of Health and Community Services stating that facilities or services are available in that place for the custody, care or treatment of the person.

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"43ZB. Appeals against supervision orders

"(1) A supervision order (including a supervision order varied under section 43ZD or 43ZE) is subject to the same rights of appeal as a sentence.

"(2) In addition to appeals referred to in subsection (1), the chief executive officer of the Department of Health and Community Services may appeal to the Court of Criminal Appeal against a supervision order if he or she considers that –

- (a) a different supervision order should have been made; and
- (b) an appeal should be brought in the public interest.

"(3) On an appeal under subsection (2), the Court of Criminal Appeal may confirm the supervision order or quash the supervision order and make another supervision order in substitution for it.

"43ZC. Term of supervision order

"Subject to sections 43ZD, 43ZE and 43ZG, a supervision order is for an indefinite term.

"43ZD. Variation or revocation of supervision order

"(1) Any of the following persons may apply to the court for an order varying or revoking a supervision order:

- (a) the Director of Public Prosecutions;
- (b) the supervised person;
- (c) a person having the custody, care, control or supervision of the supervised person;
- (d) any other person who has an interest that the court recognises as proper for the purposes of making the application.

"(2) A person who makes an application under subsection (1) must give notice of the application at least 14 days before the hearing of the application to –

- (a) the Director of Public Prosecutions;
- (b) the supervised person;
- (c) the next of kin (if any) of the supervised person; and
- (d) a person having the custody, care, control or supervision of the supervised person.

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"(3) If, on an application to vary or revoke a supervision order by the supervised person, the court refuses the application, the supervised person must not make another application within 12 months after the date of the court's refusal or any other period (which may be lesser or greater) the court fixes.

- "(4) On hearing the application, the court may –
- (a) confirm the supervision order the subject of the application;
 - (b) if the application is for an order revoking the supervision order –
 - (i) revoke the supervision order and release the supervised person unconditionally; or
 - (ii) vary the conditions of the supervision order; or
 - (c) if the application is for an order varying the supervision order –
 - (i) vary the conditions of the supervision order;
 - (ii) where the supervision order is a non-custodial supervision order – vary the supervision order to a custodial supervision order; or
 - (iii) where the supervision order is a custodial supervision order – vary the supervision order to a non-custodial supervision order.

"43ZE. Urgent variation of non-custodial supervision order

"(1) If it appears to the Director of Public Prosecutions that a supervised person who is subject to a non-custodial supervision order is not complying or is not likely to comply with the supervision order and, because of that, the supervision order should be varied urgently, the Director of Public Prosecutions may make an urgent application to the court for an order varying the supervision order.

- "(2) In making an application under subsection (1) –
- (a) the Director of Public Prosecutions may give notice of the application to one or more of the persons specified in section 43ZD(2) and the notice he or she gives may be less than the 14 days required under that subsection; and
 - (b) the Director of Public Prosecutions may make the application orally by telephone or in writing by facsimile or any other available electronic means of communication.

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"(3) If the supervised person fails to appear at the hearing of the application, the court must issue a warrant for the apprehension and arrest of the supervised person.

"(4) On hearing the application, the court may –

- (a) confirm the non-custodial supervision order;
- (b) vary the conditions of the non-custodial supervision order; or
- (c) vary the non-custodial supervision order to a custodial supervision order and impose the conditions on the custodial supervision order that the court considers appropriate.

"(5) If the court makes an order under subsection (4)(c) varying the supervision order to a custodial supervision order –

- (a) unless the term fixed under section 43ZG in respect of the supervision order has expired, that period continues to apply in respect of the custodial supervision order; or
- (b) if the term referred to in paragraph (a) has expired – the court must fix the term it considers appropriate during which the supervision order as varied is to be in force and specify the term in the supervision order (and section 43ZG applies to and in relation to the supervision order as varied as if that term were a term fixed under section 43ZG(1)).

"43ZF. Emergency power of apprehension

"(1) If a member of the Police Force suspects on reasonable grounds that –

- (a) a supervised person is failing or has failed to comply with the supervision order to which he or she is subject (including a supervision order that has just been varied);
- (b) the safety of a supervised person is at risk unless the supervised person is apprehended; or
- (c) the safety of the public is at risk if a supervised person is not apprehended,

the member may apprehend the supervised person.

"(2) A supervised person who is apprehended under subsection (1) must be detained –

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- (a) if the supervised person is subject to a custodial supervision order – in the place where he or she is committed to custody under the supervision order; or
- (b) if the supervised person is subject to a non-custodial supervision order – in an appropriate place (which would, if there is no practicable alternative in the circumstances, be a prison or a police station).

"(3) If a supervised person who is apprehended under subsection (1) is subject to a non-custodial supervision order, an application for an order varying the non-custodial supervision order is to be made to the court under section 43ZD or 43ZE.

"43ZG. Limiting of term of supervision orders

"(1) When the court makes a supervision order, the court must fix the term during which the supervision order is, subject to this section and sections 43ZD and 43ZE, to be in force and specify the term in the order.

"(2) Subject to subsections (3) and (4), the term fixed under subsection (1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.

"(3) If –

- (a) the offence charged carries a mandatory penalty of life imprisonment; or
- (b) the court is of the view that life imprisonment would have been an appropriate penalty for the offence charged,

the court must fix 15 years as the term for the purposes of subsection (1).

"(4) If the supervised person was charged with the commission of multiple offences, the court must fix the term under subsection (1) by reference to the offence carrying the longest maximum period of imprisonment.

"(5) At least 3 months (but not more than 6 months) before the expiry of the term fixed under subsection (1) in respect of a supervision order, the court must conduct a review to determine whether to release the supervised person the subject of the supervision order from it.

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"(6) On completing the review under subsection (5), unless the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released, the court must release the supervised person unconditionally.

"(7) If the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released unconditionally, the court must –

- (a) confirm the supervision order;
- (b) vary the conditions of the supervision order (including, if the supervision order is a custodial supervision order, the place of custody where the supervised person is detained);
- (c) if the supervision order is a non-custodial order – vary the supervision order to a custodial supervision order and impose the conditions on the order that the court considers appropriate; or
- (d) if the supervision order is a custodial order – vary the supervision order to a non-custodial order and impose the conditions on the order that the court considers appropriate.

"43ZH. Periodic review of supervision orders

"(1) After considering a report submitted by an appropriate person under section 43ZK, if the court considers it is appropriate, the court may conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order.

"(2) On completing the review of a custodial supervision order, the court must –

- (a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order; or
- (b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order –
 - (i) confirm the order; or
 - (ii) vary the conditions of the order, including the place of custody where the supervised person is detained.

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"(3) On completing the review of a non-custodial supervision order, the court may –

- (a) confirm the order;
- (b) vary the conditions of the order;
- (c) vary the supervision order to a custodial supervision order and impose the conditions on the order the court considers appropriate;
or
- (d) revoke the order and release the supervised person unconditionally.

"43ZI. Right of persons to appear at hearings under this Division

"(1) Subject to subsection (2), a person who is or is likely to be the subject of a supervision order has a right to appear before the court at a hearing of an application for an order making, varying or revoking the supervision order or of a review of the supervision order under this Division.

"(2) If the person who is or is likely to be the subject of the supervision order does not appear before the court, the court must satisfy itself that –

- (a) the person has been informed of his or her right to appear but has elected not to appear; or
- (b) appearing before the court would be detrimental to the person's health.

"(3) Subsection (2) does not apply to the hearing of an urgent application for an order varying a non-custodial supervision order under section 43ZE.

"(4) The Director of Public Prosecutions may appear before the court at a hearing referred to in subsection (1).

"(5) The court may give leave to a person who it considers has a proper interest in the matter the subject of a hearing referred to in subsection (1) to appear before the court at the hearing.

"(6) A person who is entitled to appear before the court under this section is a party to the matter in which he or she appears and is entitled to be legally represented.

"Division 6 – Reports

"43ZJ. Court to receive report on condition of accused persons declared liable to supervision

"(1) If the court declares under Division 2 or 4 that an accused person is liable to supervision, the appropriate person must, within 30 days after the date of the declaration or the longer period (if any) agreed to by the court, prepare and submit a report to the court on the mental impairment, condition or disability of the accused person that is the reason he or she was found to be not guilty of the offence charged because of mental impairment or to be unfit to stand trial.

"(2) A report referred to in subsection (1) is to contain –

- (a) a diagnosis and prognosis of the accused person's mental impairment, condition or disability;
- (b) details of the accused person's response to any treatment, therapy or counselling he or she is receiving or has received and any services that are being or have been provided to him or her; and
- (c) a suggested treatment plan for managing the accused person's mental impairment, condition or disability.

"43ZK. Periodic reports on condition of supervised persons

"(1) If the court makes a supervision order, the appropriate person must, at intervals of not more than 12 months, until the supervision order is revoked or expires (and the supervised person is released unconditionally), prepare and submit a report to the court on the treatment and management of the supervised person's mental impairment, condition or disability.

"(2) A report referred to in subsection (1) is to contain –

- (a) details of the treatment, therapy or counselling that the supervised person has received, and the services that have been provided to the supervised person, since the supervision order was made or the last report was prepared (as the case may require); and
- (b) details of any changes to the prognosis of the supervised person's mental impairment, condition or disability and to the plan for managing the mental impairment, condition or disability.

"43ZL. Reports on views of victim or next of kin etc.

"For the purposes of assisting the court to make, vary or revoke a supervision order, or to determine to release a supervised person, the court may request and receive one or more of the following reports:

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- (a) a report setting out the views of the victim of the offence concerning the conduct of the supervised person and containing particulars of any injury, loss or damage suffered by the victim as a direct result of the offence;
- (b) a report setting out the views of the next of kin of a deceased victim concerning the conduct of the supervised person;
- (c) a report setting out the views of the next of kin of the supervised person and the impact of the person's conduct on the person's family;
- (d) if the supervised person is a member of an Aboriginal community – a report setting out the views of members of the Aboriginal community.

"Division 7 – Principles on which court is to act

"43ZM. Principle court to apply when making, varying or revoking supervision order or releasing supervised person

"In determining whether to make, vary or revoke a supervision order or release a supervised person under this Part, the court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.

"43ZN. Matters that court is to take into account when making, varying or revoking supervision order or releasing supervised person

"(1) In determining whether to make, vary or revoke a supervision order or release a supervised person under this Part, the court must have regard to the following matters:

- (a) whether the supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or mental impairment, condition or disability;
- (b) the need to protect people from danger;
- (c) the nature of the mental impairment, condition or disability;
- (d) the relationship between the mental impairment, condition or disability and the offending conduct;
- (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

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- (f) whether the supervised person is complying or is likely to comply with the conditions of the supervision order;
- (g) any other matters the court considers relevant.

"(2) The court must not make an order under this Part releasing a supervised person from custody (whether conditionally or otherwise) or significantly reducing the supervision to which a supervised person is subject unless –

- (a) the court has –
 - (i) obtained and considered 2 reports, each report being prepared by a person who is a psychiatrist or other expert (but the same person must not prepare both reports); and
 - (ii) considered the reports submitted to the court under sections 43ZJ and 43ZK and received by the court under section 43ZL, if any; and
- (b) the court is satisfied that each of the following persons were given reasonable notice of the proceedings concerned:
 - (i) the victim of the offence concerned;
 - (ii) if the victim concerned is deceased – the victim's next of kin;
 - (ii) the next of kin of the supervised person concerned;
 - (iii) if the supervised person concerned is a member of an Aboriginal community – the Aboriginal community.

"(3) Notice is not required to be given to a person referred to in subsection (2)(b) if the person cannot be found after reasonable inquiry.

"Division 8 – Miscellaneous

"43ZO. Counsel to have independent discretion

"If an accused person is unable to instruct his or her legal representative on questions relevant to an investigation or a special hearing, the legal representative may exercise an independent discretion and act as he or she reasonably believes to be in the accused person's best interests.

"43ZP. Counselling next of kin

"(1) If an application is made to the court under this Part that might result in an order for the release from custody of a supervised person, the Minister must ensure that counselling services are available to the victim, next of kin of a deceased victim and next of kin of the supervised person.

"(2) A person who in the course of providing or being provided counselling services to a person referred to in subsection (1) discloses information about the supervised person concerned to another person does not, in doing so, contravene the law of the Territory or any code or rule of conduct or professional ethics and is taken not to have committed an offence against the law in force in the Territory because of the disclosure.

"43ZQ. Regulations

"The Administrator may make regulations, not inconsistent with this Act, prescribing matters –

- (a) required or permitted by this Part to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Part."

5. Repeal

Sections 357 and 382 of the Criminal Code are repealed.

6. Savings and transitional

(1) In this section –

"amended Code" means the Criminal Code as in force on and after 15 June 2002;

"repealed provisions" means sections 35, 36, 357 and 382 of the Criminal Code as in force before 15 June 2002.

(2) A person, who was, before 15 June 2002, acquitted on account of insanity under the repealed provisions and ordered to be kept in safe custody during the Administrator's pleasure, is taken to be a supervised person held in custody on the same terms and conditions under a custodial supervision order within the meaning of Part IIA of the amended Criminal Code and, subject to subsection (3), that Part applies in relation to the person, and the person may be dealt with under that Part, as if he or she were a supervised person subject to a custodial supervision order.

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(3) The appropriate person (within the meaning of section 43A of the amended Criminal Code) in relation to a person referred to in subsection (2) must, within 6 months, prepare and submit to the court a report of a kind described in section 43ZJ of the amended Criminal Code and the court must as soon as practicable after receiving the report commence a review in relation to the person under section 43ZH of that Act.

(4) Despite sections 3 and 5 of this Act, the defence of insanity under the repealed provisions continues to apply to any offence alleged to have been committed before 15 June 2002.

(5) If, on or after 15 June 2002, a jury finds a person not guilty of an offence referred to in subsection (4) on the grounds of insanity, the finding is taken to be, and Part IIA of the amended Criminal Code is taken to apply in relation to the person as if the finding were, a finding of not guilty because of mental impairment under Division 2 of that Part.

(6) A person who, before 15 June 2002, was found not capable of understanding the proceedings at a trial and discharged under the repealed provisions may, on or after that date, be indicted and tried for the same offence under and in accordance with the amended Criminal Code.

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