

South Australia



**CRIMINAL LAW CONSOLIDATION (MENTAL IMPAIRMENT)
AMENDMENT ACT 1995**

No. 91 of 1995

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ANNO QUADRAGESIMO QUARTO

ELIZABETHAE II REGINAE

A.D. 1995

No. 91 of 1995

An Act to amend the Criminal Law Consolidation Act 1935 and to repeal the Mental Health (Supplementary Provisions) Act 1935.

[Assented to 7 December 1995]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Criminal Law Consolidation (Mental Impairment) Amendment Act 1995*.

(2) The *Criminal Law Consolidation Act 1935* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Insertion of Part 8A

3. The following Part is inserted after Part 8 of the principal Act:

**PART 8A
MENTAL IMPAIRMENT**

DIVISION 1—PRELIMINARY

Interpretation

269A. (1) In this Part—

"authorised person" means a person authorised by the Minister for Health to exercise the powers of an authorised person under this Part;

"judge" includes magistrate;

"**mental illness**" means a pathological infirmity of the mind (including a temporary one of short duration)¹;

"**mental impairment**" includes—

- (a) a mental illness; or
- (b) an intellectual disability; or
- (c) a disability or impairment of the mind resulting from senility;

"**next of kin**" of a person means a person's spouse (or putative spouse), parents and children;

"**objective element**" of an offence means an element of an offence that is not a subjective element;

"**psychiatrist**" means a person registered under the *Medical Practitioners Act 1983* as a specialist in psychiatry;

"**subjective element**" of an offence means voluntariness, intention, knowledge or some other mental state that is an element of the offence;

"**supervision order**" — See section 269O;

"**victim**", in relation to an offence or conduct that would, but for the perpetrator's mental impairment, have constituted an offence, means a person who suffered significant mental or physical injury as a direct consequence of the offence or the conduct.

(2) For the purposes of this Part—

- (a) the question whether a person was mentally competent to commit an offence is a question of fact;
- (b) the question whether a person is mentally unfit to stand trial on a charge of an offence is a question of fact.

¹ A condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness, although such a condition may be evidence of mental illness if it involves some abnormality and is prone to recur (See *R v Falconer* (1990) 171 CLR 30).

Distribution of judicial functions between judge and jury

269B. (1) An investigation under this Part by the Supreme Court or the District Court into—

- (a) a defendant's mental competence to commit an offence or a defendant's mental fitness to stand trial; or

(b) whether elements of the offence have been established,

is to be conducted before a jury unless the defendant has elected to have the matter dealt with by a judge sitting alone.

(2) The same jury may deal with issues arising under this Part about a defendant's mental competence to commit an offence, or fitness to stand trial, and the issues on which the defendant is to be tried, unless the trial judge thinks there are special reasons to have separate juries.

(3) Any other powers or functions conferred on a court by this Part are to be exercised by the court constituted of a judge sitting alone.

DIVISION 2—MENTAL COMPETENCE TO COMMIT OFFENCES

Mental competence

269C. A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—

- (a) does not know the nature and quality of the conduct; or
- (b) does not know that the conduct is wrong; or
- (c) is unable to control the conduct.

Presumption of mental competence

269D. A person's mental competence to commit an offence is to be presumed unless the person is found, on an investigation under this Division, to have been mentally incompetent to commit the offence.

Reservation of question of mental competence

269E. (1) If, on the trial of a person for an offence—

- (a) the defendant raises a defence of mental incompetence; or
- (b) the court decides, on application by the prosecution or on its own initiative, that the defendant's mental competence to commit the offence should be investigated in the interests of the proper administration of justice,

the question of the defendant's mental competence to commit the offence must be separated from the remainder of the trial.

(2) The trial judge has a discretion to proceed first with the trial of the objective elements of the offence or with the trial of the mental competence of the defendant.

(3) If, at the preliminary examination of a charge of an indictable offence, the question of the defendant's mental competence to commit the offence arises, the question must be reserved for consideration by the court of trial.

What happens if trial judge decides to proceed first with trial of defendant's mental competence to commit offence

269F. If the trial judge decides that the defendant's mental competence to commit the offence is to be tried first, the court proceeds as follows.

Trial of defendant's mental competence**A. (1) The court—**

- (a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental competence to commit the offence; and
- (b) 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) The power to require an examination and report under subsection (1)(b) may be exercised—

- (a) on the application of the prosecution or the defence; or
- (b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If the court is not satisfied on the balance of probabilities that the defendant was at the time of the alleged offence mentally incompetent to commit the offence, the court must proceed with the trial of the offence in the normal way.

(4) If the court is satisfied on the balance of probabilities that the defendant was at the time of the alleged offence mentally incompetent to commit the offence, the court must record a finding that the defendant was mentally incompetent to commit the offence.

(5) The court may, if the prosecution and the defence agree—

- (a) dispense with, or terminate, an investigation into a defendant's mental competence to commit an offence; and
- (b) record a finding that the defendant was mentally incompetent to commit the offence.

Trial of objective elements of offence

B. (1) If the court records a finding that the defendant was mentally incompetent to commit the offence, the court must hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established.

(2) If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established.

(3) If the court finds that the objective elements of the offence are established, the court must find the defendant not guilty of the offence but declare the defendant to be liable to supervision under this Part; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

What happens if trial judge decides to proceed first with trial of objective elements of offence

269G. If the trial judge decides to proceed first with the trial of the objective elements of the offence, the court proceeds as follows.

Trial of objective elements of offence

A. (1) The court must first hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established against the defendant.

(2) If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established; but otherwise the court must record a finding that the defendant is not guilty of the offence and discharge the defendant.

Trial of defendant's mental competence

B. (1) If the court records a finding that the objective elements of the offence are established, the court—

(a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental competence to commit the offence; and

(b) 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) The power to require an examination and report under subsection (1)(b) may be exercised—

(a) on the application of the prosecution or the defence; or

(b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If the court is satisfied on the balance of probabilities that the defendant was at the time of the alleged offence mentally incompetent to commit the offence, the court must record a finding that the defendant is not guilty of the offence and declare the defendant to be liable to supervision under this Part.

(4) If the court is not satisfied on the balance of probabilities that the defendant was at the time of the alleged offence mentally incompetent to commit the offence, the court must proceed to consider whether the evidence establishes the subjective elements of the offence beyond reasonable doubt, and—

- (a) if satisfied that the subjective elements of the offence are established beyond reasonable doubt—must record a finding that the defendant is guilty of the offence and proceed to deal with the defendant as if a finding of guilt had been made in the normal way; or
- (b) if not satisfied that the subjective elements of the offence are established beyond reasonable doubt—must record a finding that the defendant is not guilty of the offence.

(5) The court may, if the prosecution and the defence agree—

- (a) dispense with, or terminate, an investigation into a defendant's mental competence to commit an offence; and
- (b) declare that the defendant was mentally incompetent to commit the offence, record a finding that the defendant is not guilty of the offence, and declare the defendant to be liable to supervision under this Part.

DIVISION 3—MENTAL UNFITNESS TO STAND TRIAL

Mental unfit to stand trial

269H. A person is mentally unfit to stand trial on a charge of an offence if the person's mental processes are so disordered or impaired that the person is—

- (a) unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
- (b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.

Presumption of mental fitness to stand trial

269I. A person's mental fitness to stand trial is to be presumed unless it is established, on an investigation under this Division, that the person is mentally unfit to stand trial.

Order for investigation of mental fitness to stand trial

269J. (1) If there are reasonable grounds to suppose that a person is mentally unfit to stand trial, the court before which the person is to be tried may order an investigation under this Division of the defendant's mental fitness to stand trial.

(2) The court's power to order an investigation into the defendant's mental fitness to stand trial may be exercised—

- (a) on the application of the prosecution or the defence; or

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(b) if the judge considers the investigation necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If a court orders an investigation into the defendant's mental fitness to stand trial after the trial begins, the court may adjourn or discontinue the trial to allow for the investigation.

(4) If a court before which a preliminary examination of an indictable offence is conducted is of the opinion that the defendant may be mentally unfit to stand trial, the preliminary examination may continue, but the court must raise for consideration by the court of trial the question whether there should be an investigation under this Division of the defendant's mental fitness to stand trial.

Preliminary prognosis of defendant's condition

269K. (1) Before formally embarking on an investigation under this Division of a defendant's mental fitness to stand trial, a court may require production of psychiatric or other expert reports that may exist on the defendant's mental condition and may, if it thinks fit, itself have a report prepared on the defendant's mental condition.

(2) If it appears from a report that the defendant is mentally unfit to stand trial but there is a reasonable prospect that the defendant will regain the necessary mental capacity over the next 12 months, the court may adjourn the defendant's trial for not more than 12 months.

(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 revoke the order for the investigation and the trial will then proceed in the normal way.

Trial judge's discretion about course of trial

269L. If the court orders an investigation into a defendant's mental fitness to stand trial, the question of the defendant's mental fitness to stand trial may, at the discretion of the trial judge, be separately tried before any other issue that is to be tried or after a trial of the objective elements of the alleged offence.

What happens if trial judge decides to proceed first with trial of defendant's mental fitness to stand trial

269M. If the trial judge decides that the defendant's mental fitness to stand trial is to be tried first, the court proceeds as follows.

Trial of defendant's mental fitness to stand trial

A. (1) The court—

- (a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental fitness to stand trial; and
- (b) 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) The power to require an examination and report under subsection (1)(b) may be exercised—

- (a) on the application of the prosecution or the defence; or
- (b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If the court is not satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must proceed with the trial of the offence in the normal way.

(4) If the court is satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must record a finding to that effect.

(5) The court may, if the prosecution and the defence agree—

- (a) dispense with, or terminate, an investigation into a defendant's fitness to stand trial; and
- (b) record a finding that the defendant is mentally unfit to stand trial.

Trial of objective elements of offence

B. (1) If the court records a finding that the defendant is mentally unfit to stand trial, the court must hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether a finding should be recorded under this section that the objective elements of the offence are established.

(2) If the court is satisfied that—

- (a) the objective elements of the offence are established beyond reasonable doubt; and
- (b) there is, on the evidence before the court, no defence to the charge that could be established on the assumption that the defendant's mental faculties were not impaired at the time of the alleged offence,

the court must record a finding that the objective elements of the offence are established and declare the defendant to be liable to supervision under this Part; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

What happens if trial judge decides to proceed first with trial of objective elements of offence

269N. If the trial judge decides to proceed first with the trial of the objective elements of the offence, the court proceeds as follows.

Trial of objective elements of offence

A. (1) The court must first hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established.

(2) If the court is satisfied that—

- (a) the objective elements of the offence are established beyond reasonable doubt; and
- (b) there is, on the evidence before the court, no defence to the charge that could be established on the assumption that the defendant's mental faculties were not impaired at the time of the alleged offence,

the court must record a finding that the objective elements of the offence are established; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

Trial of defendant's mental fitness to stand trial

B. (1) If the court records a finding that the objective elements of the offence are established, the court—

- (a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental fitness to stand trial; and
- (b) 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) The power to require an examination and report under subsection (1)(b) may be exercised—

- (a) on the application of the prosecution or the defence; or
- (b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If the court is satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must record a finding to that effect and declare the defendant to be liable to supervision under this Part.

(4) If the court is not satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must proceed with the trial of the remaining issues (or may, at its discretion, re-start the trial).

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(5) The court may, if the prosecution and the defence agree—

- (a) dispense with, or terminate, an investigation into a defendant's mental fitness to stand trial; and
- (b) declare that the defendant is mentally unfit to stand trial, and declare the defendant to be liable to supervision under this Part.

**DIVISION 4—DISPOSITION OF PERSONS DECLARED TO BE
LIABLE TO SUPERVISION UNDER THIS PART**

Supervision

269O. (1) The court by which a defendant is declared to be liable to supervision under this Part may—

- (a) release the defendant unconditionally; or
- (b) make an order (a "supervision order")—
 - (i) committing the defendant to detention under this Part; or
 - (ii) releasing the defendant on licence on conditions decided by the court and specified in the licence.

(2) If a court makes a supervision order, the court must fix a term (a "limiting term") equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court's opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established¹.

(3) At the end of the limiting term, a supervision order in force against the defendant under this Division lapses.

¹ The court should fix a limiting term by reference to the sentence that would have been imposed if the defendant had been found guilty of the relevant offence and without taking account of the defendant's mental impairment.

Variation or revocation of supervision order

269P. (1) At any time during the limiting term, the court may, on the application of the Crown, the defendant, Parole Board, the Public Advocate or another person with a proper interest in the matter, vary or revoke a supervision order and, if the order is revoked, make, in substitution for the order, any other order that the court might have made under this Division in the first instance.

(2) If the 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 cannot be made by or on behalf of the defendant for six months or such greater or lesser period as the court may direct on refusing the application.

Report on mental condition of the defendant

269Q. (1) If a defendant is declared to be liable to supervision under this Part, the Minister for Health must, within 30 days after the date of the declaration, prepare and submit to the court by which the declaration was made a report, prepared by a psychiatrist or other appropriate expert, on the mental condition of the defendant containing—

- (a) a diagnosis and prognosis of the condition; and
- (b) a suggested treatment plan for managing the defendant's condition.

(2) If a supervision order is made against the defendant, the Minister for Health must arrange to have prepared and submitted to the court, at intervals of not more than 12 months during the limiting term, a report containing—

- (a) a statement of any treatment that the defendant has undergone since the last report; and
- (b) any changes to the prognosis of the defendant's condition and the treatment plan for managing the condition.

Report on attitudes of victims, next of kin, etc.

269R. (1) For the purpose of assisting the court to determine proceedings under this Division, the Crown must provide the court with a report setting out, so far as reasonably ascertainable, the views of—

- (a) the next of kin of the defendant; and
- (b) the victim (if any) of the defendant's conduct; and
- (c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim.

(2) A report is not, however, required under this section if the purpose of the proceeding is—

- (a) to determine whether a defendant who has been released on licence should be detained or subjected to a more rigorous form of supervision; or
- (b) to vary, in minor respects, the conditions on which a defendant is released on licence.

Principle on which court is to act

269S. In deciding whether to release a defendant under this Division, or the conditions of a licence, the court must apply 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.

Matters to which court is to have regard

269T. (1) In deciding proceedings under this Division, the court should have regard to—

- (a) the nature of the defendant's mental impairment; 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 licence; and
- (e) other matters that the court thinks relevant.

(2) The court cannot release a defendant under this Division, or significantly reduce the degree of supervision to which a defendant is subject unless the court—

- (a) has considered at least three reports each prepared by a different psychiatrist or other appropriate expert who has personally examined the defendant, on—
 - (i) the mental 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 most recently submitted to the court by the Minister for Health under this Division; and
- (c) has considered the report on the attitudes of victims and next of kin prepared under this Division; and
- (d) is satisfied that—
 - (i) the defendant's next of kin; and
 - (ii) the victim (if any) of the defendant's conduct; and
 - (iii) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim,

have been given reasonable notice of the proceedings.

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

Cancellation of release on licence

269U. (1) A court that released a defendant on licence under this Division may, on application by the Crown, cancel the release if satisfied that the defendant has contravened, or is likely to contravene, a condition of the licence.

(2) An application under subsection (1) may be made, in a case of urgency, by telephone (and appropriate rules of court must be made allowing for applications by telephone).

(3) If a defendant who has been released on licence under this Division commits an offence while subject to the licence, and is sentenced to imprisonment for the offence, the release on licence is, by virtue of this subsection, cancelled and the detention order is suspended while the defendant is in prison serving the term of imprisonment.

Custody, supervision and care

269V. (1) If a defendant is committed to detention under this Part, the defendant is in the custody of the Minister for Health and the Minister may give directions for the custody, supervision and care of the defendant the Minister considers appropriate.

(2) The Minister for Health may—

- (a) place the defendant under the custody, supervision and care of another; and
- (b) if there is no practicable alternative—direct that a defendant be kept in custody in a prison.

(3) Supervisory responsibilities arising from conditions on which a person is released on licence are to be divided between the Parole Board and the Minister for Health in the following way:

- (a) the supervisory responsibilities are to be exercised by the Minister for Health insofar as they relate to treating or monitoring the mental condition of the person; and
- (b) the supervisory responsibilities are in all other respects to be exercised by the Parole Board.

DIVISION 5—MISCELLANEOUS

Counsel to have independent discretion

269W. If the defendant is unable to instruct counsel on questions relevant to an investigation under this Part, the counsel may act, in the exercise of an independent discretion, in what he or she genuinely believes to be the defendant's best interests.

Power of court to deal with defendant before proceedings completed

269X. (1) If there is to be an investigation into a defendant's mental competence to commit an offence, or mental fitness to stand trial, or a court conducting a preliminary examination reserves the question whether there should be such an investigation for consideration by the court of trial, the court by which the investigation is to be conducted, or the court reserving the question for consideration, may—

- (a) release the defendant on bail to appear later for the purposes of the investigation; or
- (b) commit the defendant to an appropriate form of custody (but not a prison unless the court is satisfied that there is, in the circumstances, no practicable alternative) until the conclusion of the investigation.

(2) If a court declares a defendant to be liable to supervision under this Part, but unresolved questions remain about how the court is to deal with the defendant, the court may—

- (a) release the defendant on bail to appear subsequently to be dealt with by the court; or
- (b) commit the defendant to some appropriate form of custody (but not a prison unless the court is satisfied that there is, in the circumstances of the case, no practicable alternative) until some subsequent date when the defendant is to be brought again before the court.

Appeals

269Y. (1) An appeal lies to the appropriate appellate court against a declaration that a defendant is liable to supervision under this Part in the same way as an appeal against a conviction.

(2) An appeal lies to the appropriate appellate court against a supervision order in the same way as an appeal against sentence.

(3) An appeal lies only by leave of the court of trial or the appropriate appellate court against an order or decision made under this Part before the court declares the defendant to be liable to supervision or decides that the trial of the defendant should proceed in the normal way.

Counselling of next of kin and victims

269Z. (1) If an application is made under Division 4 that might result in a defendant being released from detention, the Minister for Health must ensure that counselling services in respect of the application are made available to—

- (a) the defendant's next of kin; and
- (b) the victim (if any) of the defendant's conduct; and
- (c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim.

(2) A person does not, in disclosing information about the defendant during the course of providing counselling under this section, breach any code or rule of professional ethics.

Exclusion of evidence

269ZA. A finding made on an investigation into a defendant's fitness to stand trial does not establish an issue estoppel against the defendant in any later (civil or criminal) proceedings, and evidence of such a finding is not admissible against the defendant in criminal proceedings against the defendant.

Arrest of person who escapes from detention, etc.

269ZB. (1) If a person who is committed to detention under this Part—

- (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 member of the police force or an authorised person.

(2) A Judge or other proper officer of a court by which a person is released on licence under this Part may, if satisfied that there are proper grounds to suspect that the person may have contravened or failed to comply with a condition of the licence, issue a warrant to have the person arrested and brought before the court.

SCHEDULE
Repeal and Transitional Provisions

Repeal of ss. 292, 293 and 293A

1. Sections 292, 293, and 293A of the principal Act and the heading preceding those sections are repealed.

Transitional provision

2. The principal Act, as amended by this Act, applies to all trials commencing after the commencement of this Act (whether the offence is alleged to have been committed before or after the commencement of this Act).

Repeal of Mental Health (Supplementary Provisions) Act 1935

3. The *Mental Health (Supplementary Provisions) Act 1935* is repealed.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor