

Bills Digest
No. 86 2000–01

Veterans' Affairs Legislation Amendment
(Application of Criminal Code) Bill 2000

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Veterans' Affairs Legislation Amendment (Application of
Criminal Code) Bill 2000

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Veterans' Affairs Legislation Amendment (Application of Criminal Code) Bill 2000

Date Introduced: 30 November 2000

House: House of Representatives

Portfolio: Veterans' Affairs

Commencement: The *Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2000* commences on the latest of the following three dates: 28 days after the Act receives Royal Assent; 28 days after Royal Assent is given to the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* or the day on which item 15 of Schedule 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* commences.¹

Purpose

To revise criminal offence provisions in legislation administered by the Department of Veterans' Affairs in the light of Chapter 2 of the *Criminal Code Act 1995* (the *Criminal Code*) which deals with criminal responsibility.

Background

For a background to the *Criminal Code*, a brief description of its provisions and a summary of how it is being applied to Commonwealth offences, readers are referred to the Background section of the Bills Digest for the Environment and Heritage Protection Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No.92 of 2000-2001*).

Chapter 2 of the *Criminal Code* contains principles of criminal responsibility. Since 1995 there has been a staggered program of applying those principles to Commonwealth criminal laws. Chapter 2 applies to all offences against the Code. From 1 January 1997 it applied to all new Commonwealth offences. From 15 December 2001² it will apply to pre-existing Commonwealth offences. In order to meet this deadline, the Commonwealth has been reviewing pre-existing offence provisions with a view to harmonising them with

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Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 will apply.

Since mid-2000 the Government has introduced a number of Bills which apply Chapter 2 to legislation in a range of portfolios. Examples are the Treasury Legislation Amendment (Application of Criminal Code) Bill 2000, the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000, the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000, and the present Bill.

In brief, the amendments contained in the Veterans' Affairs Legislation Amendment (Application of Criminal Code) Bill 2000 apply Chapter 2 to all offence provisions in legislation administered by the Department of Veterans' Affairs, identify strict liability offences, clarify defences and fault elements, and remove references to Crimes Act ancillary offence provisions and replace them with references to equivalent provisions in the *Criminal Code*. According to the Explanatory Memorandum, the amendments are:

... intended to ensure that relevant offences continue to have much the same meaning and to operate in the same manner as they do at present.³

Main Provisions

Application of the amendments

Clause 4 provides that each amendment made by the *Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2000* applies to acts and omissions that occur or commence after the amendment commences.

Amendments of the *Defence Service Homes Act 1918*

Under the Defence Service Homes Act housing benefits are provided to eligible veterans and their dependants. The benefits are subsidised housing loans, buildings insurance and contents insurance.

Application of Chapter 2

Item 1 of Schedule 1 applies Chapter 2 of the *Criminal Code* to all offences against the Defence Service Homes Act.

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Strict liability

Under the *Criminal Code*, a strict liability offence must be expressly identified.⁴ Failure to do so means that fault elements, which have to be proved by the prosecution, will apply to all the physical elements of the offence.

Section 50A of the Defence Service Homes Act prohibits a business person, tradesperson or member of a profession using words like 'War Service Homes' or 'Defence Service Homes' in a way that suggests that his or her operations are carried on under the Defence Service Homes Act. **Item 2** provides that an offence against section 50A of the Defence Service Homes Act is a strict liability offence. The *Criminal Code* applies a defence of mistake of fact to such an offence.⁵

Amendments of the Veterans' Entitlements Act 1986

The Veterans Entitlements Act consolidates a number of primary and subordinate laws dealing with entitlements available to war veterans, their dependants, war widows and war widowers. The Act contains provisions dealing with pension rates, the making of claims for pensions and other benefits by veterans and their dependants, and how and by whom those claims are determined.

Application of Chapter 2

Item 3 applies Chapter 2 of the *Criminal Code* to all offences against the Veterans' Entitlements Act.

Strict liability

Items 5, 8-10, 13, 23-26, 29, 32 and 40 identify offences of strict liability. An example is **item 5** which inserts **new subsection 32(6A)**. Under the Veterans' Entitlements Act, the Repatriation Commission considers claims for pensions from veterans and their dependants and can also, in some circumstances, review its own decisions on these matters. For these purposes, the Commission is empowered by section 32 to summons witnesses and take evidence. Existing subsection 32(6) provides that:

A person who has been summoned to appear as a witness before the Commission shall not, without reasonable excuse, and after tender of reasonable expenses, fail to appear in answer to the summons.

The penalty for contravening subsection 32(6) is a fine of \$1,000 or 6 months imprisonment, or both.

As a result of the amendment, the offence is identified as a strict liability offence. Note that the amendments retain a defence of reasonable excuse in each case where it presently applies to an offence identified as a strict liability offence (see next section).

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Defences

Defences to criminal offences are usually external to the physical and fault elements of the offences and to the offences themselves. Perhaps for this reason, and to clearly identify defences as defences and not as an element of an offence which would have to be proved or disproved by the prosecution, the amendments relocate excuses and reword some offence provisions.

A number of the defences affected by the amendments apply to strict liability offences. Under the *Criminal Code* a defence of mistake of fact applies to a strict liability offence. However, the Code does not prevent other defences being supplied by particular statutes.⁶ Some of the amendments recreate additional defences—such as reasonable excuse—in some strict liability offences under the Veterans' Entitlement Act.

Items 4, 6-12, 15, 16, 18, 23-26, 28, 29, 30, 32, 34 and 35 recreate and relocate defences under the Veterans' Entitlements Act. For example, the offence against subsection 32(6), which was described above, contains an element of 'reasonable excuse'.⁷ **Item 4** removes the words 'without reasonable excuse' from existing subsection 32(6). **Item 7** recreates a defence of reasonable excuse in **new subsection 32(11A)**. By doing so, the amendments ensure that the element of reasonable excuse will be interpreted as a defence and not as an element of the offence (which would have to be disproved in the negative by the prosecution).

Another example of amendments relating to defences is seen in **item 10** which affects section 54AA. **Item 10** repeals subsection 54AA(7) which presently reads:

[A] person must not refuse or fail to comply with ... [a section 54AA] notice to the extent that the person is capable of complying with it.

A section 54AA notice is one issued to a person receiving a service pension which requires that person to provide information or documents or answer questions. The amendments remove the element of capacity to comply from subsection 54AA(7) and recreate it in **new subsection 54AA(9)**.⁸

Ancillary offences

Items 21 and 22 remove references in the Veterans' Entitlements Act to certain provisions in the *Crimes Act 1914*. **Item 21** can be used as an example. **Item 21** repeals subsection 93F(2) of the Veterans' Entitlements Act. Subsection 93F(2) refers to offences against the Veterans' Entitlements Act and provides that such references include references to certain sections in the Crimes Act—including sections 7, 7A or 86 of the Crimes Act. These Crimes Act provisions criminalise attempts, incitement, and conspiracy to commit an offence against any Commonwealth law. **Item 21** replaces these references with references to equivalent provisions in the *Criminal Code*.

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Fault elements

Items 17, 19, 20, 27, 33 and 36-39 make amendments relating to fault elements. Some of these amendments replace non-Code fault elements with Code fault elements. For example, **item 17** omits the word 'wilfully' in subsection 93D(7) and replaces it with the word 'intentionally'. As amended, subsection 93D(7) will read:

A reference in subsection (6) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who intentionally authorises or permits the commission of the offence.

The *Criminal Code* provides fault elements of intention, knowledge, recklessness and negligence. It does not prevent particular laws creating other fault elements.⁹ However, the amendments remove the non-Code fault element of 'wilfully' for a number of reasons. First, the drafters regard 'wilfulness' as equivalent to the Code fault element of 'intention'.¹⁰ Second, the amendments harmonise the offence provisions with the *Criminal Code*. Third, the amendments are designed to ensure that a future court is not obliged to distinguish between 'wilfulness' and 'intention' when there is no reason for doing so.¹¹

Other amendments replace the fault element of 'knowingly' with that of 'intentionally'. For example, **item 27** amends subsection 128(5) of the Veterans' Entitlements Act which presently reads:

A person shall not, in purported compliance with a notice under subsection (1), knowingly furnish information or give evidence that is false or misleading in a material particular.

As a result of the amendments, the proscribed conduct will be to intentionally furnish information or give evidence that is false or misleading in a material particular. The amendment harmonises the provision with Chapter 2 which states that knowledge applies to circumstances or results¹² rather than conduct. Additionally, the Explanatory Memorandum comments that applying "knowingly" to a physical element of conduct in the pre-*Criminal Code* environment is equivalent to applying the *Criminal Code* fault element of intention.¹³

Finally, a number of amendments are designed to clarify fault elements. For example, existing subparagraph 208(1)(a)(ii) provides:

A person shall not knowingly¹⁴ make, whether orally or in writing, a false or misleading statement:

...

(ii) to deceive an officer doing duty in relation to this Act; or

It is not clear whether the existing words, 'to deceive', are physical elements of conduct or result and, therefore, what Code fault element should apply to them. **Item 37** amends subparagraph 208(1)(a)(ii) so that it reads:

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A person shall not intentionally¹⁵ make, whether orally or in writing, a false or misleading statement:

...

(ii) with the intention of deceiving an officer doing duty in relation to this Act; or

The amendments clarify that the physical element is one of performing proscribed conduct (deceiving an officer), making the appropriate Code fault element that of intention.

Endnotes

- 1 The reason that the Act commences on the latest of the three dates specified is that certain of its provisions depend on the commencement of other legislation.
- 2 The original timetable was that Chapter 2 would apply to pre-existing Commonwealth offences from 16 March 2000. However, this deadline could not be met and so the *Criminal Code Amendment (Application) Act 2000* was passed to extend the application date to 15 December 2001.
- 3 Explanatory Memorandum, p. 2.
- 4 Subsection 6.1(1).
- 5 Paragraph 6.1(1)(b).
- 6 Subsection 6.1(3).
- 7 The defence of mistake of fact applies to an offence against subsection 32(6) as a result of the application of Chapter 2. Chapter 2 does not prevent defences other than mistake of fact being available for strict liability offences.
- 8 The amendments also reword the offence provision [**new subsection 54AA(7)**] and identify it as an offence of strict liability.
- 9 Subsection 5.1(2).
- 10 Explanatory Memorandum, p. 12. It is sometimes said that ‘wilfully’ is a word of ambiguous meaning—see *Review of Commonwealth Criminal Law. Interim Report. Principles of Criminal Responsibility and Other Matters*, July 1990, p. 29.
- 11 Explanatory Memorandum, p. 12.
- 12 Section 5.3.
- 13 Explanatory Memorandum, p. 18.
- 14 The word ‘knowingly’ is replaced by the word ‘intentionally’ by **item 36**.
- 15 See **item 36** and the explanation above about the replacement of ‘knowingly’ with ‘intentionally’.

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