

Bills Digest
No. 96 2000–01

Law and Justice Legislation Amendment
(Application of Criminal Code) Bill 2000

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INFORMATION AND RESEARCH SERVICES

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No. 96 2000–01

Law and Justice Legislation Amendment (Application of
Criminal Code) Bill 2000

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28 February 2001

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Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000

Date Introduced: 6 December 2000

House: Senate

Portfolio: Justice and Customs

Commencement: In general, 28 days after either the day on which the Act commences or the day on which the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* commences—whichever occurs later.

Purpose

To revise criminal offence provisions in legislation administered by the Attorney-General's Department in the light of principles of criminal responsibility contained in Chapter 2 of the *Criminal Code Act 1995* (the *Criminal Code*).

The amendments are designed to enable the law to operate 'in the same manner as ... at present'.¹ However, in some cases, the uncertain operation of an offence may mean that a judgment has been made about the 'likely effect' of existing offences.²

Background

For an account of the background to the *Criminal Code* and a brief description of Chapter 2 of the Code, see the Bills Digest for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No.92, 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 2001³ 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 Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 will apply.

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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 Veterans' Affairs Legislation Amendment (Application of Criminal Code) Bill 2000, and the present Bill.

Some major areas covered by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 are described below.

Application of Chapter 2

The current amendments apply Chapter 2 to offence provisions in legislation administered by the Attorney-General's Department. However, in some cases, the application of Chapter 2 is modified. For example, where a statute contains its own scheme relating to corporate criminal responsibility this is retained and Chapter 2 principles of corporate criminal responsibility are expressly excluded. This is in keeping with policy expressed when the Criminal Code Bill 1994 was introduced. At that time, the responsible Minister said, 'Part 2.5 [of the Criminal Code] concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.'⁴

Strict liability

A strict liability offence is one where the prosecution does not have to prove any fault elements. However, at common law a defendant has a defence of honest and reasonable mistake about the existence of facts which, if true, would have made his or her act innocent.⁵

At common law there is a presumption that every offence contains a mental element. Working from this basis, Chapter 2 of the *Criminal Code* requires offences of strict liability to be expressly identified as such.⁶ Failure to do so means that fault elements are applied to all the physical elements in the offence. Chapter 2 also recognises that an offence may be comprised of physical elements to which fault attaches and physical elements to which fault does not apply. Once again, a statute must identify any particular physical elements to which fault elements do not apply.⁷ The Bill therefore identifies strict liability offences and instances where strict liability applies to particular physical elements of other offences.

The *Criminal Code* will apply a defence of mistake of fact to strict liability offences⁸ and to particular physical elements which are identified as attracting strict liability in other offences.⁹ However, the Code does not prevent other defences being available.¹⁰ The Bill therefore identifies additional defences to strict liability offences in some instances. For example, the Bill relocates and recreates defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

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Absolute liability

An absolute liability offence is one where the prosecution does not have to prove any fault elements and where no defence of honest and reasonable mistake of fact is available. 'Guilt is established by proof of the objective elements of the offence'.¹¹

The *Criminal Code* provides that an offence which is an absolute liability offence must be identified as such¹², as must any particular physical elements which are intended to attract absolute liability in other offences.¹³ While mistake of fact is not available as a defence¹⁴, the *Criminal Code* recognises that other defences may be provided in particular statutes.

The Bill does not identify any absolute liability offences but does identify particular physical elements in some offences as elements which attract absolute liability.

Defences

The Bill recreates and relocates some defences and removes redundant defences.

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.¹⁵ Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the amendments relocate defences from provisions which set out the physical elements of an offence into their own separate subsections. Examples are defences of reasonable excuse.

The *Criminal Code*¹⁶ will supply a general defence of lawful authority for all offences against Commonwealth law. As a result, the Bill also amends a number of statutes to remove references to a defence of 'lawful excuse'.

Removing and replacing inappropriate fault elements

Criminal offences are composed of fault elements¹⁷ and physical elements. In general, 'fault elements describe or define ... the state of mind of the accused in relation to the offence which must be proven for guilt to attach'.¹⁸

Chapter 2 defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'.¹⁹ It also provides default fault elements. Default fault elements will apply where a statute does not specify a fault element for a particular physical element of an offence. The default fault elements provided by the *Criminal Code* are 'intention' in the case of conduct and 'recklessness' in the case of circumstances or results.²⁰

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the *Criminal Code*. For example, amendments ensure that the fault element of recklessness does not apply to the physical

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element of conduct in an offence. In the process of applying appropriate fault elements, some of the amendments also restructure offence provisions so that their constituent physical elements are clearly identified and the Code's default fault elements can be applied to them.

Non-Code fault elements

Many offence provisions in Commonwealth statutes do not specify fault elements. In other cases, a variety of expressions may be used including 'a purpose intended to be', 'wilfully', and 'for the purpose of'. The meaning of many of these expressions is uncertain.

The Criminal Code uses four fault elements. These are intention, knowledge, recklessness and negligence.²¹ The Code does not prevent other fault elements being used in a particular statutory offence provision.²² However, the Bill replaces non-Code fault elements such as 'wilfulness' with Code fault elements such as 'intention'. The amendments are designed to retain the present meaning of particular offences while removing the need for a future court to feel obligated to distinguish between Code fault elements and non-Code fault elements when in fact there may be no difference in meaning between the two.

Ancillary offences

Many Commonwealth statutes contain references to provisions in the *Crimes Act 1914* which deal with ancillary offences such as attempts to commit offences, incitement and conspiracy. These Crimes Act provisions are being disapplied and will be replaced by equivalent provisions in the *Criminal Code*. The Bill thus contains amendments removing references to the Crimes Act and replacing them with references to the *Criminal Code*.

Additionally, some Commonwealth statutes contain provisions creating ancillary offences. These provisions will no longer be necessary once the *Criminal Code* is applied as it contains ancillary offence provisions. The Bill therefore removes ancillary offence provisions from statutes administered by the Attorney-General's Department.

However, in some cases provisions in the *Crimes Act 1914* actually create primary offences of, for example, entering into a proscribed conspiracy. In these circumstances, the amendments insert principles that will govern the offence—in large part replicating principles contained in the *Criminal Code*—instead of simply applying relevant sections from the *Criminal Code*. **Items 50-54** in Schedule 10 are examples.

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Main Provisions

Application of amendments

Clause 4 provides that the amendments apply to acts and omissions that occur or commence after the amendments commence. However, this provision does not apply to amendments made to the *War Crimes Act 1945*.

Schedule 1

Item 2 is designed to remove any doubt that a presumption exists that penalties for Commonwealth offences are maximum penalties.

Item 3 is designed to remove any doubt that Chapter 2 can be applied to regulations before 15 December 2001 (the date on which Chapter 2 will apply to all pre-existing offences against Commonwealth law).

Schedule 2—Amendments of the *Australian Federal Police Act 1979*

Item 1 of Schedule 2 applies Chapter 2 of the *Criminal Code* to all offences under the *Australian Federal Police Act 1979* (the AFP) Act.

Subsection 49M(1) of the AFP Act creates an offence of ‘knowingly’ contravening a restraining order by disposing of property subject to that order. **Item 2** replaces the word ‘knowingly’ with the word ‘intentionally’. This is in keeping with the *Criminal Code* which applies the fault element of intention to the physical element of conduct in an offence. As a consequence of the amendment, the prosecution will have to prove intention in relation to contravention of a restraining order.²³ The default fault element of recklessness supplied by the *Criminal Code* will apply to other physical elements in the offence—for example, the circumstance that the property is subject to a restraining order and the result that property is disposed of.

Items 3 and 4 omit the words ‘without lawful excuse’ from offences against paragraphs 63(b), (c) and (d). Under these provisions it is an offence for a person who is not an AFP member to wear or possess AFP uniforms, or possess AFP weapons, equipment or documents. The *Criminal Code* will contain a general defence of lawful authority following its amendment by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. This defence will apply to all offences against Commonwealth law and thus make redundant the ‘without lawful excuse’ element presently found in the AFP Act.

Item 5 adds a further defence of reasonable excuse to offences against (renumbered) paragraphs 63(1)(b), (c) and (d).

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It is an offence against subsection 64A(1) for an AFP officer not to wear an identification number. The fine is 5 penalty units (\$550). **Item 6** provides that an offence against subsection 64A(1) is a strict liability offence. As a result the prosecution need not prove any fault elements. However, as a result of the application of the *Criminal Code* a defence of mistake of fact is available to a defendant.

Schedule 3—Amendments of the *Australian Protective Service Act 1987*

Item 1 of Schedule 3 applies Chapter 2 of the *Criminal Code* to all offences against the *Australian Protective Service Act 1987* (APS Act).

Item 2 replaces references in the APS Act to ancillary offence provisions in the *Crimes Act 1914* with references to equivalent provisions in the *Criminal Code*. The Crimes Act provisions will be repealed on 15 December 2001—the date when the *Criminal Code* applies to pre-existing Commonwealth offences.

Items 3-5 specify that offences under subsections 19(3), 19(6) and 20(4) are strict liability offences. These are offences of failure to wear an identification number when in Australian Protective Service uniform, and failure to return an APS uniform or identity card when a person ceases to be an APS officer. The penalty for the first offence is \$500 and for the other two offences the penalty is \$100.

Schedule 4—Amendments of the *Australian Security Intelligence Organisation Act 1979*

Item 1 applies Chapter 2 of the *Criminal Code* (with the exception of the Code's principles of corporate criminal responsibility) to all offences against the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). Principles of corporate criminal responsibility already exist in the ASIO Act.²⁴

Items 2-5 remove the element of 'reasonable excuse' from the offences in subsection 92M(1), paragraph 92M(2)(b) and subsection 92M(3) and recreate and relocate it in **new subsection 92M(3)**. The reason for doing so is to ensure that the words are interpreted as words of defence and not as elements of the offences (which would have to be disproved in the negative by the prosecution).

Schedule 5—Amendments of the *Bankruptcy Act 1966*

Item 1 of Schedule 5 applies Chapter 2 of the *Criminal Code* to all offences under the Bankruptcy Act.

Items 2, 4, 5, 7-12 specify that a number of offences under the Bankruptcy Act are offences of strict liability. Most of these offences carry small penalties—ranging from

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\$100²⁵ to 5 penalty units (\$550).²⁶ Offences carrying small penalty are found in existing subsections 54(1) & 54(2). It is an offence against these subsections for a person subject to a sequestration order to fail to file a statement of affairs and furnish a copy to the trustee in bankruptcy. The penalty in each case is 5 penalty units (\$550). **Item 2** inserts **proposed subsection 54(3)** which states that these offences are strict liability offences.

One offence designated as a strict liability offence by the amendments has a penalty of imprisonment. **Item 5** expressly states that an offence against subsection 80(1) is a strict liability offence. Subsection 80(1) makes it an offence for a bankrupt to fail to lodge change of name or address particulars with the trustee in bankruptcy. The penalty is 6 months' imprisonment.²⁷

The *Criminal Code* does not prevent a Commonwealth law from specifying that defences other than mistake of fact apply to strict liability offences. In relation to offences against subsections 56F(1)²⁸ and 155J(1)²⁹, the amendments reflect the existing words of the provisions and stipulate that a defendant will also have a defence of reasonable excuse. (see **items 3, 4, 6 and 7**).

Item 13 replaces a non-Code fault element found in existing subsection 263A of the Bankruptcy Act with a Code fault element. At present section 263A reads:

A person who wilfully makes a false statement in an affidavit to be used for the purposes of this Act is guilty of an offence ...

'Wilfully' is not a fault element which is found in the *Criminal Code*. It is sometimes said that 'wilfulness' is a word of ambiguous meaning.³⁰ However, the Explanatory Memorandum indicates that it is equivalent to the fault element of intention. Therefore, **item 13** deletes 'wilfully' and replaces it with the word 'intentionally'.

Item 18 specifies that some of the physical elements of an offence against subsection 264E(1) attract strict liability.

Items 14-17 & 22-31 omit the element of 'without reasonable excuse' from the offence provisions in subsections 265A(1), 264C(1), 265A(1), 265A(3), and sections 267B, 267D and 267F and recreate and relocate it in separate subsections. The reason for doing so is to ensure that the words are interpreted as defences and not as elements of the offences (which would have to be disproved in the negative by the prosecution). **Items 19-20, 32-33 and 36-37** effect a similar change in offence provisions which contain the words 'to the best of his or her knowledge and belief'.

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Schedule 6—Amendments of the *Classification (Publications, Films and Computer Games) Act 1995*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the *Classification (Publications, Films and Computer Games) Act 1995*.

Item 6 identifies an offence against subsection 70(4) as a strict liability offence. This offence is one of failure to comply with an Auditor-General's requirement. The maximum penalty is 10 penalty units. A defendant will have two defences to such an offence. A defence of mistake of fact will be available as a result of the application of the *Criminal Code*. Additionally, the amendments recreate and relocate the defence of reasonable excuse so that it is not interpreted as an element of the offence.

Schedule 8—Amendments of the *Complaints (Australian Federal Police) Act 1981*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the *Complaints (Australian Federal Police) Act 1981*.

Items 2-5 and 7-12 omit the words 'without reasonable excuse' from the offence provisions contained in subsections 7(8) and 44(1), paragraph 50(8)(b), section 82 and subsection 83(1) and recreate and relocate them in each case to a separate new subsection. The purpose of these amendments is to ensure that the words are read as defences and not as an element of each offence.

Additionally, **item 7** replaces the word 'wilfully' in paragraph 50(8)(b) with the word 'intentionally'. 'Wilfully' is a non-Code fault element.

Schedule 9—Amendments of the *Copyright Act 1968*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Copyright Act.

Items 2, 4, 12 and 14 identify offences against subsections 47A(3), 47A(7), 203E(6) and 203E(10) as strict liability offences. An example is subsection 203E(6) which makes it an offence for a person in charge of a library not to assist a copyright holder who has come to inspect copyright declaration forms held by the library. As a result of the application of the *Criminal Code*, a defence of mistake of fact applies to a strict liability offence. Additionally, in relation to an offence against subsection 47A(7) the amendments recreate and relocate the defence of reasonable excuse in a new provision (**items 3 and 4**).

Items 5, 7, and 9 omit the words 'without lawful excuse' from offences against subsections 172(1), 172(2) and 172(3). As a result of the application of the *Criminal Code*, these words will be redundant because the Code will provide a general defence of lawful authority to all offences under Commonwealth law.³¹

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Schedule 10—Amendments of the *Crimes Act 1914*

Item 4 inserts **proposed section 3BA** which applies the Chapter 2 of the *Criminal Code* to all offences against the *Crimes Act 1914*.

A number of amendments in Schedule 10 relate to ancillary offences such as incitement, conspiracy, and aiding and abetting. For example, **items 1-3 and 60-64** delete references to ancillary offence provisions in the Crimes Act and replace them with references to equivalent provisions in the *Criminal Code*. Other amendments—**items 28 and 53**—remove ancillary offence provisions from the primary offence provisions in the Crimes Act. For example, **item 28** repeals and replaces section 24C of the Crimes Act. Existing section 24C creates offences of engaging in a seditious enterprise, conspiring to carry out a seditious enterprise, and aiding and abetting a seditious enterprise. The amendment removes the two ancillary offences contained in section 24C and retains the primary offence. The *Criminal Code* contains provisions dealing with ancillary offences which will apply to the Crimes Act.

A number of amendments—see, for example, **items 5, 6, 11, 13, 15, 16, 21, 22, 37, 39, 55, 56**—omit the element of reasonable excuse from offence provisions and recreate it in separate provisions.

Item 16 inserts **new subsection 19AZA(5)** which states that offences under subsections 19AZA(1) & (2) are offences of strict liability. These are offences of failure to obey summonses to appear and summonses to produce documents. The penalty for each offence is 10 penalty units (\$1100).

Items 17, 18 & 20 omit the word ‘recklessly’ from offences against subsections 23XG(2), section 23XH, and subsection 23YP(2) of the Crimes Act. These are offences of ‘intentionally or recklessly’ disclosing the results of certain forensic analyses, publishing the name of a suspect who has been ordered to undergo a forensic procedure in a report of proceedings under Division 5, and disclosing forensic information. The amendments remove the fault element of recklessness from the physical element of conduct in the offences. In keeping with the *Criminal Code*, the default fault element of intention will apply to conduct, while the default fault element of recklessness will apply to the physical element of circumstance in the offences. For example, in the case of an offence against section 23XH, the default fault element of intention will apply to the physical element of conduct in the offence (ie publishing the name of a suspect) and the default fault element of recklessness will apply to the physical elements of circumstance in the offence (eg the publication appears in a report of proceedings under Division 5 of the Crimes Act).

Items 23-27 amend section 24AB of the Crimes Act. Section 24AB contains offences of sabotage. The items remove the words ‘a purpose intended to be prejudicial to’ wherever they occur in section 24AB and replace them with the words ‘with the intention of prejudicing’. As an example, under existing subsection 24AB(3) a person accused of an act of sabotage may be convicted:

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if, from the circumstances of the case, from his conduct or from his known character as proved, it appears that his purpose was a purpose intended to be prejudicial to the safety or defence of the Commonwealth.

According to the Explanatory Memorandum the reason for the change in wording is to remove ambiguity and clarify the meaning of the provision. The reference to ‘purpose’ in the provisions could be interpreted either as a physical element of result, in which case a default fault element of recklessness would apply under the *Criminal Code*. Conversely, it could be interpreted as an additional fault element of intention which attaches to the physical element of conduct. The amendments adopt the latter interpretation in the case of section 24AB ie that the defendant intended to prejudice the safety or defence of the Commonwealth. **Items 83-93 and 96** effect similar amendments to sections 78, 79 and 83A of the Crimes Act. These are offences relating to espionage, official secrets and illegal use of uniforms.

Items 29, 30, 35, 41, 47, 94 and 95, omit the word ‘knowingly’ from a number of offence provisions³² and replace it with the word ‘intentionally’. For example, existing paragraph 25(1)(b) provides that it is an offence to ‘knowingly’ attempt to incite a person to commit an act of mutiny. In the offences as they stand, the fault element of knowledge applies to physical elements which involve conduct. Under the *Criminal Code*, the fault element of intention applies to conduct while knowledge applies to circumstances or results. Therefore, to harmonise the provision with the *Criminal Code*, **item 29** rewords it to read that it is an offence to ‘intentionally’ attempt to incite a person to commit an act of mutiny.

Items 32, 51, 52, 65, 66, 67, 69, 70, 73, 74, 76, 78, 80, 82, 116, 120, 122, 129, 133, 136, and 140 apply absolute liability to certain physical elements in some offences under the Crimes Act. Amongst the offences affected by these amendments are child sex tourism offences, offences relating to postal services, and offences relating to telecommunications services.

Section 6.2(2) of the *Criminal Code* provides that if absolute liability applies to a particular physical element of an offence, then no fault elements apply to that physical element. The defence of mistake of fact (available in cases of strict liability) is not available. However, this does not prevent other defences being made available.³³

An example of the application of absolute liability to a physical element of an offence is seen in the amendment effected by **item 32**. **Item 32** amends section 29 of the Crimes Act. Section 29 (as amended by **item 29**) will provide that:

Any person who intentionally destroys or damages any property, whether real or personal, belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence.

The penalty, on conviction, is 10 years imprisonment. **Item 32** inserts **new subsection 29(2)** which provides that absolute liability applies to the physical element of circumstance in the offence—that the property belongs to the Commonwealth or

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Commonwealth authority. The Explanatory Memorandum remarks that ‘the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault’.³⁴

Another example of an offence where absolute liability will apply to a physical element is an offence against section 50BA. **Item 65** amends section 50BA. Section 50BA provides that a person must not, while outside Australia, engage in sexual intercourse with a person who is under the age of 16 years. The penalty is 17 years imprisonment. **New subsection 50BA(2)** provides that absolute liability applies to two physical elements of this offence. The first is that the sexual intercourse occurred outside Australia. The second is that the alleged victim was in fact under the age of 16 years. A fault element is not relevant to the first physical element. In relation to the second physical elements, while a defence of mistake of fact is not available where absolute liability applies, the *Criminal Code* does not prevent other defences from being available. In this case, section 50CA of the Crimes Act provides a defence that the accused believed that, at the time the act took place, the victim was aged 16 years or over. The prosecution must still prove the fault element of intention in relation to the physical element of conduct in the offence ie engaging in sexual intercourse with a person under the age of 16 years.

Items 38, 48, 49, 57 and 58 substitute the word ‘intentionally’ for the word ‘wilfully’ in a number of offence provisions.³⁵ ‘Wilfully’ is a non-Code fault element.

Items 42, 125 and 127 provide that strict liability applies to physical elements of circumstance in offences against subsections 35(1), 85X(3) and 85X(4). These are offences relating to giving false testimony and the carriage of dangerous substances by post. For instance, in relation to offences against subsections 85X(3) and 85X(5), the physical element of circumstance which will attract strict liability is that the carriage by post is not in accordance with prescribed statutory requirements.

Items 50-54 amend sections 41, 42, 43 and 46 of the Crimes Act. These are offences of conspiracy to bring a false accusation, conspiracy to defeat justice, attempting to pervert the course of justice and aiding the escape of a prisoner. The *Criminal Code* contains provisions relating to conspiracy, attempt, and aiding and abetting. These provisions set out the conditions under which a person will be guilty of conspiracy, attempt and aiding and abetting. However, in addition, the *Criminal Code* provisions also contain a general subsection which says, for example, that ‘A person who conspires with another person to commit an offence ...’. Applying general provisions such as these would result in the nonsensical situation where, for example, the proscribed conduct would be conspiring to conspire. Thus, the amendments insert provisions dealing with ancillary offences which are based on but not identical to those in the *Criminal Code*.

Schedule 11—Amendments of the *Crimes (Aviation) Act 1997*³⁶

Existing section 10 of the Crimes (Aviation) Act defines the expression ‘unlawful act’ as it appears in certain offences. These offences are endangering the safety of an aircraft in flight (section 25), and committing an act of violence at an airport (section 26). At present

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the definition of ‘unlawful act’ includes references to ancillary offences—such as attempts and being an accomplice. **Item 2** of Schedule 10 repeals and replaces section 10 to remove references to ancillary offences. Ancillary offence provisions will be supplied by the *Criminal Code*. Consequential amendments are effected by **item 25** which repeals and replaces subsections 26(1) and (2). At present, these subsections also contain references to ancillary offences.

Item 3 applies Chapter 2 of the *Criminal Code* to all offences against the Crimes (Aviation) Act.

Items 4-6, 8, 10, 12, 13, 15, 19, 20, 22-25, 28 and 30 apply absolute liability to certain physical elements in a number of offences. For example, **item 4** applies absolute liability to all the elements of circumstance in the offence of hijacking (section 13). These are matters such as the aircraft being hijacked outside Australia, the offender being an Australian citizen, and the aircraft being in flight. Because absolute liability applies, the prosecution need not prove a fault element for each of these physical elements and no defence of mistake of fact is available to the defendant. However, the prosecution will still have to prove the fault element of intention in relation to the physical element conduct in the offence ie hijacking an aircraft.

Some offences in the Crimes (Aviation) Act contain the words ‘with reckless indifference’. An example is existing section 18 which reads:

A person who destroys a Division 3 aircraft with the intention of causing anyone's death, or with reckless indifference to the safety of anyone's life, is guilty of an indictable offence punishable on conviction by imprisonment for life.

Items 11 and 14 remove the phrase ‘with reckless indifference’ from section 18 (and also from paragraph 20(b)) and substitute the words ‘reckless as to’. Some statutes use the term ‘reckless indifference’ but the Model Criminal Code Officers Committee concluded that recklessness was an equivalent concept and cited High Court dicta to support this view.³⁷ As the Explanatory Memorandum points out, harmonising the language of section 18 and paragraph 20(b) in this way will remove the possibility that a future court will feel obliged to distinguish ‘reckless indifference’ and ‘recklessness’.³⁸

Schedule 12—Amendments of the *Crimes (Biological Weapons) Act 1976*³⁹

Item 1 of Schedule 12 applies Chapter 2 of the *Criminal Code* to all offences against the Crimes (Biological Weapons) Act.

Item 2 replaces references in subsection 10(1) of the Act to ancillary offence provisions in the *Crimes Act 1914* with references to equivalent provisions in the *Criminal Code*.

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Schedule 13—Amendments of the *Crimes (Currency) Act 1981*⁴⁰

Item 1 of Schedule 13 applies Chapter 2 of the *Criminal Code* to all offences under the Crimes (Currency) Act.

Items 2-6, 8-15, 17, 19, 21 and 23 remove the words ‘without reasonable excuse’ from a number of offence provisions and relocate them in separate subsections. Examples are provided by **items 6-9** which amend section 11 of the Crimes (Currency) Act. Existing section 11 makes making, buying, selling or possessing instruments and material used for counterfeiting—without reasonable excuse—an offence. The creation of new subsections containing a defence of reasonable excuse ensures that the words are not interpreted as part of the offence—which would have to be disproved in the negative by the prosecution.

Among other things, **items 4 and 10** remove the words ‘without lawful authority’ from subsection 9(1) and section 13 of the Crimes (Currency) Act. Following the application of the *Criminal Code* these words are unnecessary because the Code will provide a general defence of lawful authority to all Commonwealth offences.

Items 10, 16 and 26 alter the fault elements presently contained in certain offences. **Item 16** replaces the non-Code fault element, ‘wilfully’ with the Code fault element of ‘intentionally’. **Item 26** replaces the fault element of ‘knowingly’ with the fault element of ‘intentionally’ in subparagraphs 29(1)(b)(ii) and (c)(ii).⁴¹ Under the *Criminal Code*, the knowledge applies to circumstance or result not conduct. Intention applies to conduct. The amendments thus harmonise the fault elements in these provisions with those in the *Criminal Code*. **Item 10** makes a similar amendment in respect of section 13 of the Crimes (Currency) Act.

Items 24 and 25 replace references in the Crimes (Currency) Act to ancillary offence provisions in the *Crimes Act 1914* with references to equivalent provisions in the *Criminal Code*.

Schedule 14—Amendments of the *Crimes (Foreign Incursions and Recruitment) Act 1978*⁴²

Item 1 applies Chapter 2 of the *Criminal Code* to all offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions and Recruitment Act).

Items 2-6 and 10 omit a number of phrases in various offences which refer to ‘purpose’ and replace them with words of ‘intention’. For example, existing paragraph 9(1)(d) provides that it is an offence for a person in Australia to:

do any ... act or thing for the purpose of facilitating or promoting the recruitment of persons to serve in any capacity in or with such an armed force.⁴³

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As amended by **item 9** paragraph 9(1)(d) will provide that it is an offence for a person in Australia to:

do any ... act or thing with the intention of facilitating or promoting the recruitment of persons to serve in any capacity in or with such an armed force.⁴⁴

In each case, the Explanatory Memorandum states that the replacement phrases remove ambiguity and clarify fault elements in the offences.⁴⁵ At present, it is uncertain whether the words ‘for the purpose of’ refer to an ‘additional fault element of intention attaching to the physical element of conduct or denote a physical element of result which would thereby attract the default fault element of recklessness’.⁴⁶ The amendments favour the first interpretation.

Items 12-14 replace references in the Foreign Incursions and Recruitment Act to ancillary offence provisions in the *Crimes Act 1914* and replace them with references to equivalent provisions in the *Criminal Code*.

Schedule 16—Amendments of the *Crimes (Internationally Protected Persons) Act 1976*⁴⁷

Item 1 of Schedule 16 applies Chapter 2 of the *Criminal Code* to offences against the Crimes (Internationally Protected Persons) Act.

Item 2 applies absolute liability to certain physical elements contained in offences against subsections 8(1), (2), (3), (3A), (3B), (3C) and (4). For example, subsection 8(1) creates an offence of murdering or kidnapping an internationally protected person. The amendments stipulate that absolute liability applies to the fact that the person who is murdered or kidnapped is an internationally protected person.⁴⁸

Items 3 and 4 remove references contained in the Crimes (Internationally Protected Persons) Act to ancillary offence provisions in the *Crimes Act 1914* and replace them with references to equivalent provisions in the *Criminal Code*.

Schedule 17—Amendments of the *Crimes (Ships and Fixed Platforms) Act 1992*⁴⁹

Item 2 applies Chapter 2 of the *Criminal Code* to all offences against the *Crimes (Ships and Fixed Platforms) Act 1992* (the Ships and Fixed Platforms Act).

Items 5, 8, 18, 19 and 20 remove references in a number of offences to the defence of lawful excuse. For example, existing section 8 reads:

A person must not, without lawful excuse, take possession of, or take or exercise control over, a private ship by the threat or use of force or by any other kind of intimidation.

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Item 5 removes the words ‘without lawful excuse’ from section 8. A defence of ‘lawful authority’ will be provided instead by the *Criminal Code* following its amendment by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.⁵⁰

Item 9 repeals and replaces section 12 which presently provides that:

A person must not destroy or seriously damage maritime navigational facilities or seriously interfere with their operation if that act is likely to endanger the safe navigation of a private ship.

Item 9 re-structures section 12. As amended, section 12 clarifies that the proscribed conduct is engaging in conduct that causes such things as the ‘destruction of maritime navigational facilities’. At present, the wording of the section suggests that the proscribed conduct is damaging maritime navigational facilities. Similar amendments to subsection 10(2)⁵¹, sections 14⁵², 15⁵³, 16⁵⁴, 23⁵⁵, 25⁵⁶, 26⁵⁷, 27⁵⁸ are made by **items 7, 11, 12, 13, 19, and 21-23**.

Items 14, 17 and 24-26 replace references to ancillary offences contained in the *Crimes Act 1914* with references to equivalent provisions in the *Criminal Code*.

Schedule 20—Amendments of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*

Item 2 applies Chapter 2 of the *Criminal Code* to all offences against the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (the Narcotic Drugs & Psychotropic Substances Act).

Items 4-9 and 12-14 identify certain physical elements of a number of offences as elements to which absolute liability applies.

An example of the physical elements affected by these amendments is **item 5** which amends section 10 of the Narcotic Drugs & Psychotropic Substances Act. Section 10 creates an offence of dealing in drugs on board an Australian aircraft. As a result of the amendments made by **item 5**, physical elements which will attract absolute liability include the facts that the conduct occurs on an Australian aircraft in flight, and would be an offence against a State or Territory law if the person engaged in it in that State or Territory. The prosecution will still have to prove intention in relation to the physical element of conduct in the offence ie dealing in drugs.

Schedule 21—Amendments of the *Customs Act 1901*⁵⁹

Item 3 applies Chapter 2 of the *Criminal Code* to all offences against the Customs Act. However, the application of Chapter 2 is modified in the case of ‘Customs prosecutions’.⁶⁰ In particular, Parts 2.4 and 2.6 (dealing with ancillary offences, and burden and standard

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of proof) will not apply to Customs prosecutions. Customs prosecutions are sometimes dealt with as civil not criminal matters so the application of these Parts of the Criminal Code is not appropriate and Customs prosecutions will be ‘... left to the existing law’.⁶¹ Nor will Part 2.5 be applied to Customs prosecutions because the Customs Act already has its own regime for corporate criminal responsibility.

Items 4-13, 15, 16, 24, 25, 30, 31, 33-36, 49, 50, 53-59, 63, 64, 66, 70-78, 80, 81, 85-92, 131, 132, 134 and 135 remove exceptions and defences from their present locations in offence provisions and relocate them in separate provisions. An example of the amendments are those effected by **items 15 and 16** which amend subsection 58(1) of the Customs Act. Existing subsection 58(1) provides that:

The master of a ship or the pilot of any aircraft shall not, without the permission of a Collector ..., suffer his ship or aircraft to enter any place other than a port or airport unless from stress of weather or other reasonable cause.

Item 15 excises the words ‘without the permission of the Collector ...’. **Item 16** inserts new subsection 58(1A) which provides that:

Subsection (1) does not apply if the master or pilot has the permission of a Collector ...’

Items 11, 13, 14, 17-20, 22, 23, 25-29, 32, 34, 36, 38-43, 46, 47, 50-52, 54, 56, 59-62, 65, 68, 69, 79, 81, 83, 84, 94, 112, 115, 118, 121, 128, 130, 135 & 141 identify offences of strict liability and instances where strict liability applies to particular physical elements of an offence. Offences which are stipulated to be strict liability offences include prohibited imports offences,⁶² offences relating to the boarding of ships and aircraft⁶³, offences relating to warehouse licences and duty free shops⁶⁴, prohibited exports offences, offences relating to ships’ stores and aircraft’s stores⁶⁵, offences relating to the coasting trade⁶⁶, offences relating to the breaking of Customs seals⁶⁷, certain smuggling offences⁶⁸, and certain customs offences.⁶⁹

In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*. Additionally, in the case of some strict liability offences, the amendments re-create additional defences. Examples are defences of permission and consent (**items 56 and 59**) and reasonable excuse (**item 50**).

Items 14, 47, 109, 112, 115, 118, 121 and 124 designate certain physical elements of offences as subject to absolute liability.⁷⁰ For example, **item 14** amends subsection 50(4) of the Customs Act. Subsection 50(4) creates an offence of importing non-narcotic goods in contravention of licence conditions and an offence of importing narcotic goods in contravention of licence conditions. As well as re-structuring subsection 50(4) in a way that clearly identifies the physical elements of these offences, **item 14** also provides that one of these physical elements—the circumstance of holding a licence granted after 16 October 1963—attracts absolute liability.⁷¹

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Items 97-101 amend section 233A of the Customs Act and create a new offence. As the Customs Act presently stands, section 233A provides that a ship's master who uses his or her ship for smuggling is guilty of an offence. The penalties depend on whether or not the smuggled goods are narcotic goods. As a result of the amendments, the offence in section 233A will be restricted to the smuggling of non-narcotic goods. The new offence (**new section 233AC**) relates to the smuggling of narcotic goods.

Items 102-107 omit references to ancillary offences in subsection 233B(1). Subsection 233B(1) contains offences relating to importing and exporting narcotic goods. Paragraph 233B(1)(b) can be used as an example. It provides that a person commits an offence if he or she:

imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies⁷²

Items 103 and 104 omit the words 'or attempts to import' and 'or attempts to export' in subsection 233B(1). Ancillary offence provisions will be applied to the Customs Act by the *Criminal Code*, making the words redundant.

Schedule 23—Amendments of the *Defence Force Discipline Appeals Act 1955*

Item 1 of Schedule 23 applies Chapter 2 of the *Criminal Code* to all offences under the Defence Force Discipline Appeals Act.

Items 2-6 identify certain offences under the Defence Force Discipline Appeals Act as offences of strict liability. These are offences of failing to attend or produce documents when required to do so by the Defence Force Discipline Appeal Tribunal⁷³, failure of a witness to attend Tribunal hearings⁷⁴, and refusal by a witness to be sworn and give evidence.⁷⁵ As a result of the application of the *Criminal Code* a defence of mistake of fact will be available for each of these offences. The *Criminal Code* does not preclude defences other than mistake of fact being available for a strict liability offence. Amendments made by **items 2-6** also recreate and relocate defences of reasonable excuse. These amendments have two effects. First, a defendant will continue to have two defences for these strict liability offences. Second, it will be clear that the element of reasonable excuse is a defence and not an element of an offence which would have to be proved by the prosecution.

Item 7 changes the non-Code fault element of 'wilfully' found in paragraph 46(a)⁷⁶ to 'intentionally'. This amendment is made to harmonise fault elements found in the offence with those in the *Criminal Code* and to ensure that a future court does not feel obliged to distinguish the concepts of 'wilfully' and 'intentionally'.

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Schedule 24—Amendments of the *Disability Discrimination Act 1992*

Item 1 of Schedule 24 applies Chapter 2 of the *Criminal Code* (except the Code's principles of corporate criminal responsibility) to all offences under the Disability Discrimination Act. The Disability Discrimination Act contains its own regime for corporate criminal responsibility.⁷⁷

Items 3-7 amend subsections 107(1) and 127(1). These subsections create offences of failure to provide information to the Human Rights and Equal Opportunity Commission (HREOC) and disclosure of private information by a HREOC Commissioner or HREOC staff, respectively. The amendments identify these offences as strict liability offences. As a result of the application of the *Criminal Code* a defence of mistake of fact will apply in each case. The *Criminal Code* does not prevent other defences being available to strict liability offences. In relation to an offence against subsection 107(1) a defence of reasonable excuse will continue to be available. In relation to an offence against subsection 127(1) a defence of performance of statutory duty or power will continue to be available.⁷⁸

Schedule 27—Amendments of the *Family Law Act 1975*

Item 1 of Schedule 27 applies Chapter 2 of the *Criminal Code* to all offences against the Family Law Act.

Items 2, 4, 6 and 8 remove ancillary offences from subsections 65Y(1), 65Y(2), 65Z(1) and 65Z(2) of the Family Law Act. For example, subsection 65Y(1) presently provides that it is an offence to intentionally or recklessly take or attempt to take a child out of Australia if the child is the subject of a residence, contact or care order made under the Family Law Act. Ancillary offence provisions will be applied to primary offence provisions as a result of the operation of the *Criminal Code*, thus making their presence in the Family Law Act redundant.

Amendments made in **items 2, 6, 10, 13 and 16** remove the words 'intentionally or recklessly' from a number of offences under the Family Law Act—including the offence against subsection 65Y(1) which is described above. As the provisions are presently worded, recklessness appears to apply to the physical element of conduct in the offences. Under the *Criminal Code*, intention is the fault element for conduct. The removal of the word 'recklessly' from the provisions thus harmonises them with the *Criminal Code*. Although the word 'intentionally' is also omitted it will apply by default to the elements of conduct in the offences by operation of the *Criminal Code*. Recklessness will apply to physical elements of circumstance in the offences as a result of the operation of default fault elements in the *Criminal Code*.

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Schedule 29—Amendments of the *Financial Transaction Reports Act 1988*

Item 1 applies Chapter 2 of the *Criminal Code* (other than the Code's principles of corporate criminal responsibility) to all offences against the Financial Transaction Reports Act. The Financial Transaction Reports Act already contains principles of corporate criminal responsibility.⁷⁹

Items 3 and 10 identify offences of strict liability. These are offences against subsection 18(9) and 27B(4). Subsection 18(9) makes it an offence for a cash dealer not to provide the Director of AUSTRAC with certain information. Subsection 27B(4) makes it an offence for a person who is no longer an authorised officer under the Act to fail to return his or her identity card when he or she ceases to be employed. A defence of reasonable excuse will continue to apply to the subsection 27B(4) offence (**items 9 and 10**).

Items 4-8, 11, 12, 13-18 make changes clarifying fault elements and physical elements in a number of offences under the Financial Transaction Reports Act. An example is amendments made to subsection 21(3A) by **items 4 and 5**. At present, subsection 21(3A) reads:

An acceptable referee, or any other person, must not, knowingly or recklessly:

- (a) make a statement in an identification reference that is false or misleading in a material particular; or
- (b) omit from an identification reference any matter or thing without which the reference is misleading in a material particular.

Item 4 removes the words 'knowingly or recklessly'. As presently worded, the provision suggests that the fault elements of knowledge and recklessness apply to physical elements of conduct in the offences. This is not in keeping with the *Criminal Code* which applies the fault element of intention to conduct and recklessness to circumstances and results.

Item 5 repeals existing paragraphs 21(3A)(a) and (b) and replaces them with re-structured provisions that clearly identify that intention applies to the fault elements of conduct in the offences (eg making a statement in an identification reference) and recklessness to the fault elements of circumstance in the offences (eg the circumstance that the statement is false or misleading).

Schedule 30—Amendments of the *Geneva Conventions Act 1957*

Item 1 of Schedule 30 applies Chapter 2 of the *Criminal Code* to all offences against the Geneva Conventions Act.

Items 2 and 3 amend section 7 of the Geneva Conventions Act. Section 7 creates offences and penalties for grave breaches of the Conventions. **Item 2** removes ancillary offences from section 7. These will be supplied by the *Criminal Code*. **Item 3** replaces the non-Code fault element 'wilful' with the Code fault element of 'intention' in paragraph 7(4)(a).

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Existing paragraph 7(4)(e) prescribes the punishment for an offence involving the wilful killing of a person protected by the relevant Convention.

Item 4 provides that an offence under subsection 15(1) of the Geneva Conventions Act is a strict liability offence. Under subsection 15(1) it is an offence to use a Red Cross or other emblem without Ministerial authorisation. The prosecution is not required to prove a fault element in relation to strict liability offences but a defence of mistake of fact is available under the *Criminal Code*.

Schedule 31—Amendments of the *High Court of Australia Act 1979*

Item 1 of Schedule 31 of the High Court of Australia Act applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 2 and 3 identify offences against subsection 19(6) and 43(7) as strict liability offences. It is an offence under subsection 19(6) of the High Court of Australia Act to contravene a direction of the Chief Executive or Principal Registrar of the High Court.⁸⁰ The penalty is \$100. Under subsection 43(7) it is an offence to fail to comply with a requirement of the Auditor-General under the High Court of Australia Act. The penalty is \$200.

Schedule 32—Amendments of the *Human Rights and Equal Opportunity Commission Act 1986*

Item 1 of Schedule 32 applies Chapter 2 of the *Criminal Code* to all offences against the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act).

Items 2 and 6 identify offences of strict liability. These are offences against subsection 14(7) and 46PL(1) of the HREOC Act, respectively. Subsection 14(7) is an offence of contravening a HREOC non-disclosure direction. The penalty is \$1,000 in the case of an individual and \$5,000 in the case of a corporation. Subsection 46PL(1) is an offence of failure to attend a compulsory conference. This offence will continue to attract a defence of reasonable excuse as well as the defence of mistake of fact supplied by the *Criminal Code*.

Items 3-8, and 13 re-structure and recreate defence provisions in the HREOC Act including the defence to a subsection 46PL(1) offence mentioned above. The amendments remove elements of excuse from offence provisions and relocate them in separate provisions so it is clear that they are defences and not elements of the offence which would have to be disproved in the negative by the prosecution.

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Schedule 33—Amendments of the *International War Crimes Tribunals Act 1995*⁸¹

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the War Crimes Tribunals Act.

Item 2 replaces the words ‘knowingly or recklessly’ in paragraphs 43(a) and (b) of the War Crimes Tribunals Act with the word ‘intentionally’. In brief, those paragraphs create offences of ‘knowingly or recklessly’ contravening a Tribunal order or hindering a Tribunal function while the Tribunal is sitting in Australia. The amendments ensure that, in keeping with the *Criminal Code*, intention will apply to the physical element of conduct in the offences (eg, contravening a Tribunal order). The fault element of recklessness will not apply to conduct but only to the physical elements of circumstance or result in the offences (eg, the circumstance that the Tribunal is sitting in Australia). Once again, this is in keeping with the policy set out in the *Criminal Code* and is achieved through the operation of *Criminal Code* default fault elements.

Schedule 34—Amendments of the *Marriage Act 1961*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Marriage Act.

Items 2, 4 and 5 apply strict liability to the physical element of circumstance in offences against subsections 94(1), 95(1) & 95(2). Subsection 94(1) creates an offence of bigamy and provides that a ‘person who is married shall not go through a form or ceremony of marriage with any person.’ Subsection 95(1) provides that a person ‘shall not go through a form or ceremony of marriage with a person who is not of marriageable age.’ In either case, the penalty is imprisonment for 5 years. Subsection 95(2) creates an offence of marrying a minor (unless the minor has previously been married or the requisite consents are obtained or dispensed with). The penalty is a fine of \$500 or imprisonment for 6 months.

A general mistake of fact defence applies to offences against subsections 94(1), 95(1) and 95(2).⁸² However, **items 3, 6 and 7** make it clear that the general defence of mistake of fact supplied by the *Criminal Code* does not apply to subsections 94(2), 94(3), 95(3) and 95(4). Subsections 94(2), 94(3), 95(3) and 95(4) contain specific mistake of fact defences.⁸³ It would be nonsensical for a general mistake of fact defence to apply to what are already defences.

Item 9 identifies an offence against subsection 105(1) as a strict liability offence. Under subsection 105(1) it is an offence to fail to comply, without reasonable excuse, with a notice requiring an incorrect marriage certificate to be returned. The penalty is \$100. The ‘without reasonable excuse’ element is recreated and relocated by **items 8 and 9** so it is clear that these are words of defence rather than an element of the offence.

Item 10 removes the non-Code fault element of ‘wilfully’ in paragraph 106(b) of the Marriage Act and replaces it with ‘intentionally’. The paragraph will now read: ‘A person

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who has acted as interpreter at the solemnization of a marriage shall not ... intentionally make a false statement in a certificate under... [subsection 112(3)]'.⁸⁴

Schedule 35—*Mutual Assistance in Business Regulation Act 1992*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Mutual Assistance in Business Regulation Act.

Section 13(1) of the Mutual Assistance in Business Regulation Act provides that it is an offence to fail to comply with a requirement to provide information or documents under the Act without reasonable excuse. **Items 2 and 3** relocate the element of 'reasonable excuse' from the offence provision in subsection 13(1) to a new subsection—thus clarifying that the words are matters of defence and not an element of the offence.

Schedule 37—Amendments of the *Native Title Act 1993*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Native Title Act. However, the Code's provisions for corporate criminal responsibility are not applied to offences against Part 11 of the Native Title Act. Part 11 of the Act deals with representative bodies and contains its own provision for corporate criminal responsibility (section 203FH).

Items 2-5, 7, 8, 11 and 12 relocate the element of 'reasonable excuse' from offence provisions in subsections 171, 172, 174, and subsection 203DG(4) to separate defence provisions so that it is clear that the words are a defence and not an element of the offences.

Items 3 and 10 identify offences against subsections 171(1) and 176(1) as offences of strict liability. These are offences of failure to attend the Native Title Tribunal without reasonable excuse after being summonsed and contravention of a Tribunal direction prohibiting the disclosure of material. The penalties are 20 penalty units in the case of an offence against subsection 171(1) and 40 penalty units in respect of an offence against subsection 176(1). As a result of the application of the *Criminal Code*, a defence of mistake of fact will be available in each case. Additionally, the element of reasonable excuse currently available in the case of a subsection 171(1) offence will be retained and clearly identified as a defence (**items 2 and 3**).

Item 6 amends section 173 to harmonise a fault element with the *Criminal Code*. At present, section 173 provides that it is an offence to 'knowingly' give false or misleading evidence to the Native Title Tribunal. Under the *Criminal Code*, the fault element of intention is applied to conduct. The fault element of knowledge is applied to circumstance or result. The amendment rewords the offence to read:

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A person appearing before the Tribunal to give evidence must not intentionally give evidence that the person knows is false or misleading in a material particular.

In this way, in conformity with the *Criminal Code*, the fault element of intention will apply to the physical element of conduct in the offence—giving evidence to the Tribunal. The fault element of knowledge will apply to the physical element of circumstance ie that the evidence is false or misleading.

Schedule 38—Amendments of the *Parliamentary Privileges Act 1987*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Parliamentary Privileges Act—except for offences against a House of Parliament. Such offences are not criminal offences.

Schedule 39—Amendments of the *Passenger Movement Charge Collection Act 1978*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the *Passenger Movement Charge Collection Act 1978* (PMCC Act).

Items 2 and 4 identify offences against subsections 6(2) and 8(1) of the PMCC Act as strict liability offences. These are offences of failure to pay a passenger movement charge and failure to answer a question or produce a document when required to do so by an authorised officer. In each case, the penalty is one penalty unit. As a result of the application of the *Criminal Code*, a defence of mistake of fact applies to each of these offences. Additionally, the existing defence of reasonable excuse found in subsection 8(1) will continue to be available in relation to that offence [**new subsection 8(1A)**].

Items 5 and 6 move the element of ‘reasonable excuse’ from the offence provision in subsection 8(3) and place it a new subsection [**new subsection 8(3A)**]. This will ensure that reasonable excuse is regarded as a defence and not as an element of the offence.

Item 7 applies strict liability to a number of physical elements in offences against subsections 8(3) and (4). For example, it is an offence against subsection 8(3) to obstruct or hinder authorised officers acting in performance of their functions. As a result of the amendments, strict liability will apply to the circumstance that the person obstructed or hindered is an authorised officer.

Item 8 repeals and replaces paragraphs 9(3)(b) and (c) to clearly identify the constituent physical and fault elements of the offences.

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Schedule 40—Amendments of the *Privacy Act 1988*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the Privacy Act.

Item 2 replaces the fault elements ‘knowingly or recklessly’ in a number of credit reporting offence provisions in the Privacy Act with the fault element of ‘intentionally’. An example is subsection 18K(4) which prohibits a credit reporting agency ‘knowingly or recklessly’ disclosing personal information. The amendments ensure that, in keeping with the *Criminal Code*, the fault element applied to conduct in an offence is intention, not knowledge or recklessness. The operation of the *Criminal Code* will also mean that the default fault element of recklessness will be applied to elements of circumstance and result contained in the offences.

Items 3, 4, 7, 8, 9 and 11 recreate and relocate elements of reasonable excuse presently found in subsections 46(2), 65(1) and 66(1). As a result, defences of ‘reasonable excuse’ will be located in new subsections to ensure they are interpreted as defences and not as elements of offences.

Items 5, 6 and 13 remove references to Crimes Act ancillary offence provisions and replace them with references to equivalent provisions in the *Criminal Code*.

Schedule 42—*Public Order (Protection of Persons and Property) Act 1971*

Item 1 applies Chapter 2 of the *Criminal Code* to all offences against the *Public Order (Protection of Persons and Property) Act 1971* (Public Order Act).

Items 2, 4, 6, 9, 12, 15, 18, 26, 28, 31 and 37 apply absolute liability to physical elements of circumstance in various offences against the Public Order Act.⁸⁵ An example is existing subsection 6(1) which provides that:

Where persons taking part in an assembly that is in a Territory or is wholly or partly on Commonwealth premises conduct themselves, in the Territory or on the Commonwealth premises, in a way that gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property, each of those persons is guilty of an offence, punishable on conviction by a fine of not more than 20 penalty units.

As a result of amendments effected by **item 2** absolute liability will apply to the following circumstances in the offence. First, that the assembly is in a Territory or partly or wholly on Commonwealth premises. Second, that the persons conduct themselves in the Territory or on Commonwealth premises. No defence of mistake of fact is available when absolute liability applies.

Items 8, 18 24, 30 and 37 apply strict liability to certain physical elements in offences against subsection 8(3), paragraph 12(2)(c), section 15(1), subsection 17(3) and paragraph 20(2)(c). An example of where amendments identify elements of strict and absolute

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liability in the same offence is provided by **item 18** which, among other things, amends paragraph 12(2)(c). It is an offence under paragraph 12(2)(c) for a person who:

being in or on Commonwealth premises, refuses or neglects, without reasonable excuse⁸⁶, to leave those premises on being directed to do so by a constable, by a protective service officer, or by a person authorized in writing by a Minister or the public authority under the Commonwealth occupying the premises to give directions for the purposes of this section;

Item 18 provides that absolute liability applies to the circumstance that premises are Commonwealth premises. Strict liability applies to the circumstance that the direction was given by a constable, protective service officer or authorised person. In the case of strict liability, a defence of mistake of fact is available as a result of the application of the *Criminal Code*. Additionally, **items 17 and 18** relocate the element of reasonable excuse from the offence provision into **new subsection 12(5)**, ensuring that a defence of reasonable excuse is clearly identified and continues to be available.

Items 3, 5, 10, 23, 25, 27 and 32 omit redundant words of defence and non-Code fault elements in a number of offences. For example, **item 5** amends section 7⁸⁷ of the Public Order Act to omit the words ‘without lawful excuse’. A defence of lawful authority will be supplied by the *Criminal Code*. **Item 5** also amends the non-Code fault element of ‘wilfully’ and replaces it with the Code fault element, ‘intentionally’.

Schedule 43—Amendments of the *Racial Discrimination Act 1975*

Item 1 of Schedule 43 applies Chapter 2 of the *Criminal Code* to offences against the Racial Discrimination Act.

Subsection 27(1) of the Racial Discrimination Act creates an offence of hindering or obstructing a person performing functions or exercising powers under the Racial Discrimination Act. **Item 2** applies strict liability to the physical element of circumstance in the offence—ie the circumstance that person is performing functions or exercising powers under the Act.

Subsection 27F(1) of the Racial Discrimination Act prohibits HREOC staff from disclosing private information except in the exercise of a statutory duty. **Items 3 and 5** relocate the excuse of statutory duty in relation to an offence under subsection 27F(1) and place it in **new subsection 27F(3A)**. This will ensure that the words are interpreted as a defence and not as an element of the offence (which would have to be proved by the prosecution).

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Schedule 45—Amendments of the *Sex Discrimination Act 1984*

Item 1 of Schedule 45 applies Chapter 2 of the *Criminal Code* to all offences under the Sex Discrimination Act.

Items 4 and 5 identify offences of strict liability. These are offences against subsections 87(1) and 92(1). The first is an offence of failure to provide actuarial or statistical data when required to do so by HREOC. The second is an offence of communicating details of a complaint made to HREOC until an inquiry has commenced or the complaint has been withdrawn or terminated. As a result of the application of the *Criminal Code* a defence of mistake of fact will apply to these offences.

Items 3, 4, 7 and 9 delete defences of reasonable excuse and statutory duty from offence provisions in section 87 and subsection 112(1) and re-create them in new subsections so that it is clear they are defences and not offence elements.

Schedule 47—Amendments of the *Telecommunications (Interception) Act 1979*

Item 1 of Schedule 47 applies Chapter 2 of the *Criminal Code* to all offences under the *Telecommunications (Interception) Act 1979* (the TI Act).

Items 2, 3, 4 and 7 relocate the elements of reasonable excuse from offences against section 106, subsection 107(1) and paragraph 107(2)(a) and place them in new provisions to ensure they are interpreted as defences rather than as offence elements. An example of the offences affected by these amendments is section 106 which currently provides that a ‘person shall not, without reasonable excuse, obstruct or hinder a person acting under a [TI] warrant.’

Schedule 49—Amendments of the *War Crimes Act 1945*

Item 1 of Schedule 49 applies Chapter 2 of the *Criminal Code* to all offences against the War Crimes Act.

Item 2 removes references to ancillary offences in the Crimes Act and replaces them with references to equivalent provisions in the *Criminal Code*.

Item 3 provides that absolute liability applies to some physical elements of an offence against subsection 9(1) of the War Crimes Act. Subsection 9(1) provides that a person who committed a war crime during World War II is guilty of an indictable offence.⁸⁸ An example of the application of absolute liability to a physical element of that offence is that absolute liability applies to the circumstance that a particular crime (such as murder) was an offence under Australian law.

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Concluding Comments

The Explanatory Memorandum states:

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

...

However, there will be occasions where the operation of existing offences will be uncertain. The amendments will therefore sometimes involve judgment about the likely effect of existing offences. Where this occurs it will provide much needed clarification of the meaning of the relevant provisions.⁸⁹

One issue which has been raised by the Senate Standing Committee for the Scrutiny of Bills is whether the amendments create new strict liability offences. In its First Report for 2001, the Committee noted that:

... in the case of some provisions covered in this bill, there has been uncertainty as to whether they are currently offences of strict liability. Given this, the Committee seeks the Minister's advice as to which offences are uncertain; whether that uncertainty is as a result of any judicial consideration, and whether (and why) the bill has resolved that uncertainty by now declaring those offences to be offences of strict liability.⁹⁰

The Committee also drew the Senate's attention to amendments which specified that particular physical elements of offences attracted absolute liability.

The tests adopted by courts to decide whether to rebut a presumption that an offence contains fault elements may be useful here. Courts examine such things as 'the words of the statute creating the offence, the subject matter with which it deals and whether the enforcement of the statute would be assisted if it imposed strict liability. [They] will, if possible, avoid the result that no mental state is an element of the offence'.⁹¹

Endnotes

- 1 Explanatory Memorandum, p. 1.
- 2 Ibid, pp. 1–2.
- 3 The original timetable was that Chapter 2 would apply to pre-existing 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.
- 4 Second Reading Speech, Criminal Code Bill 1994, *Parliamentary Debates (Hansard)*, Senate, 30 June 1994, p. 2377
- 5 *Halsbury's Laws of Australia*, 130–7950.

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- 6 Subsection 6.1(1).
- 7 Subsection 6.1(2).
- 8 Paragraph 6.1(1)(b).
- 9 Paragraph 6.1(2)(b).
- 10 Subsection 6.1(3).
- 11 Halsburys, *op.cit*, 130-7965.
- 12 Subsection 6.2(1).
- 13 Subsection 6.2(2).
- 14 Paragraphs 6.2(1)(b) and 6.2(2)(b).
- 15 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.
- 16 As amended by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*—not yet commenced.
- 17 Except in the case of strict or absolute liability offences.
- 18 Goode, *op.cit*, p. 268.
- 19 Sections 5.2, 5.3, 5.4 and 5.5.
- 20 Section 5.6.
- 21 Subsection 5.1(1).
- 22 Subsection 5.1(2).
- 23 The Explanatory Memorandum states 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".' p.10.
- 24 See subsections 93(5), (6) and (7).
- 25 Subsection 182(4).
- 26 Subsections 56F(1), 173(1), and 175(5).
- 27 The prosecution does not have to prove any fault elements in a strict liability offence. However, as a result of the application of the *Criminal Code*, a defence of mistake of fact is available to a defendant.
- 28 Subsection 56F(1) creates an offence for a non-petitioning partner who does not comply with certain duties in respect of the Official Receiver—unless that person has a reasonable excuse.
- 29 Subsection 155J(1) makes it an offence for a person who ceases to be registered trustee not to give his or her certificate of registration to the Inspector-General—unless there is a reasonable excuse.
- 30 Review of Commonwealth Criminal Law, *Interim Report. Principles of Criminal Responsibility and Other Matters*, July 1990, p. 29.

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- 31 As the result of amendments effected by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*—not yet commenced.
- 32 Subsection 25(1), section 26, section 30FC, subsection 35(1), section 38, and paragraphs 81(1)(a), (b) & (c) of the Crimes Act.
- 33 Subsection 6.2(3).
- 34 Explanatory Memorandum, page 59.
- 35 Paragraph 34(b), sections 39 and 40, paragraph 47C(1)(c) and subsection 47C(2).
- 36 The Crimes (Aviation) Act implements a number of international treaties to which Australia is a party. The treaties are Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its Protocol, and the Convention on Offences and Certain Other Acts Committed on Board Aircraft. The Act creates offences relating to hijacking and acts of violence aboard aircraft, offences relating to the safe operation of aircraft and offences at airports and air navigation facilities.
- 37 See Criminal Law Officers Committee, *Final Report. Chapter 2. General Principles of Criminal Responsibility*, December 1992, p.31. The case cited was *Royall* (1991) 65 ALJR 451.
- 38 Explanatory Memorandum, p. 116.
- 39 The Crimes (Biological Weapons) Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. It creates offences relating to the development, production, stockpiling and retaining biological agents that have no peaceful purpose. It also prohibits making or retaining biological weapons and toxins for hostile purposes.
- 40 The Crimes (Currency) Act creates offences for making, buying, selling, importing, exporting or possessing counterfeit currency. It also creates offences relating to counterfeiting instruments and material.
- 41 Subparagraph 29(1)(b)(ii) provides that instruments capable of producing genuine coins and paper money which, without lawful authority or reasonable excuse, have knowingly been removed are forfeited to the Commonwealth. Subparagraph 29(1)(c)(ii) is an equivalent provision which applies to ink, paper, bullion, metal, dye and other material.
- 42 The *Crimes (Foreign Incursions and Recruitment) Act 1978* creates offences of entering foreign States in order to engage in hostile activities, and recruiting persons to engage in hostile activities against foreign governments.
- 43 Emphasis added.
- 44 Emphasis added.
- 45 For example, see pages 26–27, 134–136.
- 46 Explanatory Memorandum, pages 26–27.
- 47 The *Crimes (Internationally Protected Persons) Act 1976* gives effect to Australia’s obligations under the Convention on the Prevention and Punishment of Crimes Against

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Internationally Protected Persons, Including Diplomatic Agents. As well as diplomats, 'internationally protected persons' include Heads of State, state officials and representatives, and officials of certain international organisations.

48 **New paragraph 8(4A)(a).**

- 49 The *Crimes (Ships and Fixed Platforms) Act 1992* implements the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. The purpose of the instruments is to protect ships and fixed platforms from terrorism. The Act creates offences of seizing control of a ship or fixed platform, committing an act of violence against a person on a ship or fixed platform, placing a destructive device on a ship or fixed platform, destroying navigational facilities.
- 50 The *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* will insert a new section into Chapter 2 which will provide a general defence of lawful excuse.
- 51 Subsection 10(2) is an offence of causing damage to a private ship or its cargo knowing that it is likely to endanger the safe navigation of the ship.
- 52 Section 14 is an offence of causing death in connection with the commission of an offence against sections 8–13.
- 53 Section 15 is an offence of causing grievous bodily harm in connection with an offence against sections 8–13.
- 54 Section 16 is an offence of injuring a person in connection with an offence against sections 8–13.
- 55 Section 23 creates an offence of destroying a fixed platform or causing damage to a fixed platform knowing that it is likely to endanger its safety.
- 56 Section 25 creates an offence of killing a person in connection with the commission or attempted commission of an offence against any of sections 21–24.
- 57 Section 26 provides that a person who causes grievous bodily harm in connection with the commission or attempted commission of an offence against any of sections 21–24 is guilty of an offence.
- 58 Section 27 provides that a person who injures a person in connection with the commission or attempted commission of an offence against any of sections 21–24 is guilty of an offence.
- 59 Note that item numbers in the Explanatory Memorandum do not always correspond to item numbers in Schedule 21. See, for example, item 125 in the Explanatory Memorandum. The correct item number is 127.
- 60 A 'Customs prosecution' is defined in section 244 of the Customs Act as 'Proceedings by the Customs for the recovery of penalties other than a pecuniary penalty referred to in section 243B under this Act or for the condemnation of ships, aircraft or goods seized as forfeited are herein referred to as Customs Prosecutions.'
- 61 Explanatory Memorandum, p. 164.

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- 62 For example, subsection 50(4) which provides that failure to comply with licence conditions for the importation of prohibited goods is an offence.
- 63 For example, an offence under section 61 relating to failure to facilitate the boarding of a ship or aircraft by Customs officers.
- 64 For example, subsection 90(1) which creates an offence of failure to comply with warehouse licence obligations—eg stacking goods so that Customs officers have reasonable access to them.
- 65 For example, section 127 creates an offence of unloading ships' stores and aircraft's stores without the consent of the Collector of Customs.
- 66 That is, the unauthorised transfer of goods between certain ships and aircraft.
- 67 For example, offences under sections 191 and 192.
- 68 For example, under section 233.
- 69 For example, an offence under subsection 234(6) which provides that a person is guilty of an offence if he or she enters designated fuel for home consumption as clean fuel.
- 70 In some cases, an offence will include some physical elements attracting strict liability and some physical offences attracting absolute liability. An example is **item 112** which amends subsection 233BAA(4).
- 71 As a result of the amendments, other physical elements of the offence attract strict liability.
- 72 Emphases added.
- 73 Section 43.
- 74 Section 44.
- 75 Section 45.
- 76 As it is presently worded, paragraph 46(a) creates an offence of wilfully insulting or disturbing the Defence Force Discipline Appeal Tribunal.
- 77 Section 123.
- 78 The amendments move words of excuse which are presently found in the offence provisions in subsections 107(1) and 127(1) into separate provisions so it is clear that they are defences and not elements of the offences which would have to be proved by the prosecution.
- 79 Section 34.
- 80 Under the High Court Act, the Chief Executive and Principal Registrar are empowered, on behalf of the Court, to give written directions about conduct on High Court land or in High Court buildings.
- 81 The purpose of the *International War Crimes Tribunals Act 1995* is to enable Australia to cooperate with and provide assistance to the International War Crimes Tribunal. It also enables the Tribunal to sit in Australia.
- 82 As a result of **items 2, 4 and 5** and the operation of the *Criminal Code*.

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- 83 For example, paragraph 94(2)(a) provides that it is a defence to a charge of bigamy that a person believed his or her spouse was dead.
- 84 Subsection 112(3) provides that an interpreter at a marriage service must provide the person who performed the marriage with a statement that he or she has faithfully performed their interpreting services.
- 85 Offences against subsection 6(1), 6(2), 7(1), 9(1), 10(1), 11(1), 11(2), 12(1), 12(2), 15(1), 15(2), paragraphs 16(1)(b) and 18(1)(a), (b) or (c), subsection 20(1) and paragraph 20(2)(c).
- 86 **Item 17** removes the words ‘without reasonable excuse’ from the offence provision in paragraph 12(2)(c) and creates a reasonable excuse defence in **new subsection 12(5)**.
- 87 Section 7 creates an offence of causing actual bodily harm or damage to property in a Territory or on Commonwealth premises.
- 88 Only Australian citizens and residents can be prosecuted under the War Crimes Act.
- 89 Explanatory Memorandum, pp. 1–2.
- 90 *Alert Digest No. 1 of 2001*, 7 February 2001, p. 23.
- 91 Review of Commonwealth Criminal Law, *op.cit.*, p. 27.

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