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Foreign Affairs and Trade 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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No. 118 2000-01

Foreign Affairs and Trade Legislation Amendment  
(Application of Criminal Code) Bill 2000

Mary Anne Neilsen  
Law and Bills Digest Group  
2 April 2001

## Contents

Purpose . . . . .	1
Background . . . . .	1
Application of Chapter 2 . . . . .	2
Strict liability . . . . .	2
Defences . . . . .	3
Removing and replacing inappropriate fault elements . . . . .	3
Non-Code fault elements . . . . .	3
Ancillary offences . . . . .	4
Main Provisions . . . . .	4
Schedule 1 - Amendment of Acts . . . . .	4
<i>Australian Trade Commission Act 1985</i> . . . . .	4
<i>Chemical Weapons (Prohibition) Act 1994</i> . . . . .	4
<i>Comprehensive Nuclear Test-Ban Treaty Act 1998</i> . . . . .	6
<i>Diplomatic and Consular Missions Act 1978</i> . . . . .	6
<i>Export Expansion Grants Act 1978</i> . . . . .	7
<i>Export Finance and Insurance Corporation Act 1991</i> . . . . .	7
<i>International Organisations (Privileges and Immunities) Act 1963</i> . . . . .	7
<i>Nuclear Non-Proliferation (Safeguards) Act 1987</i> . . . . .	7
<i>Passports Act 1938</i> . . . . .	8
<i>Registration of Deaths Abroad Act 1984</i> . . . . .	9
<i>South Pacific Nuclear Free Zone Treaty Act 1986</i> . . . . .	9
Concluding Comments . . . . .	9
Strict Liability Offences . . . . .	9
Endnotes . . . . .	10

# Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Bill 2000

**Date Introduced:** 6 December 2000

**House:** House of Representatives

**Portfolio:** Foreign Affairs and Trade

**Commencement:** The latest of the following times:

- 28 days after Royal Assent
- 28 days after Royal Assent of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*
- On commencement of item 15 of Schedule of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*

## Purpose

The Bill amends legislation administered by the Foreign Affairs and Trade portfolio in an attempt to harmonise certain criminal offence provisions in those statutes with the general principles of criminal responsibility set out in Chapter 2 of the Commonwealth Criminal Code.

## Background<sup>1</sup>

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 2001<sup>2</sup> 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 Law and Justice 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 Foreign Affairs and Trade 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 Department of Foreign Affairs and Trade. 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.'<sup>3</sup>

## 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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 offences<sup>7</sup> and to particular physical elements which are identified as attracting strict liability in other offences.<sup>8</sup> However, the Code does not prevent other defences being available.<sup>9</sup> The Bill

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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.

## 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.<sup>10</sup> 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.

## Removing and replacing inappropriate fault elements

Criminal offences are composed of fault elements<sup>11</sup> 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'.<sup>12</sup>

Chapter 2 defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'.<sup>13</sup> 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.<sup>14</sup>

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 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.

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The Criminal Code uses four fault elements. These are intention, knowledge, recklessness and negligence.<sup>15</sup> The Code does not prevent other fault elements being used in a particular statutory offence provision.<sup>16</sup> 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 Department of Foreign Affairs and Trade.

## Main Provisions

### Schedule 1 - Amendment of Acts

#### *Australian Trade Commission Act 1985*

**Item 1** amends the Australian Trade Commission Act by inserting **new section 6A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

#### *Chemical Weapons (Prohibition) Act 1994*

**Item 2** inserts **new section 6A** into the Chemical Weapons (Prohibition) Act (CWP Act). **New section 6A** applies Chapter 2 of the *Criminal Code* (other than principles of corporate criminal responsibility) to all offences against the CWP Act. Corporate criminal responsibility is dealt with in section 9 of the Act.

Section 12 of the CWP Act applies the fault elements of 'intentionally or recklessly' in relation to a number of offences including developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons or using chemical weapons. In order to harmonise this provision with the Criminal Code, **item 3** removes the word 'recklessly' from section 12 thus ensuring that the fault element of recklessness is not applied to the

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physical element of conduct in the offence. As the *Criminal Code* specifies that the default element in respect of proscribed conduct is intention then it would seem that the word 'intentionally' is no longer strictly necessary, although the amendment retains it<sup>17</sup>.

It is an offence under subsection 29(3) of the CWP Act for an operator of a certain type of chemical plant to fail (without reasonable excuse) to notify the facility to the Minister.

**Item 4** re-structures and re-words the constituent elements of the offence contained in subsection 29(3) so that the physical elements of conduct, result and circumstances are specified. As a result of the application of Chapter 2, the default fault element of intention applies to conduct and recklessness applies to circumstance and result. The amendments also separately spell out that it is a defence that the person has a 'reasonable excuse' (**proposed subsection 29(3A)**). The purpose of this amendment is to ensure that the defence is not interpreted as part of the offence provision. A defendant will bear an evidential burden of proof in relation to the defence.

Under subsection 30(2) of the CWP Act an operator of a chemical plant is required to keep records and provide information to the Chemical Weapons Convention Office. Subsection 30(3) makes it an offence for the operator to, without reasonable excuse, refuse or fail to comply with subsection 30(2). **Item 5** repeals and rewords subsection 30(3) in order to clearly identify the constituent physical elements of the offence. **New subsection 30(3)** provides that a person is guilty of an offence if, firstly, they are an operator of the particular type of chemical plant required to keep records and provide information; secondly, they engage in conduct (ie refuse or fail to provide information); and thirdly, the conduct contravenes the condition. In this way, the physical elements of circumstance, conduct and result are clearly specified. In the absence of any statutory modification the default fault elements provided by Chapter 2 will apply to each of these physical elements.<sup>18</sup> **Item 5** also relocates the element of 'reasonable excuse' to a new subsection in order to ensure that it is interpreted as a defence and not as part of the offence (which would have to be proved by the prosecution).

**Items 6 and 7** make similar amendments to subsection 31(4), and sections 77 and 78 respectively. Note that in addition **item 7** also inserts a **new subsection 78(3)** stipulating that the offence contained in subsection 78(1) is an offence of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact<sup>19</sup>. The particular offence of strict liability in subsection 78(1) relates to a breach of the conditions of permits by chemical plant operators. The current defence of reasonable excuse is retained and relocated to **new subsection 78(2)**.

Under subsection 80(1) of the CWP Act it is an offence for a person to 'intentionally or recklessly' make false or misleading statements to persons performing functions or duties under the Act. In order to harmonise this provision with the *Criminal Code*, **item 8** omits the word 'recklessly' from subsection 80(1) thus ensuring that the fault element of

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recklessness is not applied to the physical element of conduct in the offence. Under the *Criminal Code*, the default fault element in respect of proscribed conduct is intention.

**Item 9** identifies the offence under subsection 93(3) of the Act as an offence of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact. The particular offence of strict liability relates to failure to return an identity card when a person ceases to be a national inspector. The penalty is 1 penalty unit (ie \$110).

Subsection 102(3E) deals with offences relating to the divulging or communicating of confidential information. **Item 10** repeals and replaces the offence in subsection 102(3E) in order to restructure the offence to accord with the *Criminal Code*. The offence is broken up into the physical elements of circumstance, conduct and result. The default elements supplied by the *Criminal Code* will apply to each of those physical elements. The item also inserts a **new subsection 102(3F)** containing a definition of 'engage in conduct' which is to apply to this section. In keeping with section 4.1 of the Criminal Code conduct involves both doing an act and omitting to perform an act.

**Item 11** makes amendments which are consequential on the application of Chapter 2. They remove references to sections of the *Crimes Act 1914* which deal with ancillary offences and replace them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will be repealed and the relevant sections of the *Criminal Code* will commence when the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* commences.<sup>20</sup>

### ***Comprehensive Nuclear Test-Ban Treaty Act 1998***

The Comprehensive Nuclear Test-Ban Treaty Act (CNTBT Act) post-dates the passage of the Criminal Code Act. Section 6 of the CNTBT Act already provides that Chapter 2 of the *Criminal Code* applies to all offences under the Act.

**Item 12** identifies the offence under subsection 67(3) of the CNTBT Act as an offence of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact. The particular offence of strict liability relates to failure to return an identity card when a person ceases to be an inspector. The penalty is 1 penalty unit (ie \$110).

### ***Diplomatic and Consular Missions Act 1978***

**Item 13** amends the Diplomatic and Consular Missions Act by inserting **new section 3A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

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***Export Expansion Grants Act 1978***

**Item 14** amends the Export Expansion Grants Act by inserting **new section 10A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

***Export Finance and Insurance Corporation Act 1991***

**Item 15** amends the Export Finance and Insurance Corporation Act by inserting **new section 5A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

***International Organisations (Privileges and Immunities) Act 1963***

**Item 16** amends the International Organisations (Privileges and Immunities) Act by inserting **new section 4A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

**Item 17** identifies the offence under subsection 12(2) of the International Organisations (Privileges and Immunities) Act as an offence of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact. The particular offence of strict liability relates to unauthorised use of names, seals, emblems or other devices of international organisations.

***Nuclear Non-Proliferation (Safeguards) Act 1987***

**Items 18 and 19** make amendments to the Nuclear Non-Proliferation (Safeguards) Act (NNPS Act) which are consequential on the application of Chapter 2. They remove references to sections of the *Crimes Act 1914* which deal with ancillary offences and replace them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will be repealed and the relevant sections of the *Criminal Code* will commence when the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* commences.<sup>21</sup>

**Item 20** inserts **new section 8A** into the NNPS Act. **New section 8A** applies Chapter 2 of the *Criminal Code* (other than principles of corporate criminal responsibility) to all offences against the Act. Corporate criminal responsibility is dealt with in section 5 of the NNPS Act.

**Items 22 and 23** identify certain offences under the NNPS Act as offences of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact. The particular offences of strict liability relate to failure by former authorised officers to hand in their identity card<sup>22</sup> and failure by persons to give inspectors information when requested.<sup>23</sup>

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***Passports Act 1938***

**Item 24** amends the Passports Act by inserting **new section 5A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

**Item 25** omits a phrase in paragraph 9A(a) which refers to ‘for purposes of’ and replaces it with the words ‘in connection with’. Existing paragraph 9A(a) provides that it is an offence for a person, for the purposes of travel or identification and without reasonable excuse, to use an Australian passport that has been cancelled.

As amended by **item 25** paragraph 9A(a) will provide that it is an offence for a person in connection with travel or identification to use an Australian passport that has been cancelled.

The Explanatory Memorandum states that the replacement phrase removes ambiguity and clarifies the fault elements in the offence.<sup>24</sup> At present, it is uncertain whether the words ‘for the purposes 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’.<sup>25</sup> The amendment favours the second interpretation.

**Item 30** also adds a **new subsection 9A(2)** in order to separately spell out that it is a defence to this offence if the person using the cancelled passport has a ‘reasonable excuse’. The purpose is to ensure that the defence is not interpreted as part of the offence provision. A defendant will bear an evidential burden of proof in relation to the defence.

**Items 26-28 and 33-36** make similar amendments to offence provisions in paragraphs 9A(c)-(f), 10(1)(a), 10(1)(b), 10(2)(a) and 10(2)(b).

Existing paragraph 9A(g) deals with an offence of wilfully defacing or destroying an Australian passport. **Item 29** removes the words ‘wilfully defaces or destroys’ from the provision and replaces them with the words ‘intentionally does an act that causes the defacing or destruction of’. ‘Wilful’ is not an expression that is used in Chapter 2 of the *Criminal Code*. The Explanatory Memorandum remarks that ‘intentional’ is an equivalent expression.<sup>26</sup> While the *Criminal Code* does not prevent the use of non-Code fault elements (such as ‘wilfully’), its retention might lead to a future court decision distinguishing ‘wilfully’ from ‘intentionally’ when interpreting the provision.

Existing subsection 10(1) prohibits a person from ‘knowingly or recklessly’ making false or misleading statements in relation to obtaining a passport. **Item 32** removes the words ‘knowingly or recklessly’. As presently worded the provisions suggest that the fault elements of knowledge and recklessness apply to the physical element of conduct (ie making a statement). However, neither knowledge nor recklessness are applied by Chapter 2 of the *Criminal Code* to the physical element of conduct. Removal of the words ‘knowingly or recklessly’ is thus designed to harmonise the physical and fault elements in the offences with Chapter 2 of the *Criminal Code*. Following the removal of the words ‘knowingly or recklessly’, the *Criminal Code*’s default fault elements apply to each

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physical element of the offence. These default fault elements are intention in the case of conduct, and recklessness in the case of circumstance or result.

### ***Registration of Deaths Abroad Act 1984***

**Item 37** amends the Registration of Deaths Abroad Act (Deaths Abroad Act) by inserting **new section 4A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

**Item 38** repeals subsections 24(1) and (2) of the Deaths Abroad Act. These subsections are no longer necessary as they are similar to the general false and misleading provisions of the new Part 7.4 provisions of the Criminal Code. These were inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and come into effect on 25 May 2001.<sup>27</sup>

Existing subsection 24(4) of the Deaths Abroad Act deals with an offence of wilfully mutilating documents. **Item 39** removes the words 'or wilfully mutilate' and replaces them with the words 'or intentionally do an act that causes the mutilation of'. 'Wilful' is not an expression that is used in Chapter 2 of the *Criminal Code*. The Explanatory Memorandum remarks that 'intentional' is an equivalent expression. While the Criminal Code does not prevent the use of non-Code fault elements (such as 'wilfully'), its retention might lead to a future court decision distinguishing 'wilfully' from 'intentionally' when interpreting the provision.

### ***South Pacific Nuclear Free Zone Treaty Act 1986***

**Item 40** amends the South Pacific Nuclear Free Zone Treaty Act by inserting **new section 7A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

**Items 41 and 42** identify certain offences under the South Pacific Nuclear Free Zone Treaty Act as offences of strict liability. This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offences. However, the defendant can use a defence of mistake of fact. The offences of strict liability relate to failure by former authorised officers to hand in their identity card<sup>28</sup> and failure by a person to give their name and address to an inspector when requested.<sup>29</sup>

## **Concluding Comments**

### **Strict Liability Offences**

The Bill makes several amendments stating that certain offences are to be interpreted as strict liability offences. The Senate Standing Committee for the Scrutiny of Bills ('the Committee') has drawn the Senate's attention to these provisions and has asked the Minister to confirm that the Bill creates no new offences of strict liability.<sup>30</sup>

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As discussed above, a strict liability offence is one without a fault element, however a defence of mistake of fact is available.<sup>31</sup>

In response to the Committee's concern it should be noted that under the Code if there is no express mention in a pre-existing offence provision that an offence is one of strict liability, then certain fault elements will automatically apply to that offence. Although it may have always been intended that an offence is one of strict liability, without the offence provision being appropriately amended, a prosecutor would have to prove a fault element such as recklessness or intention where previously no such proof was required.

In the context of the Committee's concern it should also be noted that in all cases the Explanatory Memorandum points to the reasons why the offence has been interpreted as one of strict liability. These reasons include the relatively low penalty attached to the offence<sup>32</sup> and the fact that the offence concerns an administrative obligation which could be difficult to establish if the prosecution was required to prove intention.<sup>33</sup> The Explanatory Memorandum suggests that this type of obligation (ie to return an identity card) is usually interpreted to mean that the legislature intended that strict liability should apply.<sup>34</sup>

## Endnotes

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- 1 Much of the Background is extracted from the [Bills Digest](#) for the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No 96, 2000-2001*).
- 2 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.
- 3 Second Reading Speech, Criminal Code Bill 1994, *Parliamentary Debates (Hansard)*, Senate, 30 June 1994, p. 2377
- 4 *Halsbury's Laws of Australia*, 130–7950.
- 5 Subsection 6.1(1).
- 6 Subsection 6.1(2).
- 7 Paragraph 6.1(1)(b).
- 8 Paragraph 6.1(2)(b).
- 9 Subsection 6.1(3).
- 10 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.
- 11 Except in the case of strict or absolute liability offences.

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- 12 Goode, op.cit, p. 268.
- 13 Sections 5.2, 5.3, 5.4 and 5.5.
- 14 Section 5.6.
- 15 Subsection 5.1(1).
- 16 Subsection 5.1(2).
- 17 Note also item 8. The word 'recklessly' is removed but 'intentionally' is retained.
- 18 These fault elements are recklessness in respect of circumstance and result, and intention in respect of conduct.
- 19 Paragraph 6.1(1)(b).
- 20 At the date of writing the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 had passed both Houses and was awaiting Royal Assent.
- 21 *ibid.*
- 22 Subsection 58(2).
- 23 Subsection 66(4).
- 24 Explanatory Memorandum, pp. 21–22.
- 25 *ibid.*
- 26 page 25.
- 27 The Gibbs Committee recommended that the offences relating to false and misleading statements be replaced with a single set of provisions, based largely on revisions or extensions of the existing general provisions. It pointed to the fact that most of the specific provisions relating to false and misleading statements only differed in relation to penalties and could be covered by a more general provision.
- 28 Subsection 20(2).
- 29 Subsection 24(3).
- 30 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 1 of 2001, p. 21.
- 31 A more detailed explanation of strict liability is found above at p. 2.
- 32 For example see p. 13 of the *Explanatory Memorandum*.
- 33 *ibid.*
- 34 *ibid.*

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