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No. 132 2000–01

Prime Minister and Cabinet Legislation
Amendment (Application of Criminal Code) Bill
2001

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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. 132 2000–01

Prime Minister and Cabinet Legislation Amendment
(Application of Criminal Code) Bill 2001

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22 May 2001

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Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001

Date Introduced: 8 March 2001

House: Senate

Portfolio: Prime Minister

Commencement: The effect of the commencement provision is that the Act commences 28 days after the day it receives Royal Assent.¹

Purpose

To revise criminal offence provisions in five statutes administered by the Department of the Prime Minister and Cabinet in the light of principles of criminal responsibility contained in Chapter 2 of the *Criminal Code Act 1995* (the Criminal Code). The Bill also replaces gender specific language in one statute with gender neutral language.

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 2001 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.

The Parliament has passed the following laws which apply Chapter 2 to legislation in a range of portfolios—*Communication and the Arts Legislation Amendment (Application of Criminal Code) Act 2001*, *Environment and Heritage Legislation Amendment (Application*

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of Criminal Code) Act 2001, Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Act 2001, Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001, Treasury Legislation Amendment (Application of Criminal Code) Act 2001, and Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001. Currently before the Parliament are the Finance and Administration Legislation (Application of Criminal Code) (No.1) 2001, Migration Legislation Amendment (Application of Criminal Code) Bill 2001, Treasury Legislation Amendment (Application of Criminal Code) Bill 2001 and the present Bill.

Some major aspects of criminal responsibility covered by the Prime Minister and Cabinet (Application of Criminal Code) Bill 2001 are described below.

Offences—Physical elements and fault elements

The Criminal Code provides that an offence consists of physical elements and fault elements. Physical elements relate to external events such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence.

The Criminal Code defines the physical elements of an offence to be conduct, the circumstances in which it occurs or the consequences of conduct.² An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act.³ Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision.

In general, for every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code establishes four fault elements—intention, knowledge, recklessness and negligence in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.⁴ The Code does not prevent an offence from specifying an alternative fault element, but indicates that the default fault element will apply in the absence of a specified fault element.

Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.⁵ The prosecution bears the legal burden of proving every element of an offence. The legal burden means 'in relation to a matter, the burden of proving the existence of that matter'.⁶ The prosecution bears the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise.

Generally, where a burden of proof is placed on a defendant it is an evidential burden only.⁷ The evidential burden can be discharged by the defendant pointing to evidence

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suggesting there was a reasonable possibility that a matter existed or did not exist.⁸ The Code provides that a defendant will have a legal burden of proof only if the law creating the offence so provides. When a legal burden is placed on the defendant it must be discharged on the balance of probabilities.⁹

The Bill relocates legal burdens and identifies evidential burdens.

Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in legislation administered by the Department of the Prime Minister and Cabinet. 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 dealing with corporate criminal responsibility] concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.'¹⁰

Strict liability

At common law there is a presumption that every offence contains a mental element. However, an increasing number of statutory offences dispense with proof of intent. Where a defence of honest and reasonable mistake of fact is available, an offence is called a strict liability offence. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.¹¹ Failure to do so means that fault elements are applied to all the physical elements in the offence.

The Criminal Code supplies a defence of mistake of fact¹² for strict liability offences.¹³ The Bill identifies additional defences to strict liability offences. For example, the Bill relocates and recreates defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.¹⁴ 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.

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Removing and replacing inappropriate fault elements

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 knowledge 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.

As stated above, the Criminal Code uses four fault elements (intention, knowledge, recklessness and negligence).¹⁵ It does not prevent other fault elements being used in a particular offence provision.¹⁶ However, the Bill replaces non-Code fault element, 'wilfulness', with the Code fault element of '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 disappplied 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 themselves 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 the Prime Minister and Cabinet. Equivalent Criminal Code provisions will take their place.

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Main Provisions

Clause 4 provides that each amendment made by the *Prime Minister and Cabinet (Application of Criminal Code) Act 2001* applies to acts and omissions that occur or commence after the amendment commences.

Schedule 1—Application of the Criminal Code

Inspector-General of Intelligence and Security Act 1986

The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) establishes the Inspector-General of Intelligence and Security to monitor, conduct inquiries into, investigate, and make recommendations to the Government about Australia's intelligence and security agencies. These agencies are the Australian Security and Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Intelligence Organisation, the Office of National Assessments and the Defence Imagery and Geospatial Organisation. The IGIS has extensive powers to obtain information and, among other things, can require a person to answer questions, produce documents, and take sworn evidence.¹⁷

Item 1 of Schedule 1 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the IGIS Act.

Section 18 of the IGIS Act empowers the Inspector-General to obtain information and documents relevant to an inquiry. The effect of paragraph 18(6)(d) of the IGIS Act is that self-incriminating information supplied by a person to the Inspector-General cannot be used in evidence against that person in proceedings for the ancillary offences of attempt, incitement or conspiracy which are found in the Crimes Act. These Crimes Act provisions will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*. **Item 2** repeals existing paragraph 18(6)(d) and substitutes a new paragraph containing references to equivalent ancillary offence provisions in the Criminal Code.

Subsection 18(7) provides that a person who, 'without reasonable excuse', fails or refuses to comply with a requirement to produce information or documents or answer questions is guilty of an offence. The maximum penalty is a fine of \$1000 or 6 months imprisonment or both in the case of an individual and a fine of \$5000 for a corporation. **Items 3-5** amend subsection 18(7) in the following ways:

- first, the provision is restructured to ensure that the words 'without reasonable excuse' are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution
- second, the word 'refuses' is omitted, and

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- third, **new subsection 18(7A)** identifies the offence as one of strict liability.

The Explanatory Memorandum explains that the presence of the word ‘refuses’ suggests fault on the part of the accused and that this is inconsistent with a strict liability offence.

Ombudsman Act 1976

The Ombudsman Act establishes the office of the Commonwealth Ombudsman to investigate complaints from people who claim to have been ‘adversely affected by the defective administration of Commonwealth departments and agencies, including some government business undertakings and private contractors delivering government services to the community ...’¹⁸ In investigating a complaint, the Ombudsman has power to compel the production of documents and take sworn evidence.

Item 6 applies Chapter 2 of the Criminal Code to all offences against the Ombudsman Act.

Subsection 36(1) of the Ombudsman Act provides that a person must not refuse or fail, ‘without reasonable excuse’ to appear, give information, answer a question or produce a document when required to do so under the Act. The maximum penalty is a fine of \$1000 or 3 months imprisonment. **Items 7 and 8** restructure section 36 so it is clear that the words ‘without reasonable excuse’ are a defence and not an element of the offence which would have to be proved by the prosecution.

Parliamentary Commission of Inquiry (Repeal) Act 1986

The Parliamentary Commission of Inquiry (Repeal) Act was enacted to halt the Commission set up to advise Parliament whether Justice Lionel Murphy’s conduct amounted to ‘proved misbehaviour’ within the meaning of section 72 of the Constitution.¹⁹ Because the Judge’s terminal illness led to the Commission being wound-up before its report was completed, the Act made arrangements for the safe-keeping of the material it had collected and also made it an offence to disclose allegations derived from those materials.

Item 9 applies Chapter 2 of the Criminal Code to all offences against the Parliamentary Commission of Inquiry (Repeal) Act.

Resource Assessment Commission Act 1989

The Resource Assessment Commission was established to inquire into and report on the environmental, cultural, social, industry, economic and other aspects of resources and their uses. In the course of holding an inquiry, the Commission is empowered to require a person to give evidence or produce documents.

Item 10 applies Chapter 2 of the Criminal Code to the Resource Assessment Commission Act except for the Code’s principles of corporate criminal responsibility.

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Items 11-13 amend subsection 53(1) of the Act. Subsection 53(1) provides that it is an offence for a person who is given notice to refuse or fail to comply ‘without reasonable excuse’ with the notice or answer questions at a Commission hearing when required to do so. The penalty is a fine of \$3000. The amendments affect subsection 53(1) in the following ways:

- first, they restructure the provision so it is clear that the words ‘without reasonable excuse’ are a defence and not an element of the offence which would need to be proved by the prosecution
- second, they remove the word ‘refuses’
- third, they stipulate that a subsection 53(1) offence is one of strict liability.

Items 14 and 15 make similar amendments to subsection 53(2) which penalises a person who refuses or fails ‘without reasonable excuse’ to continue to attend a Commission hearing when required to do so.²⁰ **Items 16 and 17** make consequential amendments to subsection 53(3).

Royal Commissions Act 1902

The Royal Commissions Act enables the Governor-General to issue Letters Patent establishing a royal commission. While independent of the Executive Government, a royal commission reports to it. The Act endows royal commissions with considerable powers to summons witnesses and take evidence, require the production of documents, compel witnesses to give evidence and deal with contempt.

Item 18 applies Chapter 2 of the Criminal Code to all offences under the Royal Commission Act.

Items 19 and 20 amend subsection 3(1) of the Act. Subsection 3(1) creates an offence of failing ‘without reasonable excuse’ to attend a Royal Commission hearing when required to do so. The amendments restructure the section so it is clear that the words ‘without reasonable excuse’ are a defence rather than an element of the offence. They also specify that the offence is one of strict liability.

Items 21 and 22 make similar amendments to subsection 3(2) which creates an offence of refusing or failing ‘without reasonable excuse’ to produce documents when required to do so by a Royal Commission. Additionally, the amendments remove the element of refusal—so that the offence will be one of failing to produce documents.

Items 23 and 24 amend subsection 3(3). Subsection 3(3) reads:

It is a defence to a prosecution for an offence against subsection (2) constituted by a refusal or failure to produce a document or other thing to a Commission if it is proved that the document or other thing was not relevant to the matters into which the Commission was inquiring.

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The amendments remove the phrases ‘refusal or’ and ‘it is proved that’. The first amendment is a consequence of the amendment made by **item 21**. The second amendment has the effect, together with **item 25**, of removing the legal burden from the defendant and replacing it with an evidential burden.

Item 26 identifies an offence against subsection 6(1) as one of strict liability. Subsection 6(1) creates an offence of refusing to be sworn or give evidence to a Royal Commission.

Item 28 amends subsection 6H(1) which is an offence of ‘knowingly’ giving false or misleading evidence to a Royal Commission. The amendments identify the constituent physical elements of conduct (giving evidence) and circumstance (knowing it to be false) and apply the Code fault elements of intention and knowledge, respectively. The fault element of ‘knowledge’ is applied by the Code to circumstances and results, not to conduct. A similar amendment is made to section 6J by **item 30**. Section 6J creates an offence of fraud on a witness.

Item 29 removes attempt from section 6I which creates offences related to the bribery of a Royal Commission witness. An ancillary offence of attempt will be provided by section 11.1 of the Criminal Code.

Item 31 repeals and replaces subsection 6K(1). The amendment restructures the offence of destroying documents and other materials that are required in evidence by a Royal Commission by clearly identifying the physical elements of the offence. The amendment also removes the non-Code fault element, ‘wilfully’. As a result of the application of Chapter 2 the default fault element of intention will apply to the element of conduct in the offence and recklessness to the element of result in the offence. The fault element of knowledge will continue to be required for the element of circumstance in the offence.²¹

Item 32 amends section 6L. Section 6L creates an offence of wilfully preventing a witness from attending a Royal Commission hearing or wilfully endeavouring to prevent a witness attending. The non-Code fault element, ‘wilfully’, is replaced by the Code element of intention. Additionally, the ancillary offence of endeavouring to prevent a witness attending is repealed. The ancillary offence of attempt will be redundant because it will be supplied by the Criminal Code.

Item 33 amends section 6M. Section 6M creates an offence of inflicting or procuring injury to a Royal Commission witness. The amendment removes the offence of procuring an injury. This offence is redundant because section 11.2 of the Criminal Code creates a general offence of aiding, abetting, counselling or procuring an offence.

Item 34 amends subsection 6N(2). This subsection provides a defence to the offence in subsection 6N(1). In line with Criminal Code policy, the amendments shift the legal burden of proving the defence from the defendant (the employer) and provide that the prosecution bears the legal burden of disproving the defence.²² A note states that the defendant bears an evidential burden in relation to proving the defence.

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Subsection 6O(1) creates an offence of contempt of a Royal Commission. **Items 35 and 36** amend subsection 6O(1) by replacing the non-Code fault element, ‘wilfully’ with the Code fault element of intention.

Schedule 2—Other amendments

Items 1-3 of Schedule 2 renumber three sections in the Ombudsman Act

Items 4-38 amend the Royal Commissions Act by replacing gender specific language with gender neutral language.

Concluding Comments

The Senate Standing Committee for the Scrutiny of Bills report on the Bill drew Senators’ attention to items in the Bill which identify strict liability offences:

The Committee notes that, in some cases, the effect of this Bill will be to change the nature of some provisions. The Committee, therefore, **seeks the Minister’s advice**²³ as to whether this bill converts an offence which was previously not one of strict liability into a strict liability offence.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee’s terms of reference.*²⁴

At times, it may be difficult to know precisely whether a particular offence was intended to be an offence of strict liability and, in some cases, policy decisions may have to be made to resolve this issue. For example, the Bill amends a number of offences identified as having inconsistent elements—an element of refusal (involving fault) but small penalties and a defence of reasonable excuse (indicating strict liability).²⁵ In these cases, the element of refusal is removed, the offence becomes an offence of failing to do something (such as provide information) and is identified as a strict liability offence. In other cases²⁶, however, offences involving an element of refusal, broadly similar penalties and a defence of reasonable excuse are not identified as a strict liability offences.

Endnotes

- 1 Clause 2 provides that the Act commences on the latest of three dates—immediately following the commencement of Item 15 of Schedule 1 of the *Criminal Code (Theft, Fraud, Bribery and Related Offences) Act 2000*, 28 days after the day on which the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* receives Royal Assent or 28

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days after the day on which the Act receives Royal Assent. Item 15 of Schedule 1 is due to commence on 25 May 2001. The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received Royal Assent on 6 April 2001.

- 2 Criminal Code, section 4.1.
- 3 Criminal Code, section 4.3.
- 4 Criminal Code, section 5.6.
- 5 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 6 Criminal Code, subsection 13.1(3).
- 7 Criminal Code, subsection 13.3(1).
- 8 Criminal Code, subsection 13.3(6).
- 9 Criminal Code, sections 13.4 and 13.5.
- 10 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 11 Criminal Code, subsection 6.1(1).
- 12 A defence which is equivalent to the common law defence of honest and reasonable mistake of fact.
- 13 Criminal Code, paragraph 6.1(1)(b).
- 14 Matthew Goode, ‘The Modern Criminal Code Project’, *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.
- 15 Criminal Code, subsection 5.1(1).
- 16 Criminal Code, subsection 5.1(2).
- 17 See section 18.
- 18 Commonwealth Ombudsman, *Annual Report 1999-2000*, p. 7.
- 19 Section 72 provides that a federal judge can be removed from office for ‘proved misbehaviour’ by the Governor-General following an address from both Houses of Parliament.
- 20 The penalty is a fine of \$3000.
- 21 Section 5.3 of the Criminal Code provides that knowledge can apply to circumstance or result. However, the default fault element of recklessness will apply unless another fault element is stipulated in the offence provision—subsection 5.6(2).
- 22 Subsections 13.3(1) and 13.4.
- 23 Emphasis in original.
- 24 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 4/01*, 28 March 2001, pp. 19–20.
- 25 See, for example **items 4-5**.
- 26 See, for example, amendments to subsection 36(1) of the Ombudsman Act.

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