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No. 23 2001–02

Health and Aged Care 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

Bills Digest
No. 23 2001-02

Health and Aged Care Legislation Amendment (Application
of Criminal Code) Bill 2001

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Law and Bills Digest Group
20 August 2001

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Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001

Date Introduced: 8 August 2001

House: House of Representatives

Portfolio: Health and Aged Care

Commencement: On Royal Assent

Purpose

The Bill's main purpose is to revise criminal offence provisions in 15 statutes in the Health and Aged Care portfolio so that they harmonise with the principles of criminal responsibility found in Chapter 2 of the Criminal Code.

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—*Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2001*, *Environment and Heritage Legislation Amendment (Application 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*, *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001*, *Treasury Legislation Amendment*

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(Application of Criminal Code) Act (No. 1) 2001, and *Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001*. Currently before the Parliament are the *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001*, *Finance and Administration Legislation (Application of Criminal Code) Bill (No.1) 2001*, *Migration Legislation Amendment (Application of Criminal Code) Bill 2001*, *Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001*, *Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001*, *Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001* and the present Bill.

Some major aspects of criminal responsibility relevant to the *Health and Aged Care Legislation Amendment (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 and the results of conduct.¹ 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.² 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 default fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.³ 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.⁴ 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 the matter'.⁵ The prosecution bears the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise.

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Generally, where a burden of proof is placed on a defendant it is an evidential burden only.⁶ The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist.⁷ 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.⁸

The Bill retains one provision that places a legal burden of proof on the defendant. In a number of other cases, it amends provisions which appear to place a legal burden on the defendant and specifies that the burden is an evidential one.

Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in relevant legislation administered by the Department of Health and Aged Care. However, in some cases, the application of Chapter 2 is modified. The application of the Code's principles of corporate criminal responsibility is one example. At the time the Criminal Code Bill 1994 was introduced, 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.'⁹

The Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001 applies Part 2.5 to one statute—the *Australia New Zealand Food Authority Act 1991* and repeals the existing provision governing corporate criminal liability. However, in general, as is the case with its companion 'application of criminal code bills', existing provisions in Acts amended by the Bill governing the conduct of directors, servants and agents remain unchanged.

For a discussion of the issue of corporate criminal responsibility, see *Bills Digest No. 20, 2001-02*.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 fault elements.¹¹ Whether an offence is a strict liability offence depends on the interpretation of the offence provision. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.¹² 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 fact to strict liability offences.¹³ The Bill retains additional defences to some strict liability offences. For example, the Bill relocates and re-phrases defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

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The Criminal Code allows a law which creates an offence to provide that strict liability applies to a particular physical element of that offence.¹⁴ The Bill identifies some physical elements of offences as attracting strict liability.

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.

The Bill relocates and re-phrases defences of reasonable excuse and inability to comply with a statutory requirement. It also repeals references in portfolio legislation to defences of lawful excuse or lawful authority. Part 2.3 of the Criminal Code contains a range of general defences. In its 1998 and 1999 *Offences Against the Person* reports, the Model Criminal Code Officers Committee recommended that there be a general lawful authority defence.¹⁶ The effect of repealing existing lawful excuse/authority defences is that the general defence in section 10.5 of the Criminal Code will apply.

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 Code 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 expressions

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.

One provision amended by the Bill contains the expression 'so as to imply'. Arguably, this expression could be interpreted as a fault element or a physical element of the offence. The amendment seeks to clarify the expression.

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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 contains amendments removing references to the Crimes Act and replacing them with references to the Criminal Code.

False or misleading statements

Part 7.4 of the Criminal Code contains offences of providing false or misleading statements or information. It was inserted by the *Criminal Code (Theft, Fraud, Bribery and Related Offences) Act 2001* and has been described in the following way:

Part 7.4 contains a number of minor offences which a[re] prevalent throughout Commonwealth legislation. The idea here is to centralise them in the Criminal Code alongside other fraud related offences. This will enable the repeal of over 130 offences in other legislation and will standardise what will be required to prove. It is an important part of the Government's 'statute stocktake' initiative which is designed to simplify Commonwealth law.¹⁷ ...

False or misleading statements are often made as a prelude to committing fraud. For many years now Governments have been enacting false and misleading statement offences which have relatively low penalties (ranging from fines to 2 years imprisonment) in a very wide range of legislation. The offence is useful where the person is caught early in the process and the particular conduct did not involve large amounts of money. In 1990 the Gibbs Committee concluded that centralising these offences in the Criminal Code would be more efficient by standardising the offence for practitioners but would also simplify and reduce the size of the Commonwealth statute book.¹⁸

The Bill repeals some but not all offences in the health and aged care portfolio dealing with false or misleading statements, information and documents. Where repeal occurs, offences contained in Part 7.4 of the Criminal Code will apply instead.

Main Provisions

Clause 4 provides that each amendment made by the Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001 applies to acts and omissions that occur or commence after the amendment commences.

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Aged Care Act 1997

Chapter 2 of the Criminal Code has already been applied to all offences under the Aged Care Act—see section 96-9, which was inserted by the *Aged Care Act 1997*.

Item 1 adds a note at the end of section 96-9 which gives as an example of Criminal Code offences that can apply to providers of aged care, offences of giving false or misleading information under section 137.1 of the Criminal Code.

Aged or Disabled Persons Care Act 1954

Application of Chapter 2 of the Criminal Code

Item 2 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Aged or Disabled Persons Care Act.

False or misleading statements

Subsection 10JA(2) of the Act currently contains an offence of making statements or supplying documents which are false or misleading in relation to applications for financial assistance.¹⁹ The Explanatory Memorandum states that **item 3** repeals subsection 10JA(2) because the Criminal Code contains general offences relating to false or misleading statements or information (Part 7.4).²⁰ However, the amendment leaves in place only subsection 10JA(1), which is merely a list of certain applications under the Act, and a penalty of imprisonment for 5 years. The only clue to the meaning of section 10JA, once subsection (2) is excised, seems to be the heading ‘Statements that are false or misleading’. However, subsection 13(3) of the *Acts Interpretation Act 1901* provides that, ‘No marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act’.

Aligning fault elements in the Aged or Disabled Persons Care Act with fault elements in the Criminal Code

Section 10JB of the Act currently provides that a person must not ‘knowingly or recklessly make a submission under section 10AC or 10GD that is false or misleading in a material particular’.²¹ **Item 4** omits the phrase ‘knowingly or recklessly’ from section 10JB. The Explanatory Memorandum explains that the purpose of the amendment is to remove an inappropriate fault element, ‘knowledge’ and a redundant fault element, ‘intentionally’. Under the Criminal Code, ‘knowledge’ is a fault element for circumstances or results, not conduct. The fault element of ‘intention’ is automatically applied by the Criminal Code to conduct and so does not need to be expressly mentioned.

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Australia New Zealand Food Authority Act 1991

Item 5 applies Chapter 2 of the Criminal Code to all offences against the Australia New Zealand Food Authority Act.

Although the Act contains its own provision²² relating to corporate criminal responsibility, this is repealed by **item 6**. Part 2.5 of the Criminal Code—which deals with corporate criminal responsibility—will apply instead. In this, the Bill represents a departure from most of the companion ‘application of criminal code’ bills that have come before the Parliament. For a discussion of the issue of whether Part 2.5 should apply to all Commonwealth legislation, see *Bills Digest No. 20, 2001-02*.²³

Australian Hearing Services Act 1991

Item 7 applies Chapter 2 of the Criminal Code to all offences against the Australian Hearing Services Act.

Epidemiological Studies (Confidentiality) Act 1981

Application of Chapter 2 of the Criminal Code

Item 8 applies Chapter 2 of the Criminal Code to all offences against the Epidemiological Studies (Confidentiality) Act.

The defendant’s burden of proof

Section 5 of the Act provides as follows:

Notwithstanding section 4, the Minister may, by writing signed by him, authorize the giving of access, in a form or forms specified in the instrument of authorization, to documents prepared or obtained in the conduct of a prescribed study to persons assisting in the conduct of another prescribed study, and, where such an authorization is given, it is a defence to a prosecution for a contravention of section 4 that is constituted by the giving of access to a document if it is established that the access was given in accordance with the authorization.

Item 9 deletes the words ‘it is established that’. This is in line with Criminal Code policy that a defendant does not, in general, carry a legal burden of proof.²⁴ Instead, a note (inserted by **item 9**) explains that a defendant has an evidential burden of establishing that access was given in accordance with a Ministerial authorisation. An evidential burden is the burden of pointing to evidence suggesting a reasonable possibility that something does or does not exist.²⁵

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Health and Other Services (Compensation) Act 1995

Item 11 applies the Criminal Code to all offences against the Health and Other Services (Compensation) Act.

Relocating and re-phrasing defences and identifying strict liability offences

Items 12, 13, 17 and 19 remove the element of ‘reasonable excuse’ from a number of offence provisions and relocate it in a new subsection so it is clear that ‘reasonable excuse’ is a defence and not an element of the offence which would have to be proved by the prosecution. An example is subsection 26(1) of the Act which presently provides that a person ‘must not, without reasonable excuse, refuse or fail to comply with a requirement’ to notify the Health Insurance Commission about a personal injury compensation claim. **Item 12** removes the words ‘without reasonable excuse’ from subsection 26(1). A defence of reasonable excuse is then placed in a separate subsection [**new subsection 26(1A)**, inserted by **item 13**]. **Item 15** is a consequential amendment.

Items 13 and 19 identify two offences of strict liability. These are offences against subsections 26(1) (see above) and 44(1). The Criminal Code supplies a defence of mistake of fact to strict liability offences.²⁶ However, it does not preclude additional defences being available in particular cases.²⁷ Subsection 44(1) is one such case. **Items 17 and 18** omit two phrases from subsection 44(1)—‘without reasonable excuse’ and ‘to the extent that the person is capable of complying ...’. **Item 19** inserts two new subsections into section 44²⁸ which clarifies that the words are defences and not elements of the offence which would have to be proved by the prosecution.

False or misleading information

Item 14 repeals subsection 26(2) which creates an offence of providing false or misleading information in a notification to the Health Insurance Commission. General offences of supplying false or misleading information are found in the Criminal Code (Part 7.4). **Item 16** is a consequential amendment.

Health Insurance Act 1973

Item 21 applies Chapter 2 of the Criminal Code to all offences against the Health Insurance Act.

Relocating and re-phrasing defences

Items 22, 23, 25-32, 34, 35, 38-51, 57-60, 63 and 64 remove the element of ‘reasonable excuse’ from a number of offence provisions and relocate it in new subsections so it is clear that ‘reasonable excuse’ is a defence and not an element of the offence which would have to be proved by the prosecution. For instance, subsection 19CB(1) of the Health Insurance Act empowers the Minister to direct a doctor not to provide a service that he or

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she is not authorised to provide unless, before providing the service, the doctor's patients are told that no Medicare benefit will be payable. Subsection 19CB(4) provides that it is an offence, 'without reasonable excuse', to fail to comply with a Ministerial direction. **Items 22 and 23** excise the words 'without reasonable excuse' from subsection 19CB(4) and rephrase them as a defence of reasonable excuse in **new subsection 19CB(5)**.

Strict liability offences

Items 23, 24, 26, 28, 33, 35, 37, 39, 43, 45, 47, 49, 51, 58, 62, 64-66, 73, 77, and 80 identify a number of offences against the Health Insurance Act as strict liability offences. Once again, the offence against subsection 19CB(4) mentioned above can be used as an example. **Item 23** identifies subsection 19CB(4)—refusing or failing to comply with a Ministerial direction—as a strict liability offence. The penalty for this offence is a maximum fine of \$2,000. A strict liability offence is one where the prosecution does not have to prove fault, only that the defendant carried out the requisite physical elements of the offence. The policy of the Criminal Code is that strict liability offences have to be expressly identified in legislation.²⁹ Failure to do so means that the offence will be interpreted as one where the prosecution has to prove fault eg intention (if, for example, 'conduct' is the relevant physical element).

Re-structuring offences to identify their constituent physical and fault elements

Subsection 106E(2) of the Health Insurance Act is an offence of knowingly giving a false or misleading answer, document or information when attending a Professional Services Review Committee hearing. **Item 52** repeals and replaces subsection 106E(2) of the Health Insurance Act to restructure the offence in a way that enables appropriate Criminal Code fault elements to be applied to each physical element of the offence.³⁰

The defendant's burden of proof

Subsection 106E(6) of the Health Insurance Act provides that if a person is charged with refusing or failing to produce a document to a Professional Services Review Committee it is a defence 'if it is proved' that the document was irrelevant to the proceedings. These words suggest that the defendant has a legal burden of proof. In keeping with the general policy of the Criminal Code, **items 53 and 54** change the burden of proof imposed on a defendant in subsection 106E(6) proceedings from a legal to an evidential burden.

Similar amendments are made by **items 68, 69, 78, 79, 81 and 82**. For instance, **items 78 and 79** affect subsection 130(18) of the Health Insurance Act. Subsection 130(18) provides that where an employer is prosecuted because an employee or agent solicited the disclosure of 'protected information',³¹ it is a defence 'if it is established' that the employee or agent was acting outside the scope of his or her authority. **Item 78** removes the words 'if it is established' and **item 79** inserts a note that the defendant's burden is an evidential one.

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Ancillary offences

Item 55 replaces references in a definitions provision [subsection 124B(1)] to ancillary offences under the Crimes Act with references to equivalent provisions in the Criminal Code. Similar amendments are made to paragraphs 129AAB(2)(a) and (b) and subparagraph 130(6)(a)(ii) by **items 72 and 75**.

False or misleading answers, information or documents

Item 56 amends the definition of ‘relevant offence’ in the Health Insurance Act to include offences of making or supplying false or misleading statements or documents which are provided by the Criminal Code.³²

The defence of lawful excuse

Item 76 omits the defence of lawful authority from subsection 130(16) of the Health Insurance Act. A general defence of lawful authority will be provided by section 10.5 of the Criminal Code

Item 83 removes the words ‘without lawful excuse’ from subsection 130F(2) for the same reason. Subsection 130F(2) provides that a person summoned to appear before the Secretary of the Department of Social Security must not, without lawful excuse, fail to appear. Note, however, that section 130F of the Health Insurance Act was repealed by the *Social Security Legislation Amendment (Concession Cards) Act 2001*, which commenced on 1 July 2001.³³

Health Insurance Commission Act 1973

Ancillary offences

Items 84 and 85 replace references to Crimes Act ancillary offence provisions presently found in section 3A³⁴ of the Health Insurance Commission Act with references to equivalent provisions in the Criminal Code.

Application of Chapter 2 of the Criminal Code

Item 86 applies Chapter 2 of the Criminal Code to all offences against the Health Insurance Commission Act.

Relocating and re-phrasing defences

Items 87-89 and 91 omit the expression, ‘without reasonable excuse’, from subsections 8N(4) and 8R(1) and relocate and rephrase it in **new subsections 8N(5) and 8R(1B)**. Additionally, **item 90** omits the words ‘to the extent that the person is capable of complying ...’ from subsection 8R(1) and **item 91** rephrases the expression as a defence in **new subsection 8R(1A)**. The amendments are designed to ensure that the words are

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clearly identified as a defence and not as an element of the offence which would have to be proved by the prosecution.

Strict liability

Items 88 and 91 identify offences against subsections 8N(4) and 8R(1) as offences of strict liability. These are offences of failing to return an identity card on ceasing to be an inspector appointed under the Act and failure to comply with a notice to provide information or documents to the Health Insurance Commission. The penalty in the first case is one penalty unit (\$110) and, in the second case, the penalty is imprisonment for 6 months.

Other amendments

Item 94 clarifies paragraph 41C(2)(c) of the Health Insurance Commission Act, which currently creates an offence:

[w]here the name "medicare" or a prescribed symbol:

...

is used by an association in connection with any activity of the association so as to imply that the association is in any way connected with the Commonwealth or the Commission.

The Explanatory Memorandum remarks that the provision is clarified by replacing the words, 'so as to imply' with the phrase, 'with the result of implying'. The present lack of clarity may be because the words could be interpreted either as a fault or as a physical element of the offence.

Hearing Services Administration Act 1997

Application of Chapter 2 of the Criminal Code

Item 95 applies Chapter 2 of the Criminal Code to all offences against the Hearing Services Administration Act.

False or misleading statements

Section 22 of the Hearing Services Administration Act creates an offence of making false or misleading statements in claims for payment under the Act. **Item 97** repeals section 22 because the Criminal Code will supply offences of making or providing false or misleading statements or documents (see Part 7.4). **Item 96** repeals paragraph 19(6)(a)³⁵ of the Hearing Services Administration Act which contains a reference to section 22 and substitutes references to the relevant provisions in Part 7.4. **Item 98** is also a consequential amendment.

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Narcotic Drugs Act 1967

Application of Chapter 2 of the Criminal Code

Item 99 applies Chapter 2 of the Criminal Code to all offences against the Narcotic Drugs Act.

Strict liability offences

Subsection 23(1) of the Narcotic Drugs Act empowers the Secretary to issue a notice requiring narcotics manufacturers and wholesalers to keep records and furnish information about the manufacture, acquisition and disposal of drugs and the drug stocks in their possession. Subsection 23(2) provides that a person must comply with such a notice. The penalty is \$1,000. **Item 100** identifies an offence against subsection 23(2) as a strict liability offence.

Relocating and re-phrasing defences and other amendments

Subsection 24(1) of the Narcotic Drugs Act enables an authorised inspector to enter the premises of narcotics manufacturers and wholesalers, examine and take samples of drugs manufactured on the premises, inspect manufacturing processes, and inspect documents and papers. Subsection 24(3) provides that it is an offence, ‘without reasonable excuse’, to obstruct or hinder an authorised inspector. The occupier or manager of the premises must assist the inspector so that he or she can effectively exercise their powers.

Item 101 amends subsection 24(3) in the following ways:

- it re-structures and rewords the offences contained in subsection 24(3) to clarify their constituent physical elements [**new subsections 24(3) and (3B)**]
- it relocates and rephrases the element of reasonable excuse in order to ensure that the words are interpreted as defences and not as elements of the offence which would have to be proved by the prosecution [**new subsections 24(3A) and (3C)**]
- it stipulates that strict liability applies to the physical element of circumstance in subsections 24(3) and (3B)—that the inspector is acting under subsection 24(1) or (2). In other words, it is not necessary for the prosecution to prove that the defendant put his or her mind to the letter of the law.

National Health Act 1953

Application of Chapter 2 of the Criminal Code

Item 102 applies Chapter 2 of the Criminal Code—except for Part 2.5 dealing with corporate criminal responsibility—to all offences against the National Health Act. Section 134E of the Act deals with conduct of directors, servants and agents.

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False or misleading statements

Section 61B of the National Health Act empowers an authorised officer to require a person to answer questions and provide documents relating to an approved nursing home. Subsection 61B(3) creates an offence relating to false or misleading documents. **Item 103** repeals subsection 61B(3).

Item 105 repeals subsection 61E(2). This is an offence of providing false or misleading answers or documents to an authorised officer.

Item 125 repeals paragraphs 103(5)(a) and (aa) which provides that a person must not make or present false or misleading statements or documents in relation to pharmaceutical benefits or concession cards.

Offences relating to false or misleading statements and documents will be provided by the Criminal Code (see Part 7.4).

Relocating and re-phrasing defences

Items 104, 105, 115, 116, 120, 121, 123, 124, 126 and 127 relocate and rephrase the element of reasonable excuse currently found in subsections 61E(1), 82V(5), 82XR(4), 84L(3) and (4), and 128(1). An example is subsection 61E(1) which makes it an offence for a person, 'without reasonable excuse' to refuse or fail to attend before an authorised officer, make an oath or affirmation, answer a question or produce a document. **Item 104** omits the words, 'without reasonable excuse' from subsection 61E(1) and **item 105** inserts a defence of reasonable excuse in **new subsection 61E(2)**. The purpose of these amendments is to 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.

The defendant's burden of proof

Items 106, 107, 118, 119, 130, 131, 135, 136, 138 and 139 ensure that defendants who are prosecuted for offences against subsections 62(3), 82WC(2), section 134C and subsections 135A(17) and (19) bear an evidential burden of proof rather than a legal burden.

Strict liability offences

Items 108, 110, 112, 113, 129, 134 and 137 identify a number of offences against the National Health Act as strict liability offences. These are offences against section 74, subsection 75(5), 82K(5), 82L(2), 128(1), 135A(16) and 135A(18). For example, subsection 75(5) makes it an offence for an officer of a registered health insurer to refuse or fail to produce information, attend before a Departmental officer or produce records when required to do so by notice in writing. The maximum penalty is a fine of \$1,000 or 6 months imprisonment, or both.

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Other amendments

Subsection 82U(1) of the National Health Act creates offences of:

- refusing or failing to comply with an inspector’s requirement under section 82S ‘to the extent to which the person is able to comply’ [paragraph 82U(1)(a)]
- providing false or misleading information [paragraph 82U(1)(b)]
- making false or misleading statements [paragraph 82U(1)(c)].

Item 114 repeals and replaces subsection 82U(1). The amendments:

- reword and restructure the offence provision and separate the words of defence³⁶ to ensure they are not interpreted as an element of the offence which would have to be proved by the prosecution
- omit the offences of providing false or misleading information or statements because they will be supplied by Part 7.4 of the Criminal Code, and
- specify that strict liability will apply to one physical element of the offence—the circumstance that the requirement to comply is under section 82S of the National Health Act. In other words, the prosecution will not have to prove that the defendant put his or her mind to the letter of the law.

Aligning fault elements in the National Health Act with fault elements in the Criminal Code

Subsection 84L(1) of the National Health Act provides that it is an offence for an approved pharmacist, doctor, or hospital to ‘knowingly’ issue a concession card to a person who is not entitled to it. Subsection 84L(2) provides that it is an offence for an approved pharmacist, doctor or hospital to ‘knowingly’ include as a family member on a concession card a person who is not a family member. **Item 122** removes an inappropriate fault element, ‘knowingly’, from the offences in subsections 84L(1) and (2). By operation of the Criminal Code, default fault elements—intention in relation to the physical element of conduct and recklessness in relation to the physical elements of circumstance and result—will apply.

Ancillary offences

Item 132 replaces references in subparagraph 135A(6)(a)(ii) to ancillary offence provisions in the Crimes Act with references to equivalent provisions in the Criminal Code.

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The defence of lawful authority

Item 133 repeals subsection 135A(15) of the National Health Act which provides a defence of lawful authority for a person prosecuted for soliciting or using protected information. The Criminal Code will supply a defence of lawful authority.

National Health and Medical Research Council Act 1992

Item 140 applies Chapter 2 of the Criminal Code to all offences against the National Health and Medical Research Council Act.

Nursing Homes Assistance Act 1974

Application of Chapter 2 of the Criminal Code

Item 141 applies Chapter 2 of the Criminal Code to all offences against the Nursing Homes Assistance Act.

Penalty units; strict liability

Section 8 of the Nursing Homes Assistance Act creates offences of failing to display a Ministerial certificate approving a nursing home and failing to return the certificate if it is revoked or expires. The penalty in each case is \$40. Where the conditions in a certificate of approval are altered and a new certificate is issued, it is an offence not to return the old certificate to the Minister [subsection 9(3)]. Once again the penalty is \$40. Section 30 requires the Minister to be notified if a nursing home's proprietor is changed [subsections 30(1), (1A) and (2)]. A penalty of \$40 appears at the end of subsection 30(2). **Items 144 and 145** clarify that the penalty of \$40 applies not only to subsection 30(2) but also to offences against subsections 30(1) and (1A).

Items 142, 143 and 146 identify offences against section 8, subsection 9(3) and section 30 as strict liability offences.

The defendant's burden of proof

Section 30A provides that it is an offence to give false or misleading statements or information in relation to certain applications made under the Act—for example, an application for approval as a nursing home. **Items 147 and 148** ensure that the defendant in proceedings for an offence against subsection 30A bears an evidential rather than a legal burden of proof.

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Therapeutic Goods Act 1989

Application of Chapter 2 the Criminal Code

Item 150 applies Chapter 2 of the Criminal Code—other than Part 2.5 which deals with corporate criminal responsibility—to the Therapeutic Goods Act. Section 55 of the Act relates to conduct by directors, servants and agents.

Re-structuring offences to clearly identify their constituent physical elements

Subsection 6AA(3) provides that it is an offence to breach a condition of a Ministerial approval for the importation of restricted goods. **Item 151** restructures the offence in subsection 6AA(3) to clearly identify the physical elements of the offence (in this case, conduct and result) and to define conduct as including acts and omissions. Identification of the physical elements of the offence will allow the relevant default fault elements (in this case, intention and recklessness) to be applied by the Criminal Code. **Items 154, 162, 176 and 180** restructure offences against subsections 15(2), 22(3), 35(2) and (3) and 54AA(1) in a similar fashion.³⁷

Relocating and re-phrasing defences

Items 152, 153, 171, 172, 177 and 178 relocate and rephrase the element of reasonable excuse. For example, subsection 8(2) of the Therapeutic Goods Act provides that a person must not ‘without reasonable excuse’ fail to comply with a notice requiring details of therapeutic goods that the person has imported into Australia. **Items 152 and 153** excise the element of reasonable excuse, rephrase it and relocate it in a new subsection, making it clear that the words are words of defence and not an element of the offence that would have to be proved by the prosecution.

Strict liability offences

Items 153, 173 and 179 identify offences against subsections 8(2), 31(4) and 52(3) as strict liability offences. For example, as stated above, subsection 8(2) is an offence of failing to comply with a notice issued under the Act. The penalty is 60 penalty units (\$6600).

Aligning fault elements in the Therapeutic Goods Act with fault elements in the Criminal Code

Item 155 omits the word ‘intentionally’ from the offences in paragraph 20(1)(a) of the Therapeutic Goods Act. An example of an offence under existing paragraph 20(1)(a) is where a person intentionally imports therapeutic goods for use in humans without an approval. The deletion of the word ‘intentionally’ will allow the Criminal Code’s default fault elements to apply to the physical elements of conduct, circumstance and result in the offence. Similar results are achieved by **items 156, 158, 159, 161, 163, 164, 166-170, 174**

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and 175 which remove the words ‘intentionally or recklessly’ from a number of offence provisions.

The defendant’s burden of proof

Subsection 20(1A) provides that it is a defence to a prosecution under subsection 20(1) if the defendant proves that he or she was not the sponsor of the therapeutic goods at the time they were imported, exported, manufactured or supplied. **Item 157** inserts a note stating that a defendant bears a legal burden of proof in relation to the matter in subsection 20(1A). A legal burden of proof must be discharged by a defendant on the balance of probabilities.³⁸

False or misleading statements or information

Item 160 repeals subsection 22(2) of the Therapeutic Goods Act. This is an offence of making false or misleading statements in an application for listing of therapeutic goods. General offences of making or providing false or misleading statements or information will be supplied by the Criminal Code (Part 7.4).

Other

New subsection 54AA(1), inserted by **item 180**, appears to contain a typographical error. It reads in part, ‘the person is guilty of an offence punishable on conviction by a fine of no more than the number of penalty units specified in whichever of n or (3) applies’. The current provision, which is replaced by new subsection 54AA(1) reads ‘...whichever of subsection (2) or (3) is applicable’.

Tobacco Advertising Prohibition Act 1992

Application of the Criminal Code

Item 181 applies Chapter 2 of the Criminal Code—apart from Part 2.5 which deals with corporate criminal responsibility—to all offences against the Tobacco Advertising Prohibition Act. Section 32 of the Act governs corporate criminal responsibility.

Aligning fault elements in the Tobacco Advertising Prohibition Act with fault elements in the Criminal Code

Items 182-184 omit the words, ‘knowingly or recklessly’ from offences against subsections 13(1), 15(1), 15(2) and 15(3) of the Tobacco Advertising Prohibition Act. An example is subsection 13(1) which states that:

A person must not, knowingly or recklessly, broadcast a tobacco advertisement in Australia or Norfolk Island on or after 1 July 1993 otherwise than as permitted by section 14.

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‘Knowingly or recklessly’ are inappropriate fault elements in relation to the physical element of conduct in an offence. They are therefore removed by **item 182**. The Criminal Code default fault elements—for example, ‘intention’ in the case of conduct—will apply to each physical element of the offence.

The defendant’s burden of proof

Subsection 31(1) provides that where a partnership commits an offence against the Tobacco Advertising Prohibition Act, the offence is taken to have been committed by each of the partners. Subsection 31(3) currently provides that it is a defence if the partner ‘proves’ that he or she did not assist in the commission of the offence and was not knowingly concerned in it. **Items 185 and 186** ensure that a defendant bears an evidential rather than a legal burden in relation to subsection 31(3).

Concluding Comments

Penalties

The Bills Digest for the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 (*Bills Digest No. 20, 2001-02*) contains a detailed discussion of penalty provisions in legislation being amended by ‘application of criminal code’ bills. As that Digest points out, the question arises whether these bills should merely be regarded technical instruments or whether they present an opportunity for some more substantive matters to be considered. The Digest raises questions about the retention of penalties expressed in dollar values rather than penalty units and the adequacy of some penalties. The same questions can be raised in relation to the Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001.

Penalty units were introduced into Commonwealth legislation by the *Crimes Legislation Amendment Act 1992*. At the time the Crimes Legislation Amendment Bill 1992 was introduced, the responsible Parliamentary Secretary said:

The main amendments to the Crimes Act 1914 implement recommendations of the Review of Commonwealth Criminal Law chaired by Sir Harry Gibbs, GCMG, AC, KBE for the introduction of a penalty units scheme into Commonwealth legislation. The scheme will facilitate the calculation and updating of monetary penalties for Commonwealth offences and is modelled on similar schemes which have been operating in some States for a number of years. In future, provisions creating offences will prescribe the maximum number of penalty units and the Crimes Act will prescribe the value of a penalty unit. Thus, by simple amendment of one provision, the Parliament can ensure that the penalties for all Commonwealth offences reflect current monetary values. That will not preclude Parliament from using legislation to reflect the seriousness with which any particular offence is viewed by the Parliament by altering the number of penalty units prescribed for a particular offence.³⁹

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The health and aged care portfolio legislation amended by the Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001 uses both penalty units and dollar amounts. In some cases, within the same legislation—for example, the *Health Insurance Act 1973*—some penalties are expressed in dollar values and some in penalty units. Thus, the penalty for an offence against subsection 19CC(1) is 1 penalty unit (\$110) and the penalty for an offence against subsection 19D(2) is \$100.

Additionally, some penalties are so low that they are less than the value of 1 penalty unit. For example, the Bill ensures that a penalty amount applies to each of the offences against subsections 30(1), 30(1A) and 30(2) of the Nursing Homes Assistance Act. The amendments are made because, at present, it is arguable that the penalty provision in section 30 only applies to subsection 30(2). The present penalty is \$40—less than half the value of a penalty unit. However, the Bill does not take the opportunity to increase the penalty which applies to subsections 30(1), 30(1A) and 30(2). The present penalty of \$40 is retained.

Strict liability

The Bill identifies a number of offences in portfolio legislation as strict liability offences. In some cases, these offences currently involve ‘failing or refusing’ to comply with a statutory requirement. Arguably, ‘refusal’ suggests some fault on the part of the defendant, which is inappropriate in a strict liability offence. The *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001* addressed this issue by deleting the word ‘refusal’ where it occurs in offences that are identified as strict liability offences. This approach is not taken in the Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001, which retains the word ‘refuses’ where it currently appears in offences identified as strict liability offences. Examples can be found in subsections 106E(1) and 124M of the Health Insurance Act (and see **items 51 and 62** of the Bill).

The Senate Standing Committee on the Scrutiny of Bills has not yet commented on the Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001 but has expressed some general concerns about strict liability provisions in relation to other ‘application of criminal code’ bills. The Committee has civil liberties concerns about the creation of new strict liability offences. Of course, when the Bill identifies provisions as strict liability offences it is quite possible that this is the way that the provisions are likely to be or have been judicially interpreted. Additionally, failure to identify an offence or one of its physical elements as attracting strict liability might, in some cases, preclude effective law enforcement. Some indicators that an offence is a strict liability offence may include small penalties, the existence of a defence of reasonable excuse and physical elements that the prosecution would find difficult to prove if a fault element, such as intention, had to be established. However, it is noteworthy that some offences identified by the Bill as strict liability offences carry fairly substantial penalties—for example,

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offences against subsections 130(17) and (19) of the Health Insurance Act attract a maximum penalty of 2 years imprisonment.⁴⁰

Offences of making false or misleading statements or providing false or misleading information

In a number of cases, but not in every instance, where portfolio legislation creates an offence of providing false or misleading statements or information, the Bill repeals the offence and relies instead on Part 7.4 of the Criminal Code. Part 7.4 contains offences relating to false or misleading statements, information and documents.

The purposes of the repeal of these provisions and reliance on the Criminal Code is to standardise the offences and simplify Commonwealth law. However, some false and misleading statement offences in portfolio legislation are retained. Additionally, it is arguable that reliance on offence provisions in the Criminal Code may confuse some citizens rather than clarifying the law for them. Amendments to one portfolio Act, the Aged Care Act, insert a note to the effect that the Criminal Code contains offences relating to making false or misleading statements. This note has the advantage of alerting those who must comply with legislation that relevant offence and penalty provisions may be found in other statutes. A question that might be asked is whether similar notes should be inserted into other portfolio statutes

Endnotes

- 1 Criminal Code, section 4.1.
- 2 Criminal Code, section 4.3.
- 3 Criminal Code, section 5.6.
- 4 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 5 Criminal Code, subsection 13.1(3).
- 6 Criminal Code, subsection 13.3(1).
- 7 Criminal Code, subsection 13.3(6).
- 8 Criminal Code, sections 13.4 and 13.5.
- 9 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 10 James Prest, *Bills Digest No. 20, 2001-02*, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001.

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- 11 *He Kaw Teh v R* (1985) 157 CLR 523.
- 12 Criminal Code, subsection 6.1(1).
- 13 Criminal Code, paragraph 6.1(1)(b).
- 14 Subsection 6.1(2), Criminal Code.
- 15 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp.267-76 at p.267.
- 16 Revised Explanatory Memorandum, Criminal Code (Theft, Fraud, Bribery and Related Offences) Bill 2000.
- 17 *ibid*, p. 8.
- 18 *ibid*, p. 73.
- 19 Section 10JA of the Aged or Disabled Persons Care Act refers to a number of provisions that were repealed by the *Aged Care (Consequential Provisions) Act 1997*. However, in certain circumstances, the latter statute provides that action taken under the repealed provisions—for example, submissions made under old (repealed) provisions in the *Aged or Disabled Persons Care Act 1954*—is deemed to have been taken under the *Aged Persons Act 1997*.
- 20 Division 136 of Part 7.4 of the Criminal Code deals with false or misleading statements in applications. Division 137 deals with false or misleading information or documents. And see Explanatory Memorandum, p. 5.
- 21 Sections 10AC and 10GD were repealed by the Aged Care (Consequential Provisions) Act. However, in certain circumstances, the Act provided that action taken under those provisions is deemed to have been taken under the Aged Persons Act.
- 22 Section 65.
- 23 *Prest*, *op. cit.*
- 24 Criminal Code, sections 13.3 and 13.4.
- 25 Criminal Code, section 13.3.
- 26 Criminal Code, paragraph 6.1(1)(b).
- 27 Criminal Code, subsection 6.1(3).
- 28 **New subsections 44(1A) and (1B).**
- 29 Criminal Code section 6.1.
- 30 At present the fault element of 'knowledge' is applied to the physical elements of conduct and result in the offence. The amendments ensure that the appropriate Code fault element 'intention' will apply to conduct and that the Code fault element, 'knowledge' will apply to the physical element of result.
- 31 'Protected information' means information about a person that is held in the records of the Department.—see section 130(25), Health Insurance Act.
- 32 Criminal Code, sections 136.1, 137.1 and 137.2 of Part 7.4.

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- 33 See item 4, Schedule 2.
- 34 Section 3A defines the expression ‘relevant offence’.
- 35 Section 19 of the Hearing Services Administration Act provides that the Minister must not accredit a person who is a ‘disqualified person’. A disqualified person is defined to include a reference to a person who has committed a ‘disqualifying offence’. A disqualifying offence is defined to include an offence against section 22.
- 36 ‘... the person is only required to comply with the requirement to the extent that the person is capable of doing so’ [**new subsection 82U(1A)**].
- 37 In some cases, these offences also include physical elements of circumstance—for example, **new subsection 22(3) (item 162)**.
- 38 Criminal Code, Section 13.5.
- 39 Senate, *Parliamentary Debates (Hansard)*, 16 September 1992, p. 924.
- 40 Note that this penalty can be converted into a fine or a fine and a custodial sentence by virtue of subsection 4B(2) of the Crimes Act.

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