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27 August 2001
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Date Introduced: 8 August 2001
House: House of Representatives
Portfolio: Education, Training and Youth Affairs
Commencement: The day after the date of Royal Assent

Purpose

The Bill’s purpose is to revise criminal offence provisions in two statutes in the Education, Training and Youth Affairs 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.


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Some major aspects of criminal responsibility relevant to the Education, Training and Youth Affairs 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. 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. 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. 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. 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'. The prosecution must discharge the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise. Further, the prosecution bears a legal burden of disproving any matter where the defendant has discharged an evidential burden.

Generally, where a burden of proof is placed on a defendant it is an evidential burden only. 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. 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. The prosecution must still prove that the defendant committed the offence beyond reasonable doubt.

The Bill inserts a number of notes explaining where a defendant carries an evidential burden of proof. It does not retain or place any legal burdens on defendants.

Aligning fault elements and physical 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, one amendment ensures that the fault element of recklessness does not apply to a 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 are used including 'a purpose intended to be', 'wilfully', and 'for the purpose of'. The meaning of many of these expressions is uncertain.

The Bill removes ambiguous, non-Code expressions such as ‘for the purpose of’, ‘for any other purpose’ and ‘for that purpose’ where they occur in offence-creating provisions. It is not certain, when reading these expressions, whether they incorporate a fault element of intention which attaches to conduct or a physical element of result (to which the default fault element of recklessness would apply).
Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in relevant legislation administered by the Department of Education, Training and Youth Affairs. 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.’

The Bill retains the existing provision in the Student Assistance Act dealing with corporate criminal responsibility (section 50) rather than replacing it with Part 2.5.

For a discussion of the issue of corporate criminal responsibility, see Bills Digest No. 20, 2001-02.

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. 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. Failure to do so means that fault elements are applied to all the physical elements in the offence.

Strict liability is most often used in minor or regulatory offences attracting small penalties where requiring the prosecution to prove a fault element would render the legislation unenforceable because it would inhibit prosecution and make the hearing of cases more complex and lengthy.

As well as providing for the identification of strict liability offences, the Criminal Code allows a law which creates an offence to provide that strict liability applies to some physical elements of that offence. Although the prosecution need not prove fault in relation to strict liability, the Criminal Code supplies a defence of mistake of fact to strict liability offences and to other offences to where strict liability is applied to some of their physical elements. The Code does not prevent defences other than mistake of fact applying.

The Bill does not identify any strict liability offences but does identify some physical elements of offences as attracting strict liability.

The Explanatory Memorandum explains it is intended that when Chapter 2 is applied ‘the relevant offences [will] continue to have the same meaning and to operate in the same manner as they do at present.’ As with other ‘application of criminal code’ bills, the
Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves. 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 incapacity 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. The effect of repealing existing lawful authority defences is that the general defence in section 10.5 of the Criminal Code will apply.

Main Provisions

Application of amendments

Clause 4 provides that each amendment made by the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Act 2001 applies to acts and omissions that occur or commence after that amendment commences.

Amendments of the Higher Education Funding Act 1988

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

Sections 52 and 53 of the Higher Education Funding Act prohibit a person from making an unauthorised demand that a person disclose or record a student’s tax file number. Item 2 restructures subsection 52(1) to clearly identify the physical elements of the offence and its associated defences. The clear identification of physical elements will allow the Criminal Code’s default fault elements to apply. The separation of defence provisions will ensure that they are not interpreted as elements of the offence, which would have to be proved by the prosecution. The amendments also remove the ambiguous non-Code expressions, ‘for the purpose of’ and ‘for any other purpose’. Evidential burdens placed on the defendant are noted. Item 3 restructures subsection 53(1) for broadly similar reasons and in similar ways.
Section 78 of the Higher Education Funding Act places secrecy obligations on Commonwealth officers and others who acquire confidential information in the course of their duties under Chapter 4 of the Act. It is an offence for such a person to record or divulge such information ‘except for the purposes of … Chapter [4], or otherwise than in the performance of the person’s duties as an officer …’. Items 4 and 5 restructure subsection 78(4) by relocating and rephrasing these words. The reason for doing so is 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. A note explains that a defendant bears an evidential burden in relation to these matters. Item 5 also inserts new subsection 78(4B) which applies strict liability to the physical element of circumstance in the offence—that the information was acquired for the purposes of Chapter 4. In other words, the prosecution will not need to prove that the defendant turned his or her mind to the letter of the law.

Amendments of the Student Assistance Act 1973

Item 1 of Schedule 2 applies Chapter 2 of the Criminal Code to all offences against the Student Assistance Act, except for principles of corporate criminal responsibility.

Section 12ZU of the Student Assistance Act places secrecy obligations on Commonwealth officers and others who acquire confidential information in the course of their duties under Division 6 of the Act. It is an offence for such a person to record or disclose confidential information ‘except for the purposes of this Division, or in the performance of the person’s duties as an officer …’.

Items 2 and 3 affect subsection 12ZU(4) of the Student Assistance Act. They do three things. First, they relocate these words to a new subsection to ensure that they are interpreted as defences and not as elements of the offence which would have to be proved by the prosecution. Second, they insert a note that the defendant bears an evidential burden in relation to these matters. Third, they stipulate that strict liability applies to the physical element of circumstance in the offence—that the information was obtained for the purposes of Division 6. In other words, the prosecution will not have to prove that the defendant put his or her mind to the letter of the law.

Section 42 of the Student Assistance Act enables the Commonwealth to recover overpayments from certain third parties. A third party who is given a notice requiring payment to be made under the section must not contravene the notice ‘without reasonable excuse’ [subsection 42(5)]. Items 4 and 5 relocate the element of reasonable excuse to a new subsection 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. Additionally, a note is added explaining that the defendant bears an evidential burden.

Section 48 of the Student Assistance Act provides that students must tell the Department about certain changes in their circumstances (‘prescribed events’). Subsection 49(1) of the Student Assistance Act makes it an offence, ‘without reasonable excuse’, to

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contravene section 48. **Items 6 and 7** make amendments to subsection 49(1) of the Act which are similar to those effected by **items 4 and 5** in relation to subsection 42(5).

**Item 8** affects subsection 347(10) of the Student Assistance Act. This subsection currently provides that:

> A person must not, without reasonable excuse, intentionally or recklessly refuse or fail to comply with a requirement made under section 343, 344 or 345 to the extent that the person is capable of complying with it.

Sections 343, 344 and 345 empower the Secretary to obtain information including information about student assistance benefits, and from and about Commonwealth debtors. The amendments:

- restructure subsection 347(10) into its component parts by separating the physical elements of the offence from the elements of ‘reasonable excuse’ and ‘incapacity to comply’. This ensures that ‘reasonable excuse’ and ‘incapacity to comply’ will be interpreted as defences and not as elements of the offence which would have to be proved by the prosecution.
- remove the words ‘intentionally or recklessly’. As presently worded, the provision applies the fault elements of intention and recklessness to the physical element of conduct in the offence. Recklessness is applied by the Criminal Code to the results and circumstances of conduct. The amendments thus remove an inappropriate fault element. The default fault provisions of the Criminal Code will ensure that intention will continue to apply to the physical element of conduct in the offence.
- stipulate that strict liability will apply to the physical element of circumstance in the offence—that the requirement was made under section 343, 344 or 345. In other words, the prosecution will not have to prove that the accused person put his or her mind to the letter of the law.

**Items 9 and 10** repeal paragraphs 352(b) and 353(b) of the Student Assistance Act, respectively. These paragraphs provide defences of lawful authority where a person is prosecuted for unauthorised access to or use of protected information. The repeal of the two paragraphs means that the general defence of lawful authority in section 10.5 of the Criminal Code will be available instead.

It is an offence against section 357 of the Student Assistance Act to solicit the disclosure of protected information if the disclosure would contravene Division 3 of Part 10 of the Act and the person knows that the information is protected information. **Item 11** specifies that strict liability applies to the physical element of circumstance in subsection 357(1). This is the circumstance that the conduct contravenes Division 3 of Part 10 of the Act, which deals with confidentiality. In other words, the prosecution will not have to prove that a defendant put his or her mind to the letter of the law.
Section 358 of the Student Assistance Act reads:

If:

(a) a person solicits the disclosure of protected information from an officer; and
(b) for that purpose makes representations that the person knows or ought reasonably to know are untrue;

then, whether or not any protected information is actually disclosed, the person is guilty of an offence punishable on conviction by imprisonment for a period of not more than 2 years.

**Item 12** repeals and replaces paragraph 358(b). The amendment:

- removes the ambiguous, non-Code expression, ‘for that purpose’ in paragraph (b), and
- re-words paragraph (b) to clarify that the offence requires a person to knowingly make untrue representations with the intention of soliciting the disclosure of protected information.

Endnotes

1 Criminal Code, section 4.1.
2 Criminal Code, section 4.3.
3 ‘Knowledge’ is not a default fault element but can be applied to the physical elements of circumstance and result—see Criminal Code, section 5.3. ‘Negligence’ is not a default fault element but can be applied to a physical element of an offence—see Criminal Code, section 5.5.
4 Criminal Code, section 5.6. If ‘recklessness’ is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element—Criminal Code, subsection 5.4(4).
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.
13 Criminal Code, subsection 6.1(1).
14 Criminal Code, subsection 6.1(2).
15 Criminal Code, paragraphs 6.1(1)(b) and 6.1(2)(b).
16 Criminal Code, subsection 6.1(3).
17 Explanatory Memorandum, p. 1.
21 Chapter 4 relates to the Higher Education Contribution Scheme—HECS.
22 As strict liability is applied to the circumstance that the information recorded or disclosed was obtained ‘under or for the purposes of this Chapter’, any interpretative difficulties that may have been associated with the words (see Background), are presumably not an issue.
23 Division 6 relates to a student’s indebtedness in relation to financial supplements.
24 As strict liability is applied to the circumstance that the information recorded or disclosed was obtained ‘under or for the purposes of this Division’, any interpretative difficulties that may have been associated with the words (see Background), are presumably not an issue.
25 These ‘prescribed events’ are set out in regulation 109 of the AUSTUDY Regulations.

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