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No. 37 2001–02

Family and Community Services 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. 37 2001-02

Family and Community Services Legislation Amendment  
(Application of Criminal Code) Bill 2001

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Law and Bills Digest Group  
28 August 2001

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# Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001

**Date Introduced:** 22 August 2001

**House:** Senate

**Portfolio:** Family and Community Services

**Commencement:** With two possible exceptions, on Royal Assent. The commencement date of items 124 and 125 depends on whether this Act or item 19 of Schedule 1 of the *Family and Community Services Legislation (Simplification and Other Measures) Act 2001* commences first.<sup>1</sup>

## Purpose

To amend 15 statutes in the Department of Family and Community Services to harmonise them with the principles of criminal responsibility set down in 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*

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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, Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001, Treasury Legislation Amendment (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, Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001, Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) 2001, Finance and Administration Legislation (Application of Criminal Code) Bill 2001, Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001, Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 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 Family and Community Services 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.<sup>2</sup> 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.<sup>3</sup> 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<sup>4</sup>—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.<sup>5</sup> 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 an alternative.

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## Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.<sup>6</sup> 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'.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The prosecution must still prove that the defendant committed the offence beyond reasonable doubt.

The Bill does not retain or place any legal burdens on defendants. And, unlike its companion 'application of criminal code' bills, it does not insert any notes indicating where a defendant carries an evidential burden of proof.

## 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, it ensures that the fault elements of knowledge and recklessness does not apply to physical elements of conduct in offences.

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 readily 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, including the word 'wilfully', is uncertain.<sup>11</sup>

The Bill removes the non-Code expression, 'wilful' and replaces it with the Code fault element, 'intention'.

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## Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in relevant legislation administered by the Department of Family and Community Services. 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.'<sup>12</sup>

In two cases<sup>13</sup>, the Bill repeals existing corporate criminal responsibility provisions with the result that Part 2.5 of the Criminal Code will apply. Elsewhere<sup>14</sup>, it excludes the operation of Part 2.5.

For a discussion of the issue of corporate criminal responsibility, see *Bills Digest No. 20, 2001-02*.<sup>15</sup>

## 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.<sup>16</sup> 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.<sup>17</sup> 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. The presence of a defence of reasonable excuse may indicate that an offence is a strict liability offence.

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.<sup>18</sup> The prosecution need not prove fault in relation to strict liability. However, the Criminal Code supplies a defence of mistake of fact to strict liability offences and to strict liability physical elements of other offences.<sup>19</sup> The Code does not prevent defences other than mistake of fact applying.<sup>20</sup>

The Bill identifies strict liability offences and other offences which contain some physical elements attracting strict liability. It also retains existing additional defences, such as reasonable excuse.

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## Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.<sup>21</sup> Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the amendments relocate defences from provisions which set out the physical elements of an offence into their own separate subsections. The Bill relocates and re-phrases elements of reasonable excuse and incapacity to comply with a statutory requirement in order to ensure that they are interpreted as defences and not as elements of the offences that would have to be proved by the prosecution.

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.<sup>22</sup> The effect of repealing existing lawful authority defences is that the general defence in section 10.5 of the Criminal Code will apply.

## Ancillary offences

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

Additionally, some Commonwealth statutes 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 Immigration and Multicultural Affairs. Equivalent Criminal Code provisions will take their place.

## Main Provisions

### Application of amendments

**Clause 4** provides that each amendment made by the *Family and Community Services Legislation Amendment (Application of Criminal Code) Act 2001* applies to acts and omissions occurring or commencing after the commencement of that amendment.

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### Amendments to the *A New Tax System (Bonuses for Older Australians) Act 1999*

**Item 1** applies Chapter 2 of the Criminal Code to all offences against the A New Tax System (Bonuses for Older Australians) Act.

**Item 2** repeals and replaces section 55 of the Act, which deals with the unauthorised use or disclosure of information relating to another person. The amendments restructure the provision into its constituent elements of conduct and circumstance so that the Code's default elements can be applied. Additionally, **item 2** identifies an element of the offence as attracting strict liability—this is the circumstance that the information was acquired by the person in the course of their statutory duties. As a result, the prosecution does not have to prove a fault element for this particular physical element. However, the Criminal Code provides a defence of mistake of fact to the defendant. The Explanatory Memorandum explains that:

An individual physical element would generally qualify for application of strict liability where it describes something that a defendant would not ordinarily consider in the course of committing the offence. In those circumstances, the defendant would not have a fault element in relation to that physical element and a prosecution would be defeated if the Crown was required to demonstrate that the defendant did possess such a fault element.<sup>23</sup>

### Amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*

**Item 3** applies Chapter 2 of the Criminal Code to all offences against the A New Tax System (Family Assistance) (Administration) Act.

**Items 4-15, 17-21, 23, 24, 27, 29 and 30** apply strict liability to particular physical elements in a number of offences under the Act. An example is **item 4** which applies strict liability to the physical element of circumstance in the offence against subsection 25(1). Section 25 requires recipients of family tax benefits to notify the Secretary of changes in their circumstances in the manner set out in a written notice given to them under section 25A of the Act. **Item 4** provides that strict liability applies to the physical element of circumstance in the offence—that the notice was given under section 25A. In other words, the prosecution does not have to prove that the defendant put his or her mind to the letter of the law. However, a defence of mistake of fact is available to the defendant.

**Item 16** removes references to ancillary offence provisions in the *Crimes Act 1914* and replaces them with equivalent provisions in the Criminal Code. **Item 32** affects similar amendments in relation to section 188 of the Act.

**Items 18-20, 22-25 and 30** restructure offences against the A New Tax System (Family Assistance) (Administration) Act to clearly separate the constituent physical elements of the offences and thereby enable the Criminal Code's default fault elements to apply. In

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some cases, they also remove inappropriate fault elements. An example is item 22 which repeals and replaces section 172 of the Act. At present, section 172 reads:

A person must not knowingly or recklessly make a false or misleading statement in connection with, or in support of, the person's or any other person's claim for family assistance.

The amendments clearly separate the offence into its constituent physical elements of conduct, result and circumstance. They also omit the fault elements, 'knowingly or recklessly' which presently apply to the physical element of conduct in the offence. Under the Criminal Code, 'intention' is the fault element for conduct. The removal of the words, 'knowingly or recklessly' will enable the appropriate default fault elements—intention and recklessness—to apply to the physical elements of the offence.

**Item 32** repeals sections 186-188 of the Act. **Item 33** repeals Division 2 of Part 7 of the Act. These provisions deal with corporate criminal responsibility. They will be replaced by Part 2.5 of the Criminal Code.

**Items 34-41** identify offences against subsections 219A(2), 219B(1), 219C(1), 219D(1) and (2), 219E(1), 219F(1) and (2), 219G(1) and 219L(1), (2) and (3) as strict liability offences. An example is the offence against subsection 219F(1) which provides that an approved child care service must keep records relating to certain matters, such as an individual's eligibility for child care benefit payments, the service's compliance with certain eligibility conditions and any other matter specified by the Secretary. **Item 39** provides that subsection 219F(1) is a strict liability offence. As a result, the prosecution will not have to prove fault. However, the defendant will have a defence of mistake of fact as a result of the application of the Criminal Code. The penalty for the offence is 60 penalty units (\$6,600).

### Amendments to the *Child Support (Assessment) Act 1989*

**Item 42** applies Chapter 2 of the Criminal Code to all offences against the Child Support (Assessment) Act.

**Items 43-45** restructure and re-word subsections 150(2) and 159A(1) and (2) and section 159B. For example, subsections 159A(1) and (2) are re-structured by clearly identifying the constituent physical elements in the offence, removing an inappropriate fault element<sup>24</sup> and a non-Code fault element<sup>25</sup>, and clarifying the requirements about what constitutes reckless behaviour.

**Items 45 and 48** identify particular physical elements in offences against subsections 159B(1) and 162(3) as attracting strict liability. For example, it is an offence to fail to notify the Child Support Registrar when required to do so under section 63A of the Child Support (Assessment) Act. Strict liability applies to the physical element of circumstance—that the requirement was made under section 63A.

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**Items 46 and 47** identify offences against subsection 160(3) and 161(3) as strict liability offences. Subsection 160(3) is an offence of refusing or failing to comply with a notice from the Child Support Registrar requiring information about changes in circumstances that may affect the payment of child support. The maximum penalty is 6 months imprisonment. Subsection 161(3) is an offence of refusing or failing to give information or evidence to the Child Support Registrar. Once again, the penalty is a maximum of 6 months imprisonment. As a result, the prosecution need not prove fault. The Criminal Code provides that a defence of mistake of fact applies to strict liability offences. It does not prevent other defences being available to a defendant. The amendments effected by **items 46 and 47** also relocate and rephrase elements of ‘reasonable excuse’ and ‘incapacity to comply’ from subsections 160(3) and 161(3) so it is clear they are defences and not elements of the offence which would have to be proved by the prosecution.

### Amendments to the *Child Support (Registration and Collection) Act 1988*

**Item 49** applies Chapter 2 of the Criminal Code, with the exceptions of principles of corporate criminal responsibility found in Part 2.5, to offences against the Child Support (Registration and Collection) Act.

**Item 50** re-structures subsection 16(2) of the Child Support (Registration and Collection) Act to clearly separate the offence and defences, thus ensuring that the latter are not interpreted as elements of the offence which would have to be proved by the prosecution.

**Items 51-55, 58, 59 and 62-64** identify offences against subsections 23(7), 33(2), 34(2), 46(1), 47(1A), (2) and (3), 59(1) and (2), 60(1), 72A(2), 111(3) and 120(3) as strict liability offences. An example is **item 51** which amends section 23. Section 23 provides requires payers and payees to notify the Child Support Registrar of registrable maintenance liabilities which arise under court orders or registered agreements. A person who contravenes this requirement is guilty of an offence punishable by a maximum fine of \$1,000. This offence is identified as a strict liability offence. In the case of offences against subsections 72A(2) and 120(3) the amendments also relocate and re-phrase the elements of ‘reasonable excuse’ and ‘incapacity to comply’ so it is clear they are defences and not elements of the offences which would have to be proved by the prosecution.

**Items 56, 57 and 65** identify particular physical elements in offences against subsections 57(1), 58(1) and 121(3) as physical elements to which strict liability applies.

### Amendments to the *Commonwealth Services Delivery Agency Act 1997*

**Item 66** applies the Chapter 2 of the Criminal Code to all offences against the Commonwealth Services Delivery Agency Act.

**Item 67** identifies an offence against subsection 38(1) of the Act as a strict liability offence. This is an offence of using a protected name or symbol without the consent of the

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Chairman [sic] of the Commonwealth Services Delivery Agency's Board of Management. The penalty is 30 penalty units (\$3,300).

### Amendments to the *Data-matching Program (Assistance and Tax) Act 1990*

**Item 68** applies Chapter 2 of the Criminal Code to all offences against the Data-matching Program (Assistance and Tax) Act.

**Item 69** restructures and re-words subsection 15(1) in order to separate the elements of excuse in the provision so it is clear they are defences and not elements of the offence which would have to be proved by the prosecution.

### Amendments to the *Disability Services Act 1986*

**Item 70** applies the Chapter 2 of the Criminal Code to all offences against the Disability Services Act.

Subsection 27(3) of the Disability Services Act presently provides that it is an offence to refuse or fail to comply with a notice from the Secretary 'to the extent that the person is capable of complying with it'. It is also an offence, in purported compliance with such a notice, to 'knowingly furnish information or give evidence that is false or misleading in a material particular'. **Items 71-73** amends subsection 27(3) of the Act in the following ways:

- by separating the element of excuse ('incapacity to comply') from the offence, thus making it clear it is a defence and not an element of the offence which would have to be proved by the prosecution
- by omitting the fault element, 'knowingly', which presently applies to the physical element of conduct in the offence. The appropriate default fault element, 'intention', will apply by operation of the Criminal Code
- by applying the fault element of 'knowledge' to the physical element of circumstance in the offence.

Subsection 28(3) of the Disability Services Act creates an offence of recording or disclosing personal information acquired under the Act except in the performance of statutory powers or functions. **Items 74-75** amend subsection 28(3) of the Act by clearly identifying the defence and by specifying that strict liability applies to one element of the offence—the circumstance that an acquisition of information is an acquisition under the Act. In other words, the prosecution will not have to show that the defendant put his or her mind to the letter of the law. The defendant has access to a defence of mistake of fact as a result of the application of the Criminal Code.

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**Item 76** applies strict liability to one of the physical elements of the offence against subsection 28(3) of the Act.

### Amendments to the *Farm Household Support Act 1992*

**Item 77** applies Chapter 2 of the Criminal Code to all offences against the Farm Household Support Act.

Subsection 41(5) of the Farm Household Support Act provides that a person in receipt of farm household income support ‘must not, without reasonable excuse, refuse or fail to comply with a notice ... [issued by the Secretary] to the extent that the person is capable of complying with the notice’. **Items 78-80** relocate and re-phrase two expressions in subsection 41(5) of the Act—‘without reasonable excuse’ and ‘to the extent that the person is capable of complying with the notice’. The purpose of the amendments is to clearly identify the words as defences and not as elements of the offence which would have to be proved by the prosecution. **Item 80** also identifies an offence against subsection 41(5) as a strict liability offence. The maximum penalty for this offence is 6 months imprisonment.

Amendments similar to those effected by **items 78-80** are made by **items 81-83 and 84-85**. These amendments apply to subsections 42(5) and 54(7).

### Amendments to the *First Home Owners Act 1983*

**Item 86** applies Chapter 2 of the Criminal Code to all offences against the First Home Owners Act.

**Items 88 and 96** apply strict liability to certain physical elements in the offences against subsections 29(1) and 36(1) of the First Home Owners Act. An example is the offence against subsection 36(1) which relates to notifications of taxable income. Where a person has given a statement to the Secretary under paragraph 20(2)(b) and is later advised that his or her taxable income is greater than the amount in the statement, a fresh certificate must be provided to the Secretary. The penalty is \$1,000 or 6 months imprisonment, or both. **Item 96** provides that strict liability applies to the physical element of circumstance in the offence—that the statement is a statement under paragraph 20(2)(b). In other words, the prosecution will not have to prove that the defendant put his or her mind to the letter of the law. A defence of mistake of fact will be available to the defendant.

**Items 89-91** omit the expression, ‘without lawful excuse’ from paragraph 30(2)(a) and subsections 31(2) and (3) of the Act. The general defence of lawful authority supplied by section 10.5 of the Criminal Code will apply instead.

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**Items 92 and 93** identify offences against subsections 31(2) and (3), and 35(2) as strict liability offences. In the case of subsections 31(2) and (3) the maximum penalty is \$1,000. In the case of subsection 35(2) it is \$1,000 or 6 months imprisonment, or both.

### Amendments to the *Home Deposit Assistance Act 1982*

**Item 97** applies Chapter 2 of the Criminal Code to all offences against the Home Deposit Assistance Act.

Subsection 50(1) of the Home Deposit Assistance Act prohibits an officer from recording or disclosing personal information acquired in the performance of statutory powers or functions, 'except for the purposes of this Act'. **Items 98 and 99** relocate and rephrase the expression, 'except for the purposes of this Act' so it is clear it is a defence and not an element of the offence in subsection 50(1) which would have to be proved by the prosecution.

**Items 99 and 105** provide that strict liability applies to certain physical elements in offences against subsection 50(1) and 59(1). For example, strict liability applies to the physical element of circumstance in subsection 50(1)—that the acquisition was in the performance of statutory powers or functions.

**Items 100-102** remove references to lawful excuse defences in sections 51 and 52 of the Home Deposit Assistance Act. The general defence of lawful authority found in section 10.5 of the Criminal Code will apply instead.

**Items 103 and 104** identify offences against subsections 52(2) and (3) and 58(2) as strict liability offences. In the case of offences against subsections 52(2) and (3) the maximum penalty is a fine of \$1,000. In the case of a subsection 58(2) offence, it is \$1,000 or 6 months imprisonment, or both.

### Amendments to the *Home Savings Grant Act 1964*

**Item 106** applies Chapter 2 to all offences against the *Home Savings Grant Act 1964*.

Subsection 12(2) of the Act provides that a person shall not fail 'without lawful excuse' to appear before the Secretary or Regional Director when summoned to do so. **Item 107** omits the defence of lawful excuse in subsection 12(2) of the Act. Instead, a defence of lawful authority will be supplied by section 10.5 of the Criminal Code.

**Items 108, 111 and 112** identify offences against subsections 12(2) and (3), 24(1A) and 26A(1), (2) and (3) as strict liability offences. For example, under subsections 12(2) and (3) failing to appear before the Secretary or Regional Director when summoned to do so and failing to answer questions when required to do so are strict liability offences. As a result, the prosecution will not need to prove fault elements in respect of the physical

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elements of the offences. However, the Criminal Code supplies defences of mistake of fact and lawful authority (**item 107**).

Under subsection 13(3) of the Act it is an offence for an officer, ‘except in the exercise of statutory powers or functions, to record or disclose certain information. **Items 109 and 110** relocate and rephrase the words of exception in subsection 13(2) so it is clear they are a defence and not elements of the offence that would have to be proved by the prosecution. **Item 110** also identifies a physical element of the offence against subsection 13(2) as attracting strict liability. This is the physical element of circumstance that information is acquired under statutory powers or functions.

### Amendments to the *Home Savings Grant Act 1976*

**Item 113** applies Chapter 2 of the Criminal Code to all offences against the *Home Savings Grant Act 1976*.

Subsection 41(2) of the Act provides that it is an offence for an officer ‘except in the exercise of his powers, or the performance of his duties or functions ...’ to record or disclose official information. **Items 114 and 115** relocate and rephrase the words of exception in subsection 41(2) so it is clear they constitute a defence and not elements of the offence, which would have to be proved by the prosecution. **Item 115** also identifies one of the physical elements in subsection 41(2) as attracting strict liability. This is the physical element of circumstance that information was acquired in the exercise of statutory powers or functions.

Sections 42 and 43 of the *Home Savings Grant Act 1976* provide that a person must not, ‘without lawful excuse’, fail or refuse to provide information to the Secretary or Regional Director when required to do so or answer questions or produce documents. **Items 116-118** remove the words ‘without lawful excuse’ from sections 42 and 43 of the Act. A general defence of lawful authority will be supplied instead by section 10.5 of the Criminal Code.

**Items 119 and 120** identify offences against subsections 43(2) and (3), and 48(2) as strict liability offences. Sections 42 and 43 were described in the previous paragraph. Subsection 48(2) imposes certain notification requirements in relation to home savings grants. The penalties for the relevant offences against sections 42 and 43 are \$100 and \$500 for an offence against subsection 48(2).

### Amendments to the *Social Security Act 1991*

**Item 121** applies Chapter 2 of the Criminal Code to all offences against the Social Security Act.

Section 1061ZZBW of the Social Security Act reads:

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A person must not, without reasonable excuse, intentionally or recklessly refuse or fail to comply with a notice under section 1061ZZBR to the extent that the person is capable of complying with the notice.

**Item 122** restructures and re-words section 1061ZZBW by:

- omitting the words ‘intentionally or recklessly’. Recklessness is an inappropriate fault element for a physical element of conduct. ‘Intention’ is the appropriate Code fault element for conduct and will apply as a default fault element by operation of the Criminal Code.
- clearly identifying the physical elements of the offence
- separating the elements of excuse so it is clear they are defences and not elements of the offence which would have to be proved by the prosecution
- stipulating that strict liability applies to one physical element of circumstance in the offence—the circumstance that the notice is a section 1061ZZBR notice. In other words, the prosecution will not have to prove that the defendant turned his or her mind to the letter of the law.

**Item 123** makes similar changes to section 1061ZZCD which also creates an offence relating to refusal or failure to comply with a statutory notice.

**Items 124 and 125** restructure subsections 1184D(1) and (2) of the Social Security Act. These provisions create offences of making compensation payments after receiving preliminary notices or recovery notices. The amendments separate offence and exception provisions to ensure that the latter are interpreted as defences and not as elements of the offence that would have to be proved by the prosecution.

**Item 126** replaces references to ancillary offences in the *Crimes Act 1914* with equivalent provisions in the Criminal Code.

Section 1233(3) provides that a person who fails to comply with a garnishee notice ‘to the extent that the person is capable of doing so’ is guilty of an offence. **Items 127 and 128** relocate and rephrase the words ‘to the extent that the person is capable of doing so’ so it is clear that they are a defence and not elements of the offence which would have to be proved by the prosecution. **Item 128** also identifies one of the elements of the offence against subsection 1233(3) as attracting strict liability. This is the physical element of circumstance that the notice is a notice under the relevant statutory provision. In other words, the prosecution does not have to prove that the defendant put his or her mind to the letter of the law.

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## Amendments to the *Social Security (Administration) Act 1999*

**Item 129** applies Chapter 2 of the Criminal Code to all offences against the Social Security (Administration) Act.

**Item 130** restructures subsection 72(8) of the Act to clearly identify its constituent physical elements and to remove two inappropriate fault elements—‘knowingly or recklessly’ which are presently applied to the physical element of conduct in the offence. Following the application of the Criminal Code, the appropriate fault element for conduct will be ‘intention’. Intention will be applied to the offence by operation of the default fault element provisions in the Criminal Code. Other provisions which are similarly amended are sections 212, 213, 214 and 216 (see **items 142, 143, 144 and 148**).

**Items 131, 132, 133, 134, 135 and 136** relocate and rephrase the elements of ‘reasonable excuse’ and ‘incapacity to comply’ in sections 74 and 197 so it is clear they are defences and not elements of the offences which would have to be proved by the prosecution.

Section 74 of the Social Security (Administration) Act provides that it is an offence to refuse or fail to comply with a notice issued under the Act. The penalty is a maximum of 6 months imprisonment. **Item 133** identifies this offence as a strict liability offence. In other words, the prosecution will not have to prove fault in the defendant. However, the defence of mistake of fact will be available as a result of the application of the Criminal Code. Additionally, in relation to this offence, defences of reasonable excuse and incapacity to comply will continue to be available (see previous paragraph).

**Items 137, 139, 140, 141, 142, 143, 147 and 148** identify particular physical elements in a range of offences as elements which attract strict liability. An example is **item 137** which amends section 200 of the Social Security (Administration) Act. Section 200 provides that a person’s former employer must provide him or her with an end-of-employment statement if the person makes a request under section 199. **Item 137** provides that strict liability applies to the physical element of circumstance—that the request is a section 199 request. In other words, the prosecution will not have to prove that the defendant turned his or her mind to the letter of the law. The Criminal Code supplies a defence of mistake of fact to the defendant.

**Item 145** replaces the word ‘knowingly’ in the heading and text of section 215. As a result of the application of the Criminal Code, knowledge is an inappropriate fault element for a physical element of conduct. Intention is the appropriate fault element.

**Item 149-151** affect provisions in the Social Security (Administration) Act which deal with corporate criminal responsibility. Part 2.5 of the Criminal Code, which deals with corporate criminal responsibility, will replace these provisions. Additionally, **item 150** replaces references in Division 5 (relating to the criminal liability of certain employers and principals) to ancillary offences in the *Crimes Act 1914* with equivalent Criminal Code provisions.

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## Amendments to the *Social Welfare Commission (Repeal) Act 1976*

**Item 152** applies Chapter 2 of the Criminal Code to all offences against the Social Welfare Commission (Repeal) Act.

Section 8 of the Social Welfare Commission (Repeal) Act is a secrecy provision. It is an offence against subsection 8(2) to record or disclose official information or documents acquired by virtue of the person's employment under the Act. The maximum penalty is a fine of \$1,000 or 3 months imprisonment. **Item 153** identifies certain physical elements of the offence against subsection 8(2) as attracting strict liability. For example, strict liability will apply to the physical element of circumstance—that the information was acquired by virtue of the person's employment under the Act.

## Concluding Comments

The Bill is 'one of a series designed to apply the Criminal Code on a portfolio-by-portfolio basis'.<sup>26</sup> The amendments made by this and the other application of criminal code bills aim to ensure 'compliance and consistency with the Criminal Code's general principles'<sup>27</sup> and to ensure that 'after the application of the Criminal Code, existing criminal offences and related provisions continue to operate in the same manner as at present'.<sup>28</sup>

However, different approaches have been taken to drafting the portfolio bills that apply the Criminal Code. One example relates to the insertion of notes into the Bills. A number of application of criminal code bills insert notes alerting the reader to matters such as the purpose of Chapter 2 of the Criminal Code<sup>29</sup>, indicating where the defendant carries an evidential burden and where the relevant section of the Criminal Code can be found<sup>30</sup> or identifying the provision in the Code dealing with strict liability.<sup>31</sup> Such notes are absent from the Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001.

Another example, this time about substance rather than drafting styles, relates to strict liability. In some application of criminal code bills, offences identified as strict liability offences which contain the words 'refuse or fail' are amended so that the word 'refuse' is omitted. The rationale for this approach is that 'refusal' suggests a mental element which is inappropriate in a strict liability offence. The approach which seems to have been taken in the Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001 is to retain the wording of existing offences. If an offence identified by the Bill as a strict liability offence contains the words 'refuses or fails' this phrase is saved.<sup>32</sup> If the original offence only refers to 'failure' to do something, this expression is retained.<sup>33</sup>

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## Endnotes

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- 1 Item 19 of Schedule 1 of the *Family and Community Services Legislation (Simplification and Other Measures) Act 2001* is due to commence on 20 September 2001. If the Family and Community Services Legislation Amendment (Application of Criminal Code) Act 2001 commences first, then items 124 and 125 commence immediately after 20 September 2001.
- 2 Criminal Code, section 4.1.
- 3 Criminal Code, section 4.3.
- 4 ‘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.
- 5 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).
- 6 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 7 Criminal Code, subsection 13.1(3).
- 8 Criminal Code, subsection 13.3(1).
- 9 Criminal Code, subsection 13.3(6).
- 10 Criminal Code, sections 13.4 and 13.5.
- 11 See Review of Commonwealth Criminal Law, *Interim Report. Principles of Criminal Responsibility and Other Matters*, July 1990.
- 12 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 13 *A New Tax System (Family Assistance) (Administration) Act 1999* and *Social Security (Administration) Act 1999*.
- 14 *Child Support (Registration and Collection) Act 1988*.
- 15 James Prest, *Bills Digest No. 20, 2001–02*, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001.
- 16 *He Kaw Teh v. R* (1985) 157 CLR 523.
- 17 Criminal Code, subsection 6.1(1).
- 18 Criminal Code, subsection 6.1(2).
- 19 Criminal Code, paragraphs 6.1(1)(b) and 6.1(2)(b).
- 20 Criminal Code, subsection 6.1(3).
- 21 Matthew Goode, ‘The Modern Criminal Code Project’, *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.

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- 22 Revised Explanatory Memorandum, Criminal Code (Theft, Fraud, Bribery and Related Offences) Bill 2000.
- 23 Explanatory Memorandum, p. 4.
- 24 As the offence is presently worded, recklessness applies to the physical element of conduct in the offence. Intention is the appropriate fault element and will be applied by default as a result of the application of the Criminal Code.
- 25 The non-Code expression, ‘wilful’ is removed from subsection 159A(2) and replaced with ‘intentional’.
- 26 Second Reading Speech, Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001, Senate, *Parliamentary Debates (Hansard)*, 22 August 2001, p. 26078.
- 27 *ibid.*
- 28 *ibid.*
- 29 For example, **item 1** of the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001 inserts a note stating ‘Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility’.
- 30 For example, **item 2** of the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001 inserts a note stating ‘A defendant bears an evidential burden in relation to matters in ..., see subsection 13.3(3) of the *Criminal Code*’.
- 31 For example, **item 5** of the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001 inserts a note stating ‘For strict liability, see section 6.1 of the *Criminal Code*’.
- 32 See, for example, **items 46 and 47** which amend the *Child Support (Assessment) Act 1989*.
- 33 See, for example, **item 45** which amends the *Child Support (Assessment) Act 1989*.

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