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Defence 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. 58 2001–02

Defence Legislation Amendment (Application of Criminal  
Code) Bill 2001

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Law and Bills Digest Group  
19 September 2001

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# Defence Legislation Amendment (Application of Criminal Code) Bill 2001

**Date Introduced:** 29 August 2001

**House:** House of Representatives

**Portfolio:** Defence

**Commencement:** In general, the substantive provisions commence on the later of the following—the day on which Chapter 2 of the Criminal Code commences<sup>1</sup> or the day after the date the Defence Legislation Amendment (Application of Criminal Code) Act 2001 receives Royal Assent.

## Purpose

To amend 10 statutes in the Defence portfolio so that offence and related provisions harmonise with the Criminal Code's principles of criminal responsibility but also continue to operate in the same manner as they do at present.<sup>2</sup>

## 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*; *Finance and Administration Legislation (Application of*

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*Criminal Code) Act 2001; Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Act 2001, Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001; Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001; Migration Legislation Amendment (Application of Criminal Code) Act 2001; Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001; Reconciliation and Aboriginal and Torres Strait Islander Affairs 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.*

At the time of writing, two Bills had passed the Parliament but not yet received Royal Assent. These are the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 and the Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001.

Currently before the Parliament are the 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) Bill 2001; Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001; Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001; Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001; and the present Bill.

Some major aspects of criminal responsibility relevant to the Defence 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>3</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>4</sup> Each offence must contain at least one physical element, 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>5</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>6</sup> The Code does not prevent an offence from specifying an

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alternative fault element<sup>7</sup>, but indicates that the default fault element will apply in the absence of a specified fault element.<sup>8</sup>

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code. However, it also retains existing fault elements in some offences which do not correspond with the default fault elements supplied by the Criminal Code. The reason for doing so is to retain the meaning of existing offence provisions, especially provisions which allow for different levels of culpability. Examples are the three dangerous conduct offences in section 36 of the *Defence Force Discipline Act 1982*. Each of the three offences applies different fault elements to the physical element of result in the offences, ranging from knowledge to negligence. Penalties for each of the offences reflect the varying degrees of blameworthiness associated with each offence.

### Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.<sup>9</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>10</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>11</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>12</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>13</sup> 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.

The amendments also identify instances where a defendant carries a legal burden. This is particularly the case with offences against the *Defence Force Discipline Act*. The placement of a legal burden of proof on defendants who are charged with service offences reflects the existing legal situation. Existing subsection 12(2) of the *Defence Force Discipline Act* provides that 'in proceedings before a service tribunal, the onus of proving a defence is on the person charged ...'

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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 Defence. 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>14</sup>

The Bill retains the existing provision in the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* dealing with corporate criminal responsibility (section 15) 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*.<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.

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>

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.<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 particular physical elements of other offences as attracting strict liability.

At the time of writing the Senate Standing Committee on the Scrutiny of Bills had not reported on the Defence Legislation Amendment (Application of Criminal Code) Bill

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2001. However, its *Alert Digests* for companion ‘application of criminal code’ bills have generally sought an assurance from the Minister that no new strict liability offences are created by the proposed amendments.<sup>21</sup> Similar assurances have been sought where ‘application of criminal code’ bills contain absolute liability provisions.<sup>22</sup>

## Absolute liability

The Criminal Code provides that an absolute liability offence must be expressly identified as such, as must any physical elements of other offences which attract absolute liability.<sup>23</sup> Failure to do so means that fault elements apply to the offence or physical elements of the offence. The prosecution does not have to prove fault in the case of absolute liability. Further, Chapter 2 of the Criminal Code provides that a defence of mistake of fact is not available, although other defences may be.<sup>24</sup>

The Bill identifies some offences and some physical elements of other offences as attracting absolute liability.

## Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.<sup>25</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, some amendments relocate and re-phrase elements of excuse—such as ‘without reasonable excuse’—so it is clear that they are defences. In many instances in Defence portfolio legislation, however, defences are already clearly identified. The Bill retains existing statutory defences. And, unlike some of its companion ‘application of criminal code’ bills it does not remove references in portfolio legislation to defences of lawful excuse or lawful authority. In other ‘application of criminal code’ bills existing lawful authority and lawful excuse defences are repealed so that the general defence of lawful authority supplied by the Criminal Code<sup>26</sup> applies instead.

## Main Provisions

### Application of amendments

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

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## Amendments relating to the Criminal Code

### ***Approved Defence Projects Protection Act 1947***

**Item 1 of Schedule 1** applies the Chapter 2 of the Criminal Code to all offences against the Approved Defence Projects Protection Act.

Subsection 4(1) of the Act creates offences of boycotting or hindering an approved defence project ‘without reasonable cause or excuse’. **Item 2** restructures subsection 4(1) of the Act so that the physical elements in the offences it contains are clearly identified, and the elements of ‘reasonable cause or excuse’ are clearly designated as defences rather than as elements of the offences which would have to be proved by the prosecution.

### ***Control of Naval Waters Act 1918***

**Item 3** applies Chapter 2 of the Criminal Code to all offences against the Control of Naval Waters Act.

Subsection 6(2) of the Control of Naval Waters Act provides that:

(1) Where a vessel is within any naval waters, the superintendent of those naval waters may give to the master of the vessel directions as to the mooring, anchoring, placing, unmooring or removal of the vessel.

(2) The master of a vessel shall not fail to comply with a direction given to him under subsection (1).

The penalty is a fine of \$1,000.

**Item 4** restructures subsection 6(2) into its constituent physical elements, thereby enabling the Criminal Code’s default fault elements to be applied. It also identifies the offence as one of strict liability.

### ***Defence Act 1903***

**Item 6** applies the Criminal Code to all offences against the Defence Act.

**Items 7, 8, 13, 15, 19, 21, 25, 27, 32, 33, 34 and 35** repeal a number of existing offence provisions in the Defence Act and replace them with provisions which clearly identify the physical elements of each offence so that, in general, the Code’s default fault elements can be readily applied.

**Item 8** repeals sections 73-73E of the Defence Act. These provisions include offences of aiding and abetting the commission of a service offence under the Defence Force Discipline Act, unlawfully giving or obtaining information about defences, forging warrants or orders, supplying inferior food and equipment, and possessing certain things. Existing section 73A<sup>27</sup> (unlawfully giving or obtaining information about defences), which is repealed by **item 8**, is reconstituted as **proposed section 73A** and restructured to clearly

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identify its constituent physical and fault elements. **Item 9** is a consequential amendment resulting from the changes to numbering made by **item 8**. The reasons for repealing sections 73 and 73B-73E are not explained by the Explanatory Memorandum. However, ancillary offences are supplied by the Criminal Code (Part 2.4), as are forgery and related offences (Part 7.7).

**Items 7, 11, 22, 24, 25, 26, 27, 29, 31, 32, 33 and 35** identify certain offences and certain physical elements in other offences as attracting strict liability.

An example of a strict liability offence is an offence under subsection 79(1) of the Defence Act.<sup>28</sup> This is an offence of unlawfully disposing of Commonwealth arms accoutrements. The penalty is a fine not exceeding \$40 and 3 months imprisonment.

An example of strict liability applying to a particular physical element of an offence is seen in **item 7** which, among other things, repeals and replaces section 61CY of the Defence Act. Section 61CY creates an offence of failing to appear as a witness before a Conscientious Objection Tribunal after being served with a summons under paragraph 61CQ(b). **Item 7** provides that strict liability applies to the physical element of circumstance in the offence, that the summons is under paragraph 61CQ(b). In other words, the prosecution will not have to prove that the defendant knew the letter of the law.

**Items 7, 25 and 32** re-create and relocate the element of ‘reasonable excuse’ in a number of offence provisions so it is clear that the words are a defence and not an element of the offence which would have to be proved by the prosecution.

Paragraph 79(1)(c) of the Defence Act creates an offence of possessing Commonwealth arms accoutrements without lawful cause. **Items 10 and 11** remove the words ‘except for lawful cause (proof of which shall lie upon him)’ from paragraph 79(1)(c) of the Defence Act and rephrase and relocate the element of ‘lawful cause’ so it is clear that it is a defence and not an element of the offence which would have to be proved by the prosecution. Additionally, the re-worded provision and note reflect existing law by specifying that a defendant bears a legal burden of proof in relation to this matter.

**Item 14** repeals the averment provision in subsection 80A(3) of the Defence Act. An averment is a statement or allegation in a pleading. The use of averments is dealt with by the Criminal Code (section 13.6).

**Items 7, 16, 17, 23, 25, 32 and 35** insert notes to the effect that a defendant bears an evidential burden in relation to certain matters. For example, a defendant bears an evidential burden when raising a defence of reasonable excuse to a section 86 charge (failure to appear as a witness before a service tribunal).

**Item 18** clarifies that a penalty of \$200 applies to an offence against subsection 80B(4) as well as the offence against subsection 80B(5). At present, it is arguable that the penalty applies only to the latter offence.

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**Item 28** removes the word ‘intentionally’ from the offence in paragraph 106(b) which penalises a defence member who ‘intentionally refuses or fails to provide’ a urine sample when required to do so under the Act by an authorised person. The word ‘intentionally’ is redundant because it is the default fault element applied to conduct by the Criminal Code.

### ***Defence Force Discipline Act 1982***

#### General

The most comprehensive amendments in the Bill relate to the Defence Force Discipline Act. As the Minister’s Second Reading Speech explains:

The reason for the breadth of the amendments proposed for the DFDA is because it establishes an internal disciplinary system, implemented by military tribunals that are required to act judicially, applicable to Defence members and Defence civilians. At summary level, the level at which most hearings occur, these service tribunals are staffed by lay ADF personnel who generally do not have legal officers appearing before them. While the higher tribunals, namely Defence Force Magistrates and Courts-Martial, are conducted or assisted by legal officers, they have no original jurisdiction and may hear and try matters only on referral from summary tribunals.<sup>29</sup>

The Defence Force Discipline Act applies to ‘defence members’ who are members of the armed forces or, in certain circumstances, members of the Reserves.<sup>30</sup> It also applies to ‘defence civilians’—persons other than defence members who accompany the Defence Force when it is operating outside Australia or on operations against the enemy and who have agreed to be subject to Defence Force discipline.<sup>31</sup>

#### Definitions and application of the Criminal Code

**Item 37** provides that the expression, ‘engage in conduct’, means acts and omissions. This definition replicates the definition in subsection 4.1(2) of the Criminal Code.

**Item 38** inserts a definition of ‘property’ into the Defence Force Discipline Act which replicates that in section 130.1 of the Criminal Code. There are a number of offences in the Defence Force Discipline Act relating to theft of property and receiving stolen property.

**Item 39** removes references to ancillary offences in the *Crimes Act 1914* and replaces them with references to equivalent provisions in the Criminal Code.

**Item 40** applies Chapter 2 of the Criminal Code to all ‘service offences’<sup>32</sup> except ‘old system offences’.<sup>33</sup> The Explanatory Memorandum states that:

As the Act has been in force for over 15 years, it is unlikely that any “old system offences”, for which time limits have not expired, will be charged in the future. As a precaution, however, the reference to old system offences in this section has been retained.<sup>34</sup>

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**Item 41** is a consequential amendment.

#### Criminal liability and service offences

Section 11 of the Defence Force Discipline Act is headed ‘Recklessness and negligence in relation to a member of the Defence Force’. Subsections 11(1) and (2) provide that where a member of the Defence Force is charged with a service offence a service tribunal, when deciding whether the person acted recklessly or negligently, must have regard to the fact that the activities were undertaken in the course of duty. **Item 42** repeals existing subsection 11(3) which provides that section 11 does not alter the common law ‘except to the extent expressly provided’. It substitutes **proposed subsection 11(3)** which provides that subsections 11(1) and (2) do not alter the definitions of recklessness and negligence in the Criminal Code<sup>35</sup> but merely provide a context in which recklessness and negligence can be judged for the purposes of service offences.

**Item 43** repeals sections 12 and 13 of the Defence Force Discipline Act which deal with onus and standard of proof in service offences and with diminished responsibility, respectively. Relevant provisions in the Criminal Code will apply.<sup>36</sup>

#### Offences relating to operations against the enemy

There are a number of offences in the Defence Force Discipline Act which relate to operations against the enemy. These include aiding the enemy and communicating with the enemy. Many of the amendments relating to these offences restructure existing offence provisions by creating discrete new offences and clearly identifying the constituent physical elements of each offence so that, in general, the appropriate Criminal Code fault element can be applied. Existing penalties are retained.

Existing section 15 of the Defence Force Discipline Act can be used as an example. Existing section 15 is headed ‘Aiding the enemy’. It actually includes a number of discrete offences—such as abandoning a post, causing the enemy to capture a service ship—under its rubric. **Item 44** inserts **proposed sections 15-15G**. These new sections contain offences which include abandoning or surrendering a post, causing the capture or destruction of a service ship, aircraft or vehicle, and aiding the enemy while captured. The amendments also specify that a legal burden is placed on the defendant in relation to statutory defences. Thus, in proceedings for an offence of abandoning or surrendering a post to the enemy, a defence member or defence civilian has a legal burden of proving that he or she had a reasonable excuse for their conduct [see **proposed subsection 15(2)** and accompanying note].

In some circumstances, the default fault element that would be supplied by the Criminal Code is supplanted by the amendments. Thus, in **proposed section 15**, an offence of abandoning or surrendering a post, the fault element, ‘knows’, is applied to the physical element of circumstance in the offence—that the person has a duty to defend a place or post. Normally, the fault element of recklessness applies to the physical element of

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circumstance. However, ‘knows’ is in keeping with the existing meaning of the offence [see existing paragraph 15(1)(a) which reads ‘knowing that it is his duty to defend ...’].

In other cases, the amendments replace inappropriate fault elements with default fault elements. For instance, **proposed section 15E** recreates and restructures existing paragraph 15(f) of the Defence Force Discipline Act which currently refers to, a person who ‘being engaged on service in connection with operations against the enemy, knowingly gives a false signal ...’. The amendments re-word the provision so that the appropriate default fault element, ‘intention’ will apply instead.

#### Mutiny, desertion and unauthorised absence

Existing offences relating to mutiny, desertion and unauthorised absence are also restructured to clearly identify their constituent physical elements and corresponding fault elements. Existing penalties are retained.

In some cases, the Criminal Code’s default fault elements are applied and, in some cases, other fault elements are used. An example is the offence of failing to suppress a mutiny in **proposed subsection 21(1)** where the fault element of knowledge rather than the default fault element of recklessness is applied to the physical element of circumstance in the offence—that the defendant knows a mutiny is taking place or is intended. However, the default fault element of intention will apply to the physical element of conduct in the offence—failing to take reasonable steps to suppress the mutiny.

Offences relating to absence from duty and absence without leave—which attract punishments of 12 months imprisonment—are identified as strict liability offences [**proposed subsections 23(3) and 24(2)**]. Existing defences of ‘reasonable excuse’ and absence ‘due to circumstances not reasonably within the member’s control’ are retained [**proposed subsections 23(4) and 24(3)**]. Defendants will bear a legal burden in relation to these defences. The Criminal Code defence of mistake of fact is available for strict liability offences.

#### Insubordination

Offences involving insubordination and violence are also restructured, and strict liability offences and other offences with physical elements which attract strict liability are identified. Existing punishments are retained. Defences where the defendant bears a legal burden are identified. For example, existing subsection 25(2) reads:

It is a defence if a person charged with an offence under this section neither knew, nor could reasonably be expected to have known, that the person against whom the offence is alleged to have been committed was a superior officer.

In keeping with existing subsection 12(2), this provision is amended to indicate that the defendant bears a legal burden. [**proposed subsection 25(3)**]. Additionally, a note is inserted stating that the defendant bears a legal burden of proof in relation to this matter.

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A number of physical elements in existing offences are identified as attracting strict liability. For example, the physical element of circumstance that a person assaulted is a superior officer is identified as a strict liability element [**proposed subsection 25(2)**]. Strict liability offences are also identified. For instance, insubordinate conduct to a superior officer is a strict liability offence [**proposed subsection 26(3)**]. In cases of strict liability, the prosecution does not have to prove fault on the part of the defendant. However, a defence of mistake of fact is available as a result of the operation of the Criminal Code.

#### Offences relating to performance of duty

Existing offences relating to the performance of duty, such as negligent performance of duty, dangerous conduct, being intoxicated while on duty and malingering are restructured and re-worded to clearly identify their constituent physical elements and, in general, to enable the Criminal Code's default fault elements to apply.

However, in some cases Code fault elements that are not default fault elements will apply. For instance, one physical element in offences of dangerous conduct is that the conduct causes, or is likely to cause death or grievous bodily harm [**proposed paragraphs 36(1)(c), 36(2)(c) and 36(3)(c)**]. The default fault element supplied by the Criminal Code to the physical element of result is recklessness. However, the offences of dangerous conduct in section 36 allow for different levels of culpability. Thus, the fault element applied by **proposed paragraph 36(1)(d)** is 'knowledge'.<sup>37</sup> The Explanatory Memorandum explains that this fault element is commensurate with the penalty for the offence—a maximum punishment of 10 years imprisonment. The fault element for the physical element of result in the subsection 36(2) offence of dangerous conduct—where the penalty is 5 years imprisonment—is recklessness. The fault element for the physical element of result in the subsection 36(3) offence of dangerous conduct—where the penalty is 2 years imprisonment—is negligence.

#### Offences relating to ships, vehicles, aircraft and weapons

Existing offences including the loss of a service ship, driving while intoxicated, dangerous driving, negligent driving, driving without due care and low flying are restructured to clearly identify their constituent physical elements and, in general, to allow the Criminal Code's default fault elements to apply.

However, there are some exceptions. For example, there are three offences, involving different levels of blameworthiness, relating to the loss of a service ship [**see proposed subsections 39(1)-(3)**]. The default fault element of intention will apply to the physical element of conduct in the offences. However, as with existing offences, different fault elements will apply to the physical element of result in the offences—the loss of the service ship. In other words, the default fault elements in the Criminal Code are displaced. In the case of an offence against **proposed subsection 39(1)**, the fault element applying to the physical element of result will be intention. In the case of an offence against **proposed**

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**subsection 39(2)**, recklessness will apply. In the case of an offence against **proposed subsection 39(3)**, negligence will apply. The different levels of culpability reflect the different penalties applying to each offence—ranging from 5 years imprisonment in the case of a **proposed subsection 39(1)** offence to 6 months imprisonment in the case of a **proposed subsection 39(3)** offence.

Strict and absolute liability are applied to some offences and to some physical elements of other offences relating to ships, vehicles, aircraft and weapons. Thus, driving a service vehicle while intoxicated or under the influence of a drug to such an extent as to be incapable of exercising proper control of the vehicle is an absolute liability offence [**proposed subsection 40(1)**]. A defence of mistake of fact is not available for an absolute liability offence. The maximum punishment is imprisonment for 12 months.

The Explanatory Memorandum states:

The proposed amendment will maintain the intended operation of the present subsection and corresponds to the civilian counterpart of this offence in almost all States and Territories.<sup>38</sup>

The other absolute liability offences relate to driving without due care and attention (**proposed section 40D**). The maximum punishments are a fine of up to 7 days' pay, if the offender is a member of the Defence Force or a fine of \$100, in any other case.

Driving a service vehicle for unauthorised purposes is identified as a strict liability offence [**proposed subsection 40C(2)**]. The existing defence of reasonable excuse is retained [**proposed subsection 40C(3)**]. Additionally, a defence of mistake of fact is available as a result of the application of the Criminal Code.

Property offences—service property offences and possession of property suspected of having been unlawfully obtained

**Proposed sections 43-46** restructure and reword existing offences so that their constituent physical elements are identified. In some cases, Criminal Code default fault elements are applied<sup>39</sup> and in some cases, different fault elements are applied for consistency with existing offence provisions.<sup>40</sup> The amendments also identify strict liability offences<sup>41</sup> and particular physical elements of one offence which attracts absolute liability.<sup>42</sup> Existing statutory defences are retained and, keeping with existing law, the defendant's burden of proof is identified as a legal burden.<sup>43</sup>

Property offences—fraudulent conduct

Section 47 of the Defence Force Discipline Act ('Stealing and receiving') is repealed and **proposed sections 47-47P**, dealing with theft and receiving, are inserted in its place.

The Criminal Code contains its own provisions dealing with theft and other property offences (see Divisions 131 and 132). In general, the amendments replicate Criminal Code provisions in the context of defence discipline matters. For example, **proposed section 47**

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reproduces the Code's statement of when property belongs to a person for the purposes of property offences. Other amendments apply provisions of the Criminal Code with appropriate modifications. For example, **proposed section 47C** generally replicates section 131.1 of the Criminal Code which deals with theft. However, it specifies that the offence of theft applies to defence members and defence civilians and omits any reference to property belonging to a Commonwealth entity (which appears in paragraph 131.1(1)(b) of the Criminal Code). In other words, the offence of theft will apply to any property, not just Commonwealth property.

Another example is **proposed section 49P** which, with some modifications, reproduces the offence of receiving found in section 132.1 of the Criminal Code. The modifications are that there is an explicit reference to the offence applying to defence members and defence civilians. Additionally, references to the offence of receiving in relation to Commonwealth property are removed. In other words, the offence will apply when any stolen property is dishonestly received by a defence member or defence civilian.

#### Looting

**Proposed section 48** structures and rewords existing section 48 of the Defence Force Discipline Act. It replicates existing fault elements—for example, **proposed subsection 48(2)** provides that a defence member or defence civilian is guilty of an offence if the person receives property, the property has been looted and the person knows this. Ordinarily, the default fault element supplied by the Criminal Code would be recklessness rather than knowledge, but the existing fault element in the Act is knowledge and this is retained. Existing defences of taking or receiving property for the services of the Commonwealth and reasonable excuse are retained [see **proposed subsection 48(3)**].

#### Arrest, custody and proceedings before service tribunals

There are a number of offences in the Defence Force Discipline Act that relate to arrest, custody and proceedings before service tribunals. These include resisting arrest, denying a person natural justice, escaping from custody, giving false evidence and contempt of a service tribunal.

Once again, offences are restructured and reworded so that their constituent physical and fault elements can be clearly identified. In general, the Criminal Code's default fault elements will apply. However, there are some exceptions. For instance, in the offence of giving false evidence (**proposed section 52**) the fault elements 'knows' and 'does not believe' are applied to the physical element of conduct in the offence—making a false statement. The default fault element for conduct is intention. However, the Explanatory Memorandum states that the substituted fault elements conform to the wording of existing section 52.<sup>44</sup>

Strict liability is applied to some physical elements of some offences relating to arrest, custody and service tribunal proceedings. For example, a defence member or defence civilian is guilty of an offence if the person is ordered into arrest, the order is lawful and

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the person disobeys the order [**proposed subsection 49(1)**]. **Proposed subsection 49(2)** applies strict liability to the physical elements of circumstance and conduct in the offence—that the order is lawful and that the order is disobeyed by the defendant. Existing statutory defences—for example, that the defendant did not know that the other person was acting lawfully—are retained. Further, a defence of mistake of fact is supplied by the Criminal Code. The Explanatory Memorandum explains that:

The existing statutory defence of actual or imputed knowledge that the other person was acting lawfully has been retained in the proposed subsection ... The statutory defence mitigates the application of strict liability and affords the defendant some protection.<sup>45</sup>

Notes inserted by the amendments and the rewording of relevant substantive provisions provide that the defendant bears a legal burden in relation to each statutory defence [see, for example, **proposed subsection 49(3)** and the accompanying note]. Such provisions reflect existing subsection 12(2) of the Defence Force Discipline Act which provides that a defendant before a service tribunal bears the burden of proving a defence.

#### Miscellaneous offences

**Item 49** repeals existing miscellaneous offence provisions in the Defence Force Discipline Act and replaces them. Miscellaneous offences include such things as falsifying service documents, making false statements when applying for benefits, making false statements in relation to enlistment, dealing with narcotic goods, and conduct which is prejudicial to the Defence Force.

As with other changes, these amendments relating to miscellaneous offences restructure and reword provisions. Additionally, in some cases, the amendments insert expressions which are consistent with the Criminal Code. For instance, existing section 55 (dealing with falsifying service documents) contains the expression ‘with a view to gain’. This expression is replaced with ‘with intent to make a gain’, words that are in keeping with the Criminal Code’s fault elements.

Existing punishments are generally retained. However, the penalty for the offence of making false statements in an application for benefits [**proposed subsection 56(1)**] is reduced from 2 years imprisonment to 12 months imprisonment. The Explanatory Memorandum indicates that this is because a similar provision in the Criminal Code (section 136.1 relating to false or misleading statements in applications) sets the penalty at 12 months imprisonment. However, the existing penalty of 3 months imprisonment is retained in relation to offences of making false statements in applications relating to appointments or enlistments in the Defence Force (see **proposed section 57**).

#### Offences based on Territory offences

Existing section 61 of the Defence Force Discipline Act picks up provisions of the general criminal law which are applicable in the Jervis Bay Territory. These are offences which,

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for example, apply to conduct in the Jervis Bay Territory by a defence member or defence civilian which is an offence in the Jervis Bay Territory. Such offences have no connection with the defence forces other than the defendant's status—for example as a 'defence member'. The Bill restructures section 61. **Proposed subsection 61(6)** and a note which is inserted by the amendments provide that new section 10 of the Defence Force Discipline Act—which applies Chapter 2 of the Criminal Code to all offences against the Act—does not result in Chapter 2 applying to the law in force in the Jervis Bay Territory.

The Explanatory Memorandum explains:

Section 61 creates certain offences triable by service tribunals that are offences against the ordinary criminal law. The offences relevant to this section are acts or omissions which would be Territory offences if they took place in the Jervis Bay Territory.

... whilst the content of Chapter 2 applies to section 61, it may not apply to the content of the law in force in the Jervis Bay Territory. To determine, for the purposes of section 61, whether Chapter 2 of the Criminal Code also applies to Jervis Bay Territory law, it is necessary to consult Jervis Bay Territory law. For example, where a law of the Commonwealth is in force in the Jervis Bay Territory, Chapter 2 will apply to the Commonwealth law for the purposes of an offence under section 61.<sup>46</sup>

Other amendments

**Items 51 and 64** replace references to the *Crimes Act 1914* in paragraphs 70(4)(b) and 142(1)(b) of the Defence Force Discipline Act with reference to equivalent provisions in the Criminal Code.

**Items 55-58** remove the expression 'without reasonable excuse' from two offence provisions<sup>47</sup> in the Defence Force Discipline Act and re-create them as separate defence provisions so it is clear they are words of defence and not elements of the offences which would have to be proved by the prosecution. The re-worded provisions and notes which accompanying them indicate that a defendant has a legal burden in relation to proving the defences. This burden on the defendant reflects the existing law.<sup>48</sup>

**Items 52-54, 59 and 63-88** are consequential amendments that come about because the Bill re-numbers provisions in the Defence Force Discipline Act.

### ***Defence Force Retirement and Death Benefits Act 1973***

**Item 89** applies Chapter 2 of the Criminal Code to all offences against the Defence Force Retirement and Death Benefits Act.

**Item 90** repeals and replaces subsection 127(1) by restructuring it into its constituent physical elements. The existing penalty of \$100 for this offence is retained.

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**Items 91 and 92** amend section 130 of the Defence Force Retirement and Death Benefits Act. Section 130 deals with the attachment of benefits. Existing penalties, including a penalty of \$40, in relation to failure to comply with a written notice, are retained. One indicator of a strict liability offence is a low penalty. However, offences against subsections 127(1), 130(3) and 130(8) are not identified as strict liability offences.

#### ***Defence Forces Retirement Benefits Act 1948***

**Item 93** applies Chapter 2 of the Criminal Code to all offences against the Defence Forces Retirement Benefits Act.

**Items 94, 96 and 97** amend provisions in the Defence Forces Retirement Benefits Act which impose certain notification requirements and notification compliance requirements on Defence Force pensioners, judgement debtors and judgment creditors. Existing penalties, which are retained, range from \$40 to \$100 or 3 months imprisonment. Despite the small penalties, these offences are not identified as strict liability offences.

#### ***Defence (Special Undertakings) Act 1952***

**Item 98** applies Chapter 2 of the Criminal Code to all offences against the Defence (Special Undertakings) Act.

**Items 99-105** re-structure provisions in the Defence (Special Undertakings) Act which create offences of unlawful entry into a prohibited area, failure to comply with permits authorising entry into a prohibited area, non-compliance with the directions of an officer in charge of a prohibited area, sabotage etc. The amendments identify the constituent physical elements of offences, identify instances where a fault element other than a default fault element applies and indicate where the defendant bears a evidential burden.

For instance, existing section 16 of the Defence (Special Undertakings) Act creates an offence where a pilot ‘finds that he is over a prohibited area or restricted area’. **Proposed section 16** provides that a pilot is guilty of an offence if he or she is over a prohibited or restricted area and ‘knows of that fact’. Under the Criminal Code, recklessness is the fault element that normally applies to the physical element of circumstance in an offence. However, in keeping with the original provision, the amendments identify knowledge as the fault element for this physical element.

#### ***Military Superannuation and Benefits Act 1991***

**Item 106** applies Chapter 2 of the Criminal Code to all offences against the Military Superannuation and Benefits Act.

#### ***Naval Defence Act 1910***

**Item 107** applies Chapter 2 of the Criminal Code to all offences against the Naval Defence Act.

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### ***Weapons of Mass Destruction (Prevention of Proliferation) Act 1995***

**Item 110** applies Chapter 2, except for principles of corporate criminal responsibility, to offence against the Weapons of Mass Destruction (Prevention of Proliferation) Act. Section 15 of the Act deals with conduct by directors, servants and agents.

Subsection 14(6) of the Act is an offence of ‘knowingly’ supplying or exporting goods or providing services in contravention of a notice given under section 14 of the Act. **Item 111** restructures subsection 14(6) so that its constituent fault elements are identified. The Criminal Code default fault element of intention will apply to the physical element of conduct in the offence (supplying or exporting goods or providing services). The fault element of knowledge will apply to the physical element of circumstance in the offence—that the conduct contravenes a notice.

### Technical amendment

**Item 112** corrects a drafting error made by the *Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Act 2001* when it amended the definition of ‘defence member’ found in subsection 3(1) of the Defence Force Discipline Act. **Item 112** commences immediately after the commencement of that amendment<sup>49</sup> to the Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Act (ie 19 April 2001).

## Endnotes

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- 1 15 December 2001.
- 2 Explanatory Memorandum, p. 2.
- 3 Criminal Code, section 4.1.
- 4 Criminal Code, section 4.3.
- 5 ‘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.
- 6 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).
- 7 Criminal Code, subsection 5.1(1).
- 8 Criminal Code, section 5.6.
- 9 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.

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- 10 Criminal Code, subsection 13.1(3).
- 11 Criminal Code, subsection 13.3(1).
- 12 Criminal Code, subsection 13.3(6).
- 13 Criminal Code, sections 13.4 and 13.5.
- 14 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 15 James Prest, *Bills Digest No. 20, 2001-2002*, 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 See, for example, *Alert Digest, No. 10 of 2001*, 22 August 2001, which commented on the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001.
- 22 See, for example, *Alert Digest, No. 6 of 2001*, 23 May 2001, which commented on the Migration Legislation Amendment (Application of Criminal Code) Bill 2001.
- 23 Criminal Code, subsections 6.2(1) and (2).
- 24 Criminal Code, paragraphs 6.2(1)(b) and 6.2(2)(b), and subsection 6.2(3).
- 25 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp. 267-76 at p.267.
- 26 Criminal Code, section 10.5.
- 27 Penalties for offences against section 73A are set out in section 73F of the Defence Act.
- 28 See **item 11**.
- 29 House of Representatives, *Parliamentary Debates (Hansard)*, 29 August 2001, p. 30468.
- 30 Subsection 3(1), Defence Force Discipline Act.
- 31 Subsection 3(1), Defence Force Discipline Act.
- 32 A 'service offence' is an offence against the Defence Force Discipline Act or its regulations, an offence committed by a person when he or she was a defence member or defence civilian or an 'old system offence'.
- 33 'Old system offences' refers to the systems of naval, military and air force law provided by Commonwealth Acts and regulations and Imperial Acts and regulations which were superseded by the Defence Force Discipline Act.
- 34 Explanatory Memorandum, p. 11.

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- 35 Criminal Code, sections 5.4 and 5.5, respectively.
- 36 In relation to onus and standard of proof, the relevant Criminal Code provisions are found in Part 2.6, Division 12. In the case of the present defence of diminished responsibility, the relevant provisions in the Criminal Code are lack of voluntariness (section 4.2) and mental impairment (section 7.3).
- 37 Note, however, that the relevant fault element in the existing subsection 36(1) offence appears to be intention rather than knowledge.
- 38 Explanatory Memorandum, p. 30.
- 39 For example, **proposed paragraphs 43(1)(a), (2)(a) and (3)(a)**.
- 40 For example, **proposed paragraphs 43(1)(c), (2)(c) and (3)(c)**.
- 41 See **proposed subsections 45(2) and 46(2)**.
- 42 **Proposed subsection 44(2)**.
- 43 **Proposed subsections 43(4), 44(3), 45(3), 46(3) and 46(4)** and accompanying notes.
- 44 Explanatory Memorandum, p. 46.
- 45 Explanatory Memorandum, p. 45.
- 46 Explanatory Memorandum, p. 53.
- 47 Paragraphs 101QA(1)(e) and 101QA(2)(f).
- 48 See subsection 12(2), Defence Force Discipline Act.
- 49 **Item 35** of Schedule 2.

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